No. 19-__________

In The
Supreme Court of the United States

PAUL D. VOORHEES, Major, USAF,
Petitioner,
v.
UNITED STATES OF AMERICA,
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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QUESTION PRESENTED

In *Elonis v. United States,* 135 S.Ct. 2001 (2015), this Court reaffirmed a long-standing principle under both the Fifth Amendment's Due Process Clause and the Sixth Amendment's Informed Clause, that criminal statutes must contain a *mens rea* element–with the exception of strict liability offenses. Furthermore, as *Elonis* explains, a "defendant must be 'blameworthy in mind' before he can be found guilty" of any offence in order to differentiate between lawful and unlawful conduct. *Id.* at 2009. Where a criminal statute is silent about scienter, a court must "read into" a criminal charge a *mens rea* element in its jury instructions as *Elonis* and its antecedents held, and as refined in *Rehaif v. United States,* 139 S.Ct. 2191 (2019).

Petitioner was convicted of five counts of violating 10 U.S.C. § 933, Article 133, *Uniform Code of Military Justice*, for "conduct unbecoming an officer."

The Question Presented is:

> Does this *mens rea* or scienter principle apply to criminal prosecutions under the *Uniform Code of Military Justice*, where the underlying statute at issue, 10 U.S.C. § 933, contains no *mens rea* element and the U.S. Court of Appeals for the Armed Forces held below that only a *general* intent was required using an *objective*, versus *subjective* standard, i.e., *negligence,* and thus, no *mens rea* element need be instructed to the jury, even where the "conduct" alleged to be criminal, is facially non-criminal?

PARTIES TO THE PROCEEDING and RULE 29.6 STATEMENT

1. Petitioner, Defendant-Appellant below, is Paul D. Voorhees, Major, USAF. Respondent is the United States.
2. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

1. This case arises from a trial by a General Court-Martial, *United States v. Voorhees,* sitting with officer Members, convened by Headquarters, 12th Air Force, Davis-Monthan Air Force Base, Arizona. Petitioner was convicted of six offenses under the *Uniform Code of Military Justice* [UCMJ], 10 U.S.C. § 801 *et seq.,* and acquitted of one. He was sentenced on 9 January 2015, to a Dismissal, three years confinement, and forfeiture of all pay and allowances.

2. Further proceedings in the United States Air Force Court of Criminal Appeals [AFCCA] and the United States Court of Appeals for the Armed Forces [CAAF], were as follows:

   a. *United States v. Voorhees*, No. ACM 38836, (AFCCA, Nov. 23, 2016) (unpub. op.). available at 2016 WL 11410622 [Pet.App. 46a-79a]; which reversed and dismissed with prejudice Petitioner's conviction for sexual assault under 10 U.S.C. § 920, as being factually insufficient, and remanding the case back to a new court-martial for resentencing as to the remaining offenses, all under 10 U.S.C. § 933;

   b. A second General Court-Martial convened by the same Headquarters, *United States v. Voorhees* (rehearing) with a Military Judge sitting alone without Members at Petitioner's request, on 5 April 2017, resentenced Petitioner to a Dismissal and a Reprimand. The General Court-Martial Convening Authority approved only the Dismissal portion of the sentence adjudged.

c. *United States v. Voorhees*, No. ACM 38836 (reh) (AFCCA July 20, 2018) (unpub. op.), available at: 2018 WL 3629893 [Pet.App. 28a-45a], which affirmed the approved sentence.

d. *United States v. Voorhees,* Dkt. # No. 18-0372, 79 M.J. 5 (CAAF,June 27, 2019); *rehearing denied,* 79 M.J. 218 (CAAF, August 8, 2019) [Pet.App. 1a-27a; 90a], is the case below, which affirmed Petitioner's remaining § 933 convictions and approved sentence.

3. There are no other proceedings in state, military, or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Major Paul D. Voorhees, USAF, respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Armed Forces.

INTRODUCTION

The Fifth Amendment's Due Process Clause (fair notice) and the Sixth Amendment's Informed Clause, require that criminal statutes contain a *mens rea* element–with the exception of "public welfare" offenses. Where a statute is silent about scienter, a court must "read into" a criminal charge a *mens rea*

element in its instructions to the jury as *Elonis v. United States,* 135 S.Ct. 2001 (2015) and its antecedents hold, and as refined in *Rehaif v. United States,* 139 S.Ct. 2191 (2019).

Unlike the Fifth Amendment's Grand Jury exceptions for "cases arising in the land or naval forces," the Constitution nowhere else exempts Congress (or the Commander-in-Chief) from complying with the fair notice–*mens rea*–provisions of the Fifth and Sixth Amendments. Since at least 1950, every Congress and every Commander-in-Chief has accepted this premise.

Petitioner makes no claim that Congress cannot proscribe misconduct by our military's officer corps under the Make Rules Clause of Article I, § 8, U.S. Const., Petitioner only submits that where Congress does proscribe such misconduct–as in 10 U.S.C. § 933–it must do so in a constitutionally acceptable manner, i.e., that the conduct or speech allegedly "unbecoming," be done knowingly or with a subjective *mens rea.*[1] In its decision below, the CAAF fundamentally distorted–if not eliminated–the basic principles of the constitutional requirement of a *mens rea* element for military defendants, absent a specific intent element in a particular punitive Article of the UCMJ. CAAF's decision will encompass all UCMJ offenses which must separate unlawful from innocent conduct as 10 U.S.C. § 933 does.

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[1] *Black's Law Dictionary*, 9th ed., 1075 (2009), defines *mens rea* as: "The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime."

The CAAF affirmed Major Voorhees' convictions of five Specifications (counts) of violating § 933, which does not have a *mens rea* for "conduct unbecoming an officer and a gentleman,"[2] and affirmed his sentence to a Dismissal (under dishonorable conditions). A Dismissal for an officer carries not only a life-long stigma, but also deprives the officer of any military pension benefits they may be entitled to, and virtually all VA benefits the veteran may be entitled to. In Petitioner's case this is true even after completing six combat deployments.[3] As relevant here, CAAF granted review on this issue:

> "Whether the military judge erred when she failed to instruct the panel on a *mens rea* for Article 133, UCMJ [10 U.S.C. § 933]."

Pet.App. 3a.

CAAF's decision below ignored this Court's precedents since at least *Morissette v. United States,* 342 U.S. 246, 251 (1952)(requiring the "concurrence of an evil-meaning mind with an evil-doing hand. . . ."),

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[2] Four Specifications dealt with language that he directed to female Air Force members, e.g., "I would like to take you back to my room," and one of actual "conduct," *viz.,* a *consensual* back rub, given to an adult female, enlisted Air Force member. *Cf., Lawrence v. Texas,* 539 U.S. 558, 564 (2003) ["The petitioners were adults at the time of the alleged offense. Their conduct was in private and consensual."]

[3] There is another lifetime, direct consequence. Under 18 U.S.C. § 922(g)(6), a person "who has been discharged from the Armed Forces under dishonorable conditions," is prohibited from possessing firearms or ammunition. *Compare, Rehaif, supra.*

continuing through *Rehaif.*[4] CAAF's decision disregards not only the teaching of *Morissette* but, contrary to *Elonis*, framed its holding as follows:

> In the instant case, a general intent *mens rea* would require only that Appellant intended to commit the conduct alleged in each specification—i.e., making inappropriate comments and massaging his subordinate's back. It was up to the panel [jury] to determine whether Appellant's acts constituted conduct unbecoming.

Pet.App. 24a. In other words, CAAF is interpreting Congressional silence as to a military defendant's state of mind as only requiring the prosecution to prove negligence, namely that a reasonable person (or juror) would believe that Petitioner's speech and conduct were "unbecoming an officer." That approach flies in the face of *Elonis*, and denotes an *objective* intent, with no *mens rea* requirement.[5]

OPINIONS BELOW

The CAAF opinion (Pet.App. 1a-27a) is reported at 79 M.J. 5 (CAAF 2019). CAAF denied Reconsideration (Pet.App. 80a) without opinion, 79 M.J. 218 (CAAF

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[4] *Carter v. United States*, 530 U.S. 255 (2000), is not to the contrary, as the statute at issue–bank robbery–required that the *actus reus* be done "by force and violence," hardly innocent conduct.

[5] It also ignores the separation of powers issue articulated in *United States v. Davis,* 139 S.Ct. 2319, 2333 (2019)[decided days before *Voorhees*], that it is a Congressional function to define crimes.

2019).The AFCCA opinion (Pet.App. 28a-45a), after resentencing is unreported, but available at 2018 WL 3629893 (AFCCA 2018). The initial AFCCA opinion (Pet.App. 46a-78a), is unreported, but available at 2016 WL 11410622 (AFCCA 2016).

JURISDICTION

CAAF's decision below was rendered on June 27, 2019. Petitioner timely sought reconsideration, which was denied on August 8, 2019. The Chief Justice granted Petitioner's Application to extend the time to file his Petition for Certiorari to December 23, 2019. This Court's jurisdiction is invoked per 28 U.S.C. § 1259(3).

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides as relevant:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment of the U.S. Constitution provides as relevant:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . .

Title 10, U.S. Code § 836(a), provides in relevant part:

> Pretrial, trial, and post-trial procedures, *including modes of proof*, for cases arising under this chapter triable in courts-martial

> . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, *apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts*. . . . [Emphasis added]

Title 10, U.S. Code § 933, provides in relevant part:

> Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

STATEMENT

1. Until his conviction, Major Voorhees was an Air Force [AF] pilot. He flew a modified version of the C-130 "Hercules" tactical cargo/transport plane, designated as an EC-130. The "E" designation signified that the aircraft was configured for electronic warfare [EW] and psychological operations. That included providing intelligence, surveillance and reconnaissance or EW support to ground-based military units in a combat zone via highly sensitive and sophisticated onboard electronic systems.

The EC-130 aircrews generally consisted of the Aircraft Commander (pilot), co-pilot, navigator, and flight engineer. The EW section–depending on the particular mission–would consist of up to eight additional members; EW specialists, linguists, and an airborne maintenance technician for the EW equipment. Major Voorhees was also cross-qualified as an EW Officer [EWO]. At the time of his trial, he had six combat deployments, had flown 179 combat

missions, with 1,183 combat flight hours.

2. Petitioner's charges arose during the time-frame of July 2012 to July 2013. The initial allegations did not come to light until some seven months after their return to the United States, when HB (a crewmember) confessed to her husband that she had "cheated" on him with Petitioner. Pet.App. 50a-51a.

3. Major Voorhees was tried by a general court-martial [GCM], consisting of a Military Judge and Members (jurors) at Davis-Monthan Air Force Base, Arizona (his home Base) in early January 2015. *Id.* at 46a-47a. The Members convicted him of one Specification of sexual assault in violation of the then current version of 10 U.S.C. § 920; five Specifications of "conduct unbecoming an officer" in violation of 10 U.S.C. § 933; and acquitted him of one § 933 Specification.[6] *Id.*

The Members–in accordance with military procedure–sentenced Petitioner to a Dismissal (under dishonorable conditions), confinement for three years, and total forfeiture of all pay and allowances on 9 January 2015. *Id.* He entered confinement that day.

Petitioner was convicted under 10 U.S.C. § 933 of the following:

> (1) Asking [HB] "*inappropriate* questions, to wit: 'Have you ever cheated on your husband?', 'Have you ever sent him pictures?', and 'Can I have pictures of you?'"[Emphasis added];

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[6] Notably, this was the only § 933 offense charged that involved a *male* AF member.

(2) "At or near Baltimore, Maryland . . . massage the back of [HB];"

(3) "Make to [HB] an *inappropriate* statement or question, to wit: 'I would like to take you back to my room;" [Emphasis added];

(4) "Send *unprofessional* text messages to [MQ], to wit: 'What I want to say could end my career and marriage,' 'Your (*sic*) a very beautiful woman and I would love to be close to you,' 'What's your definition of cheating?' 'So if I asked what color panties you were wearing?'" [Emphasis added]; and

(5) "Send *unprofessional* text messages to [BR], to wit: 'This is about to become a game to see what else I can say that will slip by you,' 'mind if I ask u (*sic*) a couple of personal questions?' 'What I want to say could end my career so I want to make sure you can keep what I say between us because you seem really cool?' 'Oh, really? What's under there?' 'I've had a crush on you.'" [Emphasis added]. *Id.* at 59a-60a.[7]

All individuals involved were adults; none made any contemporaneous complaint to anyone.

4. By virtue of his sentence, Petitioner appealed to the AFCCA via the version of 10 U.S.C. §

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[7] It requires a leap-of-faith to jump from conduct (or speech) that is "inappropriate" or "unprofessional" to that which is "criminal." The Military Judge instructed the Members that "unbecoming conduct" "means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior . . . ." Pet.App. 22a-23a.

866(b)(1)[2012], then applicable. That court reversed and dismissed with prejudice the sexual assault conviction on the basis of *factual* insufficiency, i.e., the prosecution failed to disprove that Petitioner had a reasonable belief that HB was consenting to the sexual activity. *Id.* at 57a, 77a-79a. The AFCCA, however, rejected Petitioner's arguments that the § 933 offenses failed to legally state offenses and that the Military Judge had a duty to "read into" the statute during her instructions to the Members, a *mens rea* element. *Id.* at 61a-62a. It then remanded the case for resentencing.[8] *Id.* at 79a. Petitioner was subsequently released from confinement after serving slightly more than two years of his sentence.

5. Upon remand, Petitioner elected to be re-sentenced by a different Military Judge alone versus Members. *Id.* at 30a. After the re-sentencing proceeding, the Military Judge sentenced Petitioner to a Dismissal and a Reprimand. *Id.* The GCM Convening Authority only approved the Dismissal, which, as noted above, is under dishonorable conditions. *Id.*

6. Petitioner again appealed to the AFCCA, which re-affirmed his convictions under 10 U.S.C. § 933, and affirmed his sentence to a Dismissal. *Id.* at 45a.

7. Major Voorhees then petitioned CAAF for review, which in turn granted review–as relevant here–on two issues:

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[8] Under military procedure then in effect, sentences were imposed in a unitary fashion, i.e., one aggregate sentence is imposed for all convictions combined, versus individual sentences for each conviction, to then run concurrently or consecutively.

a. Whether or not the charged § 933 offenses legally stated offenses; and

b. "[W]hether the military judge erred when she failed to instruct the panel on a mens rea for Article 133, UCMJ [10 U.S.C. § 933]." *Id.* at 3a.

In its decision, CAAF merged these two issues into a single "mens rea" issue. *Id.*

CAAF concluded–in a footnote–that using the terms "inappropriate" or "unprofessional" coupled with the phrase "unbecoming an officer and a gentleman," were sufficient "words of criminality to state an offense. . . ." *Id.* at 21a.[9] Relying on one of its earlier "general intent" decisions, CAAF concluded that where the crime "was a military-specific offense . . . the government need only 'prove general intent in order to obtain a conviction.'" [*Id.* at 23a], [quoting *United States v. Caldwell,* 75 M.J. 276, 278 (CAAF), *cert. denied,* 137 S.Ct. 248 (2016)]. But, CAAF nowhere explains the source of this conclusion. The Fifth and Sixth Amendments do not provide authority to excuse a *mens rea* requirement, nor does the UCMJ.

Again, quoting *Caldwell,* CAAF held "We therefore conclude that general intent sufficiently separates lawful and unlawful behavior in this [§ 933] context. .

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[9] Without distinguishing or disapproving a prior decision to the contrary, both courts below ignored the following: "The addition of the phrase 'which conduct was unbecoming an officer and a gentleman' adds nothing to the legal effect of the purported misconduct." *United States v. Shober*, 26 M.J. 501, 503 (AF CMR), *aff'd*, 23 M.J. 249 (CMA 1986).

. ." *Id.* at 27a. How this serves to distinguish a "lawful" back rub from an "unlawful" one, was not addressed by CAAF. Furthermore, nowhere in its discussion of the *mens rea* issue in § 933, does CAAF discuss, much less cite to, the long-standing precedents of this Court, beginning with *Morissette,* to *Elonis,* to *Rehaif.*[10] This Court has never held that criminal prosecutions under the UCMJ are somehow exempt from its *mens rea* jurisprudence. Nor does the Court's decision in *Parker v. Levy,* 417 U.S. 783 (1974), suggest such an exemption–indeed, as discussed *infra, Levy*, portends the contrary.

Finally, CAAF's decision here is *internally* inconsistent. CAAF concluded that a *general intent* of the *actus reus* sufficiently "separates lawful and unlawful behavior" in the context of § 933, *Id.* at 26a-27a, CAAF then sets forth an inconsistent test, stating that "conduct unbecoming" depends upon "whether the officer possessed *general intent* to act *indecoriously, dishonestly,* or *indecently."* [Emphasis added; Pet.App. 25a-26a]. But, Major Voorhees was not charged with acting "indecoriously, dishonestly, or indecently." Furthermore, regardless of CAAF's judicially labeling § 933 as a "general intent" crime, the reality is that when one "inten[ds] to act *indecoriously, dishonestly,* or *indecently,"* that constitutes a *mens rea* which under *Elonis* and *Rehaif* and their antecedents, must be specifically instructed upon.

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[10] *Rehaif* was decided six days prior to CAAF's decision here, and roughly six *weeks* prior to CAAF denying Petitioner's Motion for Reconsideration.

REASONS FOR GRANTING THE PETITION

> *In our republic, a speculative possibility that a man's conduct violated the law should never be enough to justify taking his liberty.*[11]

CAAF's decision marks a sharp departure from the settled *mens rea* jurisprudence of this Court. It establishes a negligence standard for criminal liability under the guise of labeling 10 U.S.C. § 933 a "general intent" crime, in direct conflict with *Elonis*. CAAF's general intent premise, if not corrected or clarified by this Court, has the potential to affect hundreds of military cases at the trial and appellate levels. Absent intervention here, the Service Courts of Criminal Appeals and CAAF will continue their erroneous application of basic constitutional procedure–the elimination of *mens rea* requirements–contrary to this Court's precedents.

I. CAAF'S DECISION CONTRAVENES THE CONSTITUTION.

The Constitution grants Congress considerable power in Article I, § 8. That includes the power to deprive citizens of their liberty, their property, and even their lives. It also gave Congress the power over the Nation's military by including the Make Rules Clause, while Article II, § 2, cl.1, designates the President as Commander-in-Chief. However, when it came time to add the Bill of Rights to the Constitution, the Drafters included only one military exclusion in the Fifth Amendment, i.e., the Grand Jury exemption. Nothing other than that exempts Congress from

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[11] *United States v. Davis,* 139 S.Ct. 2319, 2335 (2019).

enacting *military* criminal statutes which lessen (or omit) the “fair notice” provisions of the Due Process Clause and the Sixth Amendment’s Informed Clause.

Congress cannot create a crime–civilian or military–with lifetime punishments which has no *mens rea* element. In its decision below, CAAF *assumed* that Congress could do so (without citing any authority), but CAAF is simply wrong and only this Court can tell them that. The issue here is not Congressional power under the Make Rules Clause to delineate military crimes. Rather, it is the more nuanced issue that *when* Congress enacts a military criminal statute such as 10 U.S.C. § 933, must it also comply with the *mens rea* element requirement? Furthermore, where the statute itself is silent on that issue, must the military courts (to include courts-martial) “read into” the elements of the offense, a *mens rea* provision, as this Court has repeatedly held in the civilian context? Here again, CAAF said no–with due respect, CAAF is wrong again. Unlike the express Grand Jury exception for military criminal proceedings, nothing in the Constitution exempts military crimes with a lifetime stigma and prohibitions from a *mens rea* element. As this Court held last term:

> Respect for due process and the separation of powers suggests a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.

United States v. Davis, 139 S.Ct. at 2333. Only this Court can remind CAAF of this principle.

II. CAAF'S DECISION MISCONSTRUES PLAIN, SIMPLE, AND LONG-STANDING PRECEDENTS FROM THIS COURT.

A. The *Mens Rea* Jurisprudence.

The Fifth and Sixth Amendments to the Constitution provide *two* fundamental and clear indicia of the Framers' intent with respect to criminal charges. First, the Due Process Clause requires fair notice of the elements of a criminal charge to include an applicable *mens rea* element. With the exception of minor, "strict liability" offenses, where a criminal statute does not contain an express *mens rea* element, this Court has required one to be "read into" it. *Cf. Morissette, supra.* Second, the "Informed" Clause of the Sixth Amendment expressly requires this as well. Justice Jackson said it succinctly in *Morissette:* there must be a "concurrence of an evil-meaning mind with an evil-doing hand. . . ." 342 U.S. at 257. CAAF's decision below turns this principle on its head to the detriment of our Servicemembers. Here, the issue is both simple and stark–how can a consensual back rub, between two adults, in the privacy of a hotel room, constitute either an "evil-meaning mind" or an "evil-doing hand?" Law, logic, and common sense–separately and combined–say that they cannot, thus requiring this Court's intervention to correct CAAF's error.

Section 933 of Title 10, U.S. Code, is *sui generis.* It neither defines what conduct or speech is unbecoming, nor does it contain any *mens rea* element. As this case demonstrates, it also criminalized speech which was nothing more than sexual innuendo, e.g., "Have you ever cheated on your husband?" or a wishful fantasy, "I would like to take you back to my room." It also

criminalized innocuous conduct, a consensual back massage to an adult female in the privacy of her hotel room. There was no allegation that the physical contact was done with force, under duress, or under circumstances that HB was incapable of consenting. This was innocent behavior where *mens rea* was crucial to establish that it was criminal. *Cf. Lawrence v. Texas, supra.* Both appellate courts below rejected Petitioner's claims that the § 933 offenses as charged, not only failed to state an offense, but that the Constitution mandated a *mens rea* ("evil mind") element requiring an instruction to the fact-finder.

CAAF is wrong–both in its analysis and application of this Court's *mens rea* jurisprudence. Since *Morissette* was decided in 1952, Congress has amended the UCMJ numerous times with a major revision effective beginning in 2019.[12] At no time did Congress ever state, much less imply, that the *mens rea* principles in the Fifth and Sixth Amendments do not apply to the UCMJ–even assuming that the Constitution would allow it. Furthermore, CAAF ignored military "regulations, or customs having the effect of law," where the Commander-in-Chief has since 1951, exercised his delegated powers under 10 U.S.C. § 936, in promulgating the *Manuals for Courts-Martial*–which predated *Morissette* by one year–mandating that those drafting military criminal charges under the UCMJ allege "intent" as an element, or where none is specified in the statute, such as with 10 U.S.C. § 933, to include words of criminality to provide fair notice to

[12] *Nat'l Defense Authorization Act for FY 2017*, Pub. L. No. 114-328, 130 Stat. 2000 (2016).

an accused.

The Constitution does not authorize this military differentiation as it does in the Grand Jury contexts. Congress has not claimed any such authority–even if it could–under the Make Rules Clause. If CAAF had any residual doubts on the *mens rea* issue, they could have looked for guidance from the Commander-in-Chief in the *Manual For Courts-Martial.* The *Manual* instructs that, at a minimum, charges under 10 U.S.C. § 933, must contain "words of criminality" to avoid the precise issue here. Since the Government did not raise any issue under the Make Rules Clause as providing any authority for CAAF to exempt § 933 from the *Manual's* requirements or this Court's precedents, they should not be heard to do so now.

Since 1951, the year the UCMJ became effective, the *Manual for Courts-Martial* ["MCM (1951)"](promulgated as an Executive Order pursuant to the authority delegated to the President under 10 U.S.C. § 836), required in paragraph 28(a)(3)–in addition to the statutory elements–the following:

> Any intent, or state of mind such as guilty knowledge, expressly made an essential element of an offense should be alleged . . . If the alleged act of the accused is not in itself an offense, but is made an offense by applicable statute (including ***Articles 133*** and 134), regulations, or custom having the effect of law . . . *words importing criminality* such as "wrongfully," "unlawfully," "without authority," or "dishonorably," depending upon the nature of the particular offense involved, should be used to describe the

accused's acts. [Emphasis added].[13]

Major Voorhees was convicted of violating Article 133, UCMJ, 10 U.S.C. § 933, with Specifications that failed to allege any "intent, or state of mind," much less alleging any words of criminality. General intent suffices in a criminal statute only when it protects innocent conduct. Thus in *Carter,* there was nothing "innocent" about robbing a bank by "force and violence," so a general intent sufficed.

CAAF held two things that significantly twist this Court's precedents into a proverbial pretzel. First, it said, "Congress is not required to include an explicit *mens rea* in every article of the UCMJ." Pet.App. 23a. That is true in the abstract, but it ignores the principle that *mens rea* is required to separate innocent conduct from that which is criminal–the issue here. Second, CAAF held: "[a] statute's silence can be indicative of a general intent scienter." *Id.* That misreads and misapplies this Court's holdings–it is accurate *only* where a criminal statute cannot ensnare innocent conduct, such as in *Carter*. Here, the speech and conduct at issue, were facially and presumptively innocent.

In *United States v. X-Citement Video, Inc.,* 513 U.S. 64, 69 (1994), this Court made it clear that "some form of scienter is to be implied in a criminal statute even if not expressed . . . ." Here, CAAF made no effort "to

[13] At the time of Petitioner's trial, the MCM (2012), was in effect, and although the formatting has since changed, Rule 307(c)(3), *Discussion* ¶ (G)(i) and (ii), *Rules for Courts-Martial* ["RCM"] continue to use virtually the same language as the 1951 edition through the current MCM (2019).

avoid construing [§ 933] to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct." *Staples v. United States,* 511 U.S. 600, 610 (1994)[quoting *Liparota v. United States,* 471 U.S. 419, 426 (1985)]. CAAF made no effort to explain just how Petitioner's wishful statement to an adult female that "I would like to take you back to my room," without more, without words of criminality, without any *mens rea* element, is or could be criminal. CAAF's response was the antithesis of the constitutional requirements of fair notice and scienter: "It was up to the panel [jury] to determine whether Appellant's acts constituted conduct unbecoming." Pet.App. 24a. But, how would anyone–Petitioner included–know that his verbal fantasizing (or the private, consensual back rub) was criminal, especially as adjudged from the perspective of a fact-finder who received no *mens rea* instructions?

It is important to note, that should this Court grant Major Voorhees relief, that "good order and discipline" is not going to disappear in our military. *See, e.g.,* 10 U.S.C. § 934. Nor was Petitioner tried on a host of other offenses under the UCMJ, such as Fraternization, MCM (2012), Part IV, ¶ 83; Maltreatment, 10 U.S.C. § 893 (2012)(which includes sexual harassment); Indecent Language, MCM (2012), Part IV, ¶ 89; etc. Indeed, all five of Petitioner's convictions could have been charged under 10 U.S.C. § 934, as violating "good order and discipline." But, under CAAF's § 934 jurisprudence, that added an element to plead and prove that the speech or conduct violated "good order and discipline." *United States v. Fosler,* 70 M.J. 225 (CAAF 2011). By charging Major Voorhees under § 933, without a *mens rea* element, it

did what *Morissette* warned of, it "ease[d] the prosecution's path to conviction. . . ." 342 U.S. at 263.

Our constitutional scheme certainly demands more. Justice Gorsuch hit the proverbial nail on the head in his separate opinion in *Sessions v. Dimaya,* 138 S.Ct. at 1224, (Gorsuch, J., concurring in part and concurring in judgment): "The law's silence leaves judges to their intuitions and the people to their fate. In my judgment, the Constitution demands more." Writing for the Court in *United States v. Davis,* 139 S.Ct. 2319, 2323 (2019), Justice Gorsuch noted in a slightly different context, the "responsibility for defining criminal behavior [is given] to unelected prosecutors and judges . . . ." That is exactly what happened here. Unelected prosecutors–not Congress, not the Commander-in-Chief with both inherent and delegated powers, but military prosecutors–decided what speech and what conduct in *their* opinions fell within the sweep of "conduct unbecoming"under § 933 to criminally charge Petitioner. CAAF then eschewed any *mens rea* element instruction to the fact-finder, which likewise, only served to "to ease the prosecution's path to conviction." *Morissette, supra.*

CAAF's decision below is not an outlier. Just weeks earlier, CAAF denied reconsideration of its decision in *United States v. McDonald,* 78 M.J. 376, *recon. denied* 79 M.J. 94 (CAAF 2019), involving a conviction under 10 U.S.C. § 920 [sexual assault].[14] CAAF utilized their expanding "general intent" approach to the *mens rea* issue by not requiring any instructions be "read into"

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[14] *McDonald's* Petition for *Certiorari* is pending at this Court under Dkt. No. 19-557.

any provision of the UCMJ without a stated specific intent element as it did here. CAAF's dramatic and erroneous deviation from long-settled precedents from this Court, as well as 68 years of Presidential direction to add words of criminality for a *mens rea* component, is constitutionally mistaken. *Morissette's* warning has now come to fruition via CAAF:

> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.

342 U.S. at 263.

This case demonstrates that CAAF's current approach to *mens rea* is wrong as it leaves the determination as to what is criminal or innocent conduct to prosecutors, unelected judges, and *uninstructed* Members. Here, the words of a wishful fantasy, "I would like to take you to my room," or a consensual back rub between two adults in private, were deemed to constitute a violation of 10 U.S.C. § 933, yet according to CAAF, did not require proof of any *mens rea* or instruction on intent to the Members, for facially innocent conduct. Words can be slippery things as this case demonstrates. What differentiates words that somehow rise to the level of criminal "conduct unbecoming," from those that are simply crude? That distinction is the core of this Petition.

B. *Parker v. Levy.*

The Government cannot find solace in *Parker v.*

Levy, 417 U.S. 733 (1974). Army Captain Levy was convicted of *inter alia*, violating 10 U.S.C. § 933, as was Major Voorhees. *Levy* compels reversal for two reasons. First, there was no *mens rea* issue there because Levy's § 933 charge included appropriate words of criminality, that he "wrongfully and dishonorably" committed a violation of § 933. *Id.* at 739, n. 6, providing an appropriate *mens rea* element. Second, *Levy* compels reversal because this Court recognized that "Decisions of this Court during the last century have recognized that the longstanding *customs and usages* of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134." *Id.* at 746-47 [Emphasis added]. These "customs and usages" are taught to every recruit, both officer and enlisted, and include, *e.g.,* saluting superior officers when outdoors and in uniform; standing at attention and saluting the Flag as it is raised, lowered, or passes by while in uniform; referring to superior officers as "Sir" or "Ma'am;" etc. For military prosecutors, the "customs and usages" in drafting criminal charges–at least since 1949–require words of criminality where the underlying statute does not contain an intent element.[15]

Since President Truman's MCM (1951), implementing the UCMJ, the "customs and usages of the services" have mandated that words of criminality

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[15] Prior to the enactment of the UCMJ, similar requirements were found in the Army *Manual for Courts-Martial* (1949), ¶ 29(a), under the former *Articles of War*. Copies of all MCM's are available at the Library of Congress website at: http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html [Last accessed: 6 December 2019].

be added to § 933 specifications (counts) to accommodate the constitutional *mens rea* element requirements. Thus, CAAF ignored the command of this Court to look at § 933 through the "longstanding customs and usages of the services" *vis-a-vis* the *mens rea* issue. At issue in *Levy* was whether or not § 933 was "void for vagueness." Petitioner does not raise that issue herein.[16]

Congress has abrogated many of the foundational pillars *Levy* was based upon. The Court in *Levy* relied upon a pre-UCMJ plurality decision, *Burns v. Wilson,* 346 U.S. 137, 140 (1953), which held: "military law. . . is a jurisprudence which exists separate and apart from the law which governs in our federal government." While perhaps true at one point in time, by the time *Burns* was decided, Congress had expressly rejected that concept when it enacted 10 U.S.C. § 836–now § 836(a)–bringing military practice under the UCMJ in line with "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . ." Additionally, as part of the UCMJ, Congress created a civilian appellate court, the Court of Military Appeals, since renamed the CAAF.

In 1984, the President, using his power, both inherent as Commander-in-Chief and as delegated by Congress in § 836, promulgated the *Military Rules of Evidence*, in the MCM (1984), a virtual analogue (with minor exceptions) to the *Federal Rules of Evidence*. In

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[16] Petitioner does not concede the vagueness issue, only that it was not raised below.

1989, Congress enacted 10 U.S.C. § 867a, which permits this Court to review "[d]ecisions of the United States Court of Appeals for the Armed Forces" by a writ of certiorari, thus permitting review and Constitutional "supervision" of CAAF's decisions. In 2001, Congress enacted 10 U.S.C. § 825a, mandating that there be "not less than 12" Members in most capital cases, as in federal capital cases; and in *Loving v. United States,* 517 U.S. 748 (1996), this Court approved the President's inclusion of "aggravating factors" in military capital cases in the then Rule 1004, *Rules for Courts-Martial*, MCM (1984).

Thus, the legal landscape has changed considerably since the pre-UCMJ era of *Burns v. Wilson,* as well as since the time *Parker v. Levy* was decided in 1974 (he was convicted in 1967), and military law under the UCMJ is in reality, no longer "separate and apart" from the principles and practice of federal criminal law. *See generally,* Sen. Sam Irvin, Jr., *The Military Justice Act of 1968,* 45 Mil. L. Rev. 77, 83 (1969)[describing Act which "modernizes outmoded and cumbersome military trial procedures to conform more closely with federal court practices."].

C. CAAF Ignored *Elonis* and *Rehaif.*

CAAF did not reference (or cite to) either *Elonis* or *Rehaif* in its decision. But, in *Rehaif,* this Court unequivocally stated, "We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question." 139 S.Ct. at 2197. That concept is "traceable to the common law." *Id.* at 2195. The text of § 933 is silent as to scienter. *Rehaif* went on to state, "we normally presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a

wrongful mental state." *Id.* at 2198. Whether or not the Government could have proven "a wrongful mental state" here, is not the issue. The focus must be on the fact that Petitioner's panel was never instructed as to *any* scienter element and CAAF's avoidance of the issue by simply labeling § 933 a "general intent" crime, misses the mark.

Elonis held with clarity that "[t]he 'central thought' is that a defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as mens rea, scienter, malice aforethought, guilty knowledge, and the like." 135 S.Ct. at 2009, [citing *Morissette,* 342 U.S. at 252]. But, CAAF failed to address how an aspirational statement, "I would like to take you to my room," or how a private, consensual back rub between two adults, rises to the level of being "blameworthy in mind." *Elonis* dealt with speech, as do four of Petitioner's five convictions. But, as this Court held:

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law, but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." [citing *Staples*, 511 U.S., at 606–607].

135 S.Ct. at 2011. *Elonis* continued by observing: "Elonis can be convicted, the Government contends, if he himself knew the contents and context of his posts, and a reasonable person would have recognized that

the posts would be read as genuine threats. That is a negligence standard." *Id.* That is precisely the standard CAAF used to affirm Petitioner's convictions–that a "reasonable person would have recognized" that his language and conduct were "unbecoming."

Here, CAAF concluded as follows:

> The military judge's instructions adequately explained the *actus reus* of Appellant's crimes—actions that could not, under the circumstances, have been innocent—and informed the members that they were to consider Appellant's conduct "under the circumstances." Under our precedent, this instructional language "can reasonably be understood as requiring the panel members to determine whether Appellant" knew that he was engaging in certain conduct. [citing *Caldwell,* 75 M.J. at 283].

Pet.App. 27a. That conclusion contravenes the conclusion of this Court in *Elonis*: ". . . Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state." 135 S.Ct. at 2012.

III. THE IMPORTANCE OF THIS CASE.

This case is profoundly important to the proper functioning of our military justice system under the UCMJ. For almost 70 years, Congress via 10 U.S.C. § 836, and the Commander-in-Chief via the *Manuals for*

Courts-Martial, have uniformly held that if a punitive provision of the UCMJ does not contain an express intent element, a *mens rea* element must be read into that statute's elements consistent with federal criminal practice. Virtually every day at U.S. military bases around the world, some Soldier, Sailor, Airman, or Marine will be in jeopardy of being convicted of *innocent* conduct based upon CAAF's erroneous interpretation and application of *mens rea*.[17]

In *McDonald,* for example, CAAF's analysis was clearly faulty when it rationalized that because rape was historically a general intent crime, that sexual assault under 10 U.S.C. § 920 is likewise a general intent crime. 78 M.J. at 380. But, that comparison is inapposite. Rape, under the UCMJ, historically consisted of sexual penetration (however slight) "by force and without consent." MCM (1951), ¶ 199(a). As in *Carter,* the "by force and without consent" elements sufficed to protect innocent conduct.

CAAF's error is highlighted by its conclusion in *McDonald,* "Because we have determined that Congress intended [then] Article 120(b)(1)(B) [10 U.S.C. § 920(b)(1)(B)] to state a general intent offense, *that is the end of the matter*. 78 M.J. at 380-81 [emphasis added]. But, *Morissette* and its progeny emphatically demonstrate that it is *not* "the end of the matter" with respect to the *mens rea issue*, and this Court respectfully must correct CAAF.

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[17] This includes 1,380,000 active duty members (including the Coast Guard) as of 31 October 2019. Source: https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp [last accessed: 17 December 2019].

Finally, this case provides an ideal vehicle to resolve the military *mens rea* issue identified here. It was litigated extensively and expressly below as the Appendices demonstrate. CAAF's refusal to reconsider its decision based upon *Elonis*, establishes that it is not about to alter its "general intent" approach to *mens rea* under the UCMJ, absent this Court's intervention. The matter will not percolate in the Service appellate courts as they are bound by CAAF's precedents. The federal Circuit Courts of Appeal lack jurisdiction over courts-martial convictions, except in the *habeas corpus* context.

The issue needs to be resolved one way or the other, and only this Court can resolve it. It is not going to go away as *Caldwell* (certiorari denied); *McDonald* (certiorari pending); and this case demonstrate. Furthermore, until it is resolved, competent defense counsel will continue to litigate the issue.

CONCLUSION

The petition for a writ of certiorari respectfully should be granted. Alternatively, certiorari should be granted, CAAF's decision vacated, and the case remanded to the CAAF for further consideration in light of this Court's decisions in *Elonis*, *Rehaif,* and *Davis.*

Respectfully submitted,

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December 2019

APPENDIX

APPENDIX A

This opinion is subject to revision before publication

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

Paul D. VOORHEES, Major
United States Air Force, Appellant

No. 18-0372
Crim. App. No. 38836 (reh)

Argued February 21, 2019—Decided June 27, 2019

Military Judges: Natalie D. Richardson (trial) and Mark F. Rosenow (sentence rehearing)

For Appellant: *Terri R. Zimmermann*, Esq. (argued); *Major Jarett Merk* and *Jack B. Zimmermann*, Esq. (on brief).

For Appellee: *Captain Anne M. Delmare* (argued); *Colonel Julie L. Pitvorec*, *Lieutenant*

Colonel Joseph Kubler, and *Mary Ellen Payne*, Esq. (on brief).

Judge SPARKS delivered the opinion of the Court, in which Chief Judge STUCKY, and Judges RYAN, OHLSON, and MAGGS, joined.

Judge SPARKS delivered the opinion of the Court.

A panel of officer members convicted Appellant, contrary to his pleas, of five specifications of conduct unbecoming an officer and a gentleman and one specification of sexual assault in violation of Articles 133 and 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 933, 920 (2012). The panel acquitted Appellant of one specification of conduct unbecoming an officer and a gentleman. The members sentenced Appellant to forfeiture of all pay and allowances, three years of confinement, and dismissal. The convening authority approved the sentence as adjudged.

The United States Air Force Court of Criminal Appeals set aside Appellant's Article 120, UCMJ, conviction for factual insufficiency, but affirmed his remaining convictions and ordered a sentence rehearing. *United States v. Voorhees*, No. ACM 38836, 2016 WL 7028962, at *2, 2016 CCA LEXIS 752, at *2 (A.F. Ct. Crim. App. Nov. 23, 2016) (unpublished). A military judge sitting alone conducted the sentence rehearing for the remaining five Article 133, UCMJ,

convictions, and sentenced Appellant to a dismissal and a reprimand. The convening authority approved the dismissal.

We granted review to determine: (1) whether trial counsel's final arguments on the merits contained prejudicial prosecutorial misconduct and (2) whether the military judge erred when she failed to instruct the panel on a mens rea for Article 133, UCMJ.[1] We now hold neither issue warrants relief.

Background

The lower court adequately summarized the facts underlying Appellant's offense as follows:

> Appellant's convictions for conduct unbecoming are rooted in the sexual comments and actions he directed toward subordinate female Airmen with whom he deployed or went on temporary duty assignments (TDY) on different occasions. Appellant is an EC–130 pilot who performed duty as an aircraft commander and a co-pilot during several deployments to Afghanistan. While TDY, deployed, and transiting to and from

[1] Appellant also petitioned this Court to review the mens rea issue through a failure to state an offense analysis, and asked us to decide it separately from the instructional error issue. We thought it sufficient to address mens rea solely through our review of the military judge's instructions.

> deployment, Appellant used electronic communications to make a variety of comments with sexual undertones to a Senior Airman …, a Technical Sergeant …, and a First Lieutenant …. The comments included telling the Senior Airman he wanted to take her back to his hotel room, asking all three individuals if they cheated on their husband or significant other, and asking two of them about the undergarments they were wearing.

Voorhees, 2016 WL 7028962, at *2, 2016 CCA LEXIS 752, at *3. Appellant was also convicted of conduct unbecoming an officer for giving Senior Airman HB a back massage. At the time of this massage, "Appellant served as the aircraft commander for an eight-member aircrew where [Senior Airman] HB was the only female and the junior member of the crew." *Voorhees*, 2016 CCA LEXIS 752, at *4, 2016 WL 7028962, at *2.

Discussion

I. Prosecutorial Misconduct

Appellant alleges trial counsel's findings and rebuttal arguments contained numerous instances of prosecutorial misconduct, ranging from personal attacks on Appellant and his defense counsel, to improper vouching and expressing personal opinions.

We review prosecutorial misconduct and improper argument de novo and where, as here, no objection is made, we review for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). "The burden of proof under plain error review is on the appellant." *Id.* (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)). "Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (internal quotation marks omitted) (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). Thus, we must determine: (1) whether trial counsel's arguments amounted to clear, obvious error; and (2) if so, whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)); *see also United States v. Tovarchavez*, __ M.J. __ (8) (C.A.A.F. 2019) (explaining that, where nonconstitutional error is forfeited, the *Molina-Martinez* test should be applied).

As we have explained repeatedly:

> Trial prosecutorial misconduct is behavior by the prosecuting attorney that oversteps the bounds of that propriety and fairness which should characterize the conduct of such an

> officer in the prosecution of a criminal offense. Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon. Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction.

Andrews, 77 M.J. at 402 (internal quotation marks omitted) (quoting *Fletcher*, 62 M.J. at 178, *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996, and *United States v. Berger*, 295 U.S. 78, 88 (1935)).

As trial counsel tried to establish his bona fides with the court members during voir dire, he introduced himself as an attorney of considerable experience and gravitas:

> I'm Captain Josh Traeger. I'm a senior trial counsel assigned to Peterson Air Force Base. In that capacity I travel around the world, between 200 and 250 days a year, prosecuting the Air Force's most serious cases.
>
> ....

> … And on behalf of the Unites State [sic] of America, I am happy to be prosecuting this case.

Despite his self-described expertise, trial counsel's findings and rebuttal arguments were riddled with egregious misconduct, much of which amounted to clear, obvious error. We are most concerned with trial counsel's: (1) personal attacks on defense counsel; (2) personal attacks on Appellant; and (3) expressing personal opinions, bolstering, and vouching. We address each in turn.

Personal Attacks on Defense Counsel

First, trial counsel accused defense counsel of "misplaced lying," and made the defense theory of the case seem fantastical, saying "defense counsel's imagination is not reasonable doubt." Both statements amount to clear, obvious error.[2]

"[I]t is … improper for a trial counsel to attempt to win favor with the members by maligning defense

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[2] The Government contends trial counsel's attack on defense counsel was simply challenging "defense counsel's misrepresentation of the record and the law during closing argument." If the defense counsel mischaracterizes the evidence or misstates the law, the trial counsel may object, ask the military judge for an instruction, and explain the mischaracterization during rebuttal argument. But he may not label the defense counsel a liar or fabricator, nor may he engage in any argument amounting to prosecutorial misconduct. *See Fletcher*, 62 M.J. at 181.

counsel," including accusing the defense counsel of fabrication. *See Fletcher*, 62 M.J. at 181–82 (citations omitted). As *Fletcher* warned, but trial counsel failed to heed, when trial counsel maligned defense counsel, he risked both turning the trial into a "popularity contest" and influencing the members such that they may not have been able to objectively weigh the evidence against Appellant. *Id.* "Rather than deciding the case solely on the basis of the evidence presented, as is required, the members [could have been] convinced to decide the case based on which lawyer they like[d] better." *Id.* (internal quotation marks omitted) (quoting *United States v. Young*, 470 U.S. 1, 18 (1985)). Indeed, the panel could have been so swayed by trial counsel's disparaging remarks that they "believe[d] that the defense's characterization of the evidence should not [have been] trusted, and, therefore, that a finding of not guilty would [have been] in conflict with the true facts of the case." *Id.* (internal quotation marks omitted) (quoting *United States v. Xiong*, 262 F.3d 672, 675 (7th Cir. 2001)). Trial counsel's attacks on defense counsel were all the worse given that they "were gratuitous and obviously intended to curry favor with the members. [He] drew … comparisons between [his] style and that of defense counsel," framing defense counsel as an overly imaginative liar, while contrasting himself as a highly experienced, well-trained prosecutor.[3] *Id.* at 182.

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[3] As above, during voir dire, trial counsel referred to himself as "a senior trial counsel" who "travel[s] around the world, between 200 and 250 days a year, prosecuting the Air Force's most serious cases." He made a statement with similar implications as he began his rebuttal argument, saying

> The trial counsel's obvious attempts to win over the [panel] by putting [him]self in a favorable light while simultaneously making defense counsel look like a [liar] who would say anything to get his client off the hook were plainly improper. The trial counsel erroneously encouraged the members to decide the case based on the personal qualities of counsel rather than the facts. Not only did [his] comments have the potential to mislead the members, but they also detracted from the dignity and solemn purpose of the court-martial proceedings.

Id.

Personal Attacks on Appellant

Next, trial counsel also repeatedly attacked Appellant's character, calling him "perverted," "sick," and a "narcissistic, chauvinistic, joke of an officer." At one point, trial counsel went so far as to describe Appellant as, "[n]ot an officer, not a gentleman, but a pig." Later, trial counsel stressed this theme further, adding, "Disgusting. Disgusting. Deplorable.

"Members, I don't—I don't go TDY and leave my family 250 days a year to sell you a story. I don't do that." Together, these statements may have falsely suggested to the panel that trial counsel was so experienced he could select and try only winning cases.

Degrading. That's the nature of the conduct that the accused committed. That's the nature of this man."[4] These attacks on Appellant also amount to clear error. *See Andrews*, 77 M.J. at 402 (holding trial counsel's references to the accused as a liar and Don Juan to be error).

"Disparaging comments are also improper when they are directed to the defendant himself." *Fletcher*, 62 M.J. at 182. Trial counsel's word choice served as "more of a personal attack on the defendant than a commentary on the evidence." *Id.* at 183. "[S]uch conduct is inconsistent with the duty of the prosecutor to 'seek justice, not merely to convict.' " *Id.* at 182 (quoting *United States v. White*, 486 F.2d 204, 206 (2d Cir. 1973)). Trial counsel had only to demonstrate that Appellant violated the UCMJ—not that he was perverted, deplorable, disgusting, chauvinistic, narcissistic, or a pig. Nor was it necessary for trial counsel to repeat these insults throughout his argument; in doing so, trial counsel risked unduly inflaming the passions of the panel. *See United States v. Clifton*, 15 M.J. 26, 29, 30 (C.M.A. 1983) ("It is axiomatic that a court-martial must render its verdict solely on the basis of the evidence presented at trial" and "it is improper for counsel to

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[4] While it was error for trial counsel to use these adjectives to disparage Appellant, it was not error for the trial counsel to use these adjectives to describe Appellant's conduct. See generally Fletcher, 62 M.J. at 182 (explaining that disparaging comments are improper when they amount to a personal attack, directed at the accused; suggesting they do not otherwise amount to misconduct).

seek unduly to inflame the passions or prejudices of the court members." (citations omitted)).

Expressing Personal Opinions, Bolstering, and Vouching

Trial counsel also improperly expressed his personal opinion about Appellant's guilt, utilized personal pronouns, bolstered his own credibility, and vouched for government witnesses. While a prosecutor may argue that the evidence establishes an accused's guilt beyond a reasonable doubt, he is prohibited from expressing his personal opinion that the accused is guilty. *See Young*, 470 U.S. at 7.

Trial counsel also made the following statement during his closing argument: "And here's where attention to detail is important. Here's really where the attention to detail—and I've been doing this a long time. I've been trying cases a long time and I've quickly learned that attention to detail is as important as any other skill in the courtroom."

And during rebuttal:

- "Technical Sergeant [BR] is an outstanding airman; an outstanding noncommissioned officer in the United States Air Force."
- Referring to a Government witness's testimony: "That was his perception. That was the truth."

- “And if there is any doubt in your mind as to that point or the quality of the United States evidence on this charge, rely entirely on Senior Airman [HB’s] credibility. Hang your hat there, because you can. Because that airman is credible. She testified credibly; she told you what happened to her.”
- “[Senior Airman HB’s] not lying. It’s the truth. It’s what happened.”
- “Members, I don’t—I don’t go TDY and leave my family 250 days a year to sell you a story. I don’t do that. And I don’t stand up here and try to appeal to your emotions. I think I made that clear in talking about the government’s presentation of evidence.”
- “But I’m not going to apologize for becoming emotional when talking about a Major who sexually assaulted a Senior Airman. I’m not going to apologize for that.”
- “[W]e win. Clearly.”
- “*I know* that the defense counsel’s imagination … is not reasonable doubt.” (Emphasis added.)
- “I’m not in the business of convicting innocent people, but this man is guilty.”
- Appellant is “without a doubt … guilty.”

These statements are all clear and obvious error.

From voir dire forward, trial counsel tried to convince the members to convict based on his purported integrity, credibility, and experience as an

accomplished prosecutor, and vouched for the credibility of his witnesses, rather than the evidence presented.

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

Young, 470 U.S. at 18–19; *see also Fletcher*, 62 M.J. at 180 (explaining that "use of personal pronouns in connection with assertions that a witness was correct or to be believed" is improper).

Prejudice

Although trial counsel's misconduct amounted to grievous error, Appellant fails to establish prejudice. "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on

the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184 (citation omitted). "We weigh three factors to determine whether trial counsel's improper arguments were prejudicial: '(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.' " *Andrews*, 77 M.J. at 402 (quoting *Sewell*, 76 M.J. at 18). Under this test, Appellant has the burden to prove that there is a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Lopez*, 76 M.J. at 154 (internal quotation marks omitted) (citation omitted). Because Appellant failed to demonstrate that trial counsel's misconduct was "so damaging" as to call into question whether the members convicted Appellant on the basis of the evidence alone, we cannot reverse here. *Sewell*, 76 M.J. at 18 (internal quotation marks omitted) (citation omitted); *see also Andrews*, 77 M.J. at 402 (quoting *Sewell*, 76 M.J. at 18) ("[T]he third factor [alone] may so clearly favor the government that the appellant cannot demonstrate prejudice." (alterations in original)).

As indicated above, trial counsel's improper argument was severe. The misconduct was sustained throughout argument and rebuttal, occurring with alarming frequency. *See Fletcher*, 62 M.J. at 184 (listing "the raw numbers—the instances of misconduct as compared to the overall length of the argument," as well as its persistence throughout argument, as two "Fletcher factors" to consider when determining the severity of prosecutorial misconduct).

Its persistence throughout final arguments was aggravated by the military judge's total failure to offer any curative instructions. *See id.* (listing "whether the trial counsel abided by any rulings from the military judge" as another "*Fletcher* factor").

Despite the severity of trial counsel's misconduct and the absence of curative measures, however, several other factors militate against finding prejudice. First, defense counsel's failure to object to any of the prosecutorial misconduct is "some measure of the minimal impact of [the] prosecutor's improper argument." *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (internal quotation marks omitted) (citation omitted). In *Andrews* we warned defense counsel that failing to object to prosecutorial misconduct "may give rise to meritorious ineffective assistance of counsel claims." 77 M.J. at 404. In this case, the record contains some indication that defense counsel's failure to object may have been a "tactical decision" made as part of his case strategy, rather than a sign of ineffectiveness. *See Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (finding no prejudice from prosecutorial misconduct where a defense counsel made "tactical decision[s]" in case strategy). After standing by and allowing trial counsel's improper argument to proceed, defense counsel told the panel that trial counsel's argument was merely an emotional appeal, made because the Government's case was weak. He described trial counsel's argument as "theatrics," performed as a product of:

> a lesson that's taught at law schools across the country and in the military advocacy courses. And it is this: if you have the facts, argue the facts. If you have the law, argue the law. If you have neither, then literally the lesson is to pound your fist and try to appeal to the emotions of the panel.

Defense counsel's argument explains why he acquiesced to trial counsel's improper argument—not because he was ineffective, but because he wanted trial counsel to make a spectacle of himself. Defense counsel sought to "plac[e] … the prosecutors' comments and actions in a light that was more likely to engender strong disapproval than result in inflamed passions against" Appellant. *Darden*, 477 U.S. at 182. Put simply, in the context of the entire court-martial, trial counsel's arguments were unlikely to prejudice the panel against Appellant. This is especially true given the composition of the panel, which leads to our next point.

The panel at Appellant's court-martial was comprised of colonels and lieutenant colonels. As senior officers, these individuals were uniquely situated to assess whether Appellant's conduct was unbecoming under Article 133, UCMJ. *See* Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2) (2012) (requiring that the convening authority detail officers "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament" to serve as panel members).

After all, these members too were bound by the *Manual for Courts-Martial, United States* (MCM), and required by Article 133, UCMJ, to act honorably, gracefully, and decently, as officers and gentlemen. *See* MCM pt. IV, para. 59.c.(2) (discussing the traits expected of commissioned officers). Trial counsel's arguments were thus unlikely to impede these experienced officers' ability to recognize conduct unbecoming and weigh the evidence against Appellant.[5]

In addition to defense counsel's tactical acquiescence and the members' unique understanding of the offense charged, the evidence that Appellant violated Article 133, UCMJ, "so clearly favor[s] the government that [A]ppellant cannot demonstrate prejudice." *Sewell*, 76 M.J. at 18. To have convicted Appellant of Article 133, UCMJ, the panel must have found:

> 1. That the accused did or omitted to do certain acts; and
>
> 2. That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman.

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[5] In fact, defense counsel simply left it to the members to decide whether Appellant's conduct qualified as conduct unbecoming, arguing as follows: "[I]t's your call as to whether or not those comments were just inappropriate or they went way over the top. I'm not going to tell you one way or the other." "Do those charged words … rise to the level to be a … federal crime? Is it inappropriate, distasteful, or is it way over the top?… But that's for you to decide when you go back there and deliberate."

MCM pt. IV, para. 59.b. (2016 ed.).[6] In the instant case, the acts charged in the first element of each specification alleged Appellant acted sexually inappropriately toward his subordinates. In one specification, the acts element alleged that Appellant gave Senior Airman HB a back massage. In the other four specifications, the acts element alleged Appellant made inappropriate comments to various subordinates. "Regardless of trial counsel's improper arguments, there was ample evidence in support of" Appellant's convictions. *Andrews*, 77 M.J. at 403. Appellant conceded that he gave Senior Airman HB a back massage when he argued she consented to the massage as part of his defense to the Article 120, UCMJ, offense. Each of the other four specifications was supported by compelling in-court testimony or documented with physical evidence in the form of text messages.

Accordingly, Appellant's court-martial was neither perfect, nor fundamentally unfair. *See Darden*, 477 U.S. at 183 (affirming the lower court's finding that the appellant's "trial was not perfect … but neither was it fundamentally unfair" (internal quotation marks omitted) (citation omitted)). Although trial counsel's conduct reveals a lack of

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[6] Because the lower court set aside Appellant's Article 120, UCMJ, conviction, we only analyzed the weight of the evidence pertaining to the Article 133, UCMJ, offenses. Even if trial counsel's argument swayed the panel to wrongfully convict Appellant of violating Article 120, UCMJ, the evidence as to the Article 133, UCMJ, specifications was so strong that Appellant cannot demonstrate prejudice. *Fletcher*, 62 M.J. at 184; *Sewell*, 76 M.J. at 18.

practical legal skills and a level of courtroom etiquette far below that which we expect of military officers, judge advocates, and all experienced trial counsel, we are "confident that the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184. "There was, therefore, no prejudice to Appellant's substantial rights." *Andrews*, 77 M.J. at 403.

A Note on Prosecutorial Misconduct

Although the law precludes us from finding plain error, trial counsel's performance in this case was not one we would expect from any lawyer, let alone a "senior" trial counsel.

In every case, and especially a case alleging unbecoming conduct, trial counsel should take care to remember that they too are military officers and should conduct themselves accordingly. In this case, as he attempted to sway the members to convict Appellant of conduct unbecoming pursuant to Article 133, UCMJ, trial counsel himself approached the line of indecorum. Attacking one's opposing counsel is as unacceptable as launching ad hominem attacks on the accused in open court. In our view, the token trait of a good prosecutor is the ability to be adversarial without being hostile, but here, unfortunately, trial counsel was openly hostile and petty, leaving propriety and good advocacy at the courtroom door.[7]

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[7] The Government's poor decision-making in this case was not limited to the trial level. In its brief, the Government

Trial counsel, however, was not the sole attorney at fault during Appellant's court-martial. As we admonished in *Andrews*, "Military judges are neither mere figurehead[s] nor are they umpire[s] in a contest between the Government and accused;" they too have a "*sua sponte* duty to [e]nsure that an accused receives a fair trial." 77 M.J. at 403–04 (alterations in original) (internal quotation marks omitted) (citations omitted). The military judge in Appellant's case simply allowed trial counsel to ramble on with his improper argument. Similarly, although defense counsel's failure to object appears to have been a conscious and tactical choice in the instant case, we remind all defense counsel they "owe[s] a duty to the[ir] client[s] to object to improper arguments early and often." *Id.* at 404.

This case aside, the consistent flow of improper argument appeals to our Court suggests that those in supervisory positions overseeing junior judge advocates are, whether intentionally or not,

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acknowledged that "[d]isparaging comments directed at an accused can be improper," but argued that "[i]n this case, trial counsel's comments were a reasonable inference from the evidence admitted at trial, and not outside the norms of fair comment in a court-martial where the appellant was accused of conduct unbecoming of an officer." Brief for the Government at 19, *United States v. Voorhees*, No. 18-0372 (C.A.A.F. Jan. 15, 2019). Appellate counsel repeated this sentiment at oral argument. We find it deeply troubling that experienced appellate attorneys persistently argued that it is within "the norms of fair comment" for a trial counsel to refer to an accused as a "pig," "a pervert," and "a joke of an officer."

condoning this type of conduct. As superior officers, these individuals should remind their subordinate judge advocates of the importance of the prosecutor's role within the military justice system and should counsel them to "seek justice, not merely to convict." *Fletcher*, 62 M.J. at 182 (internal quotation marks omitted) (citation omitted).

"Every attorney in a court-martial has a duty to uphold the integrity of the military justice system," and multiple experienced attorneys failed to do so here. *Andrews*, 77 M.J. at 404.

II. Article 133, UCMJ Mens Rea

Appellant also alleges that the military judge erred when she failed to instruct the panel on a mens rea for any of the Article 133, UCMJ, specifications.[8] We find no such error.

"Questions pertaining to the substance of a military judge's instructions, as well as those involving statutory interpretation, are reviewed de novo." *United States v. Caldwell*, 75 M.J. 276, 280

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[8] Appellant also alleges the Article 133, UCMJ, specifications wrongfully omitted words of criminality, but we disagree. The specifications use the terms "inappropriate" or "unprofessional" or allege the conduct in each specification was unbecoming an officer and a gentleman. These allegations sufficiently contain words of criminality to state an offense for purposes of this appeal. *See United States v. Maderia*, 38 M.J. 494, 496 (C.M.A. 1994) (explaining the language "conduct unbecoming" was sufficient to state an offense).

(C.A.A.F. 2016) (citations omitted). "Because Appellant did not object to the military judge's failure to instruct the members on a mens rea requirement … we review this issue for plain error" as well. *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017).

"Military judges are required to instruct members on the elements of each offense …." *United States v. Davis*, 73 M.J. 268, 272 (C.A.A.F. 2014) (citations omitted). As noted earlier, Article 133, UCMJ, contains just two elements: "[t]hat the accused did or omitted to do certain acts; and [t]hat, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman." *MCM* pt. IV, para. 59.b. The military judge adequately instructed the panel on each specification of Article 133, UCMJ, when she read the panel the elements as charged in each specification and provided the following instruction both orally and in writing:

> "Conduct unbecoming an officer and a gentleman" means behavior in an official capacity which, in dishonoring or disgracing the individual as a commissioned officer, seriously detracts from his character as a gentleman, or behavior in an unofficial or private capacity which, in dishonoring or disgracing the individual personally, seriously detracts from his standing as a commissioned officer. "Unbecoming conduct" means misbehavior more serious than slight, and of a material and

> pronounced character. It means conduct morally unfitting and unworthy rather than merely inappropriate or unsuitable misbehavior which is more than opposed to good taste or propriety.[9]

Appellant contends these instructions were inadequate because they make no mention of a mens rea requirement. Presumably, the military judge omitted anything specific about mens rea from her instructions because Article 133, UCMJ, contains no explicit mens rea requirement.

This case is strikingly similar to *Caldwell*, in which we held that maltreatment under Article 93, UCMJ, 10 U.S.C. § 893, was a military-specific offense, and so the government need only "prove general intent in order to obtain a conviction." 75 M.J. at 278. Like Article 133, UCMJ, Article 93, UCMJ, does not explicitly specify a mens rea. *MCM* pt. IV, para. 17.a. As we explained in *Caldwell*, although it is true that "wrongdoing must be conscious to be criminal," 75 M.J. at 280 (internal quotation marks omitted) (citation omitted), Congress is not required to include an explicit mens rea in every article of the UCMJ. *Haverty*, 76 M.J. at 203 ("[S]ilence in a criminal statute regarding a mens rea requirement does not necessarily prevent such a requirement from being inferred." (citation omitted)). When a statute is silent as to mens rea, we "only read into the statute

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[9] The military judge's definition mirrors the *MCM's* definition of conduct unbecoming. *MCM* pt. IV, para. 59.c.(2).

that mens rea which is necessary to separate wrongful conduct from innocent conduct." *Caldwell*, 75 M.J. at 281 (internal quotation marks omitted) (citation omitted). A statute's silence can be indicative of a general intent scienter. *See United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019). "[G]eneral intent merely requires [t]he intent to perform [the actus reus] *even though the actor does not desire the consequences that result*." *Haverty*, 76 M.J. at 207 (alterations in original) (internal quotation marks omitted) (citation omitted). In the instant case, a general intent mens rea would require only that Appellant *intended* to commit the conduct alleged in each specification—i.e., making inappropriate comments and massaging his subordinate's back. It was up to the panel to determine whether Appellant's acts constituted conduct unbecoming. *See United States v. Miller*, 37 M.J. 133, 138 (C.M.A. 1993) (disagreeing with the appellant that the evidence was insufficient to prove the conduct unbecoming element and instead "hold[ing] that 'a reasonable military officer would have no doubt that the activities charged in this case constituted conduct unbecoming an officer.' " (quoting *United States v. Frazier*, 34 M.J. 194, 198 (C.M.A. 1992))).

Because "there is no scenario where [an officer] who engages in the type of conduct" Appellant engaged in "can be said to have engaged in innocent conduct," we infer a general intent scienter from Congress's silence. *Caldwell*, 75 M.J. at 281. "We base our conclusion on the unique and long-recognized importance" of an officer's behavior "in the United

States armed forces, and the deeply corrosive effect that [indecorous behavior] can have on the military's paramount mission to defend our Nation." *Id.*

Conduct unbecoming is a "military offense that was specially created by Congress and prohibited under its own separate article … reflecting" a high level of congressional concern. *Haverty*, 76 M.J. at 205 n.10 (quoting *Caldwell*, 75 M.J. at 281, 285). "The gravamen of [Article 133, UCMJ] is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command … so as to successfully complete the military mission." *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009) (internal quotation marks omitted) (citation omitted). Article 133, UCMJ, was drafted in response to the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). By criminalizing conduct unbecoming, Article 133, UCMJ, is intended to help ensure a "disciplined and obedient fighting force." *Parker v. Levy*, 417 U.S. 733, 763 (1974) (Blackmun, J., with whom Burger, C.J., joined, concurring). These traits are so essential to war fighting capabilities, that this article's foundations were established long before the Republic itself. *See Levy*, 417 U.S. at 745 (explaining that Article 133, UCMJ, originated in "the British antecedents of our military law," followed our nation's founders across the Atlantic, and was adopted in a similar form by the Continental Congress in 1775). Because officer behavior is so important, "criminal

liability for [conduct unbecoming] does not depend on whether conduct actually effects a harm upon [a] victim," but rather on whether the officer possessed the general intent to act indecorously, dishonestly, or indecently. *Caldwell*, 75 M.J. at 282; *MCM* pt. IV, para. 59.c.(2) ("There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty."). As Justice Blackmun wrote in *Parker v. Levy*—soldiers are expected to know the general difference between right and wrong. 417 U.S. at 762–63 (Blackmun, J., with whom Burger, C.J., joined, concurring) (explaining that soldiers understand "concepts of 'right' and 'wrong' " and that "[f]undamental concepts of right and wrong are the same now" as they've always been); *see also United States v. Meakin*, 78 M.J. 396, 404 (C.A.A.F. 2019) (detailing the history and purpose of Article 133, UCMJ, and noting that "it has historically been the case that officers are held to a higher standard of behavior").

Conscious conduct that is unbecoming an officer:

> is in no sense lawful. This behavior undermines the integrity of the military's command structure, and as we have repeatedly recognized in the context of dangerous speech in the armed forces, [t]he hazardous aspect of license in this area is that the damage done may

> not be recognized until the battle has begun. We therefore conclude that general intent sufficiently separates lawful and unlawful behavior in this context, and there is no basis to intuit a mens rea beyond that which we have traditionally required for Article [133], UCMJ.

Caldwell, 75 M.J. at 282 (internal quotation marks omitted) (citation omitted).

The military judge's instructions adequately explained the actus reus of Appellant's crimes—actions that could not, under the circumstances, have been innocent—and informed the members that they were to consider Appellant's conduct "under the circumstances." Under our precedent, this instructional language "can reasonably be understood as requiring the panel members to determine whether Appellant" knew that he was engaging in certain conduct. *Id.* at 283. The military judge was under no requirement to offer any further instruction specific to general intent. As such, her instructions were not erroneous, let alone plainly erroneous.

Judgment

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

APPENDIX B

Not Reported in M.J., 2018 WL 3629893
Only the Westlaw citation is currently available.

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 38836 (reh)

UNITED STATES
Appellee

v.

Paul D. VOORHEES
Major (O-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 20 July 2018

Military Judge: Mark Rosenow.

Approved sentence: Dismissal. Sentence adjudged 5 April 2017 by GCM convened at Davis-Monthan Air Force Base, Arizona.

For Appellant: Major Patrick A Clary, USAF; Terri R Zimmerman, Esquire; Jack B. Zimmerman, Esquire.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Tyler B. Musselman, USAF; Mary Ellen Payne, Esquire.

Before HARDING, SPERANZA, and HUYGEN, *Appellate Military Judges*.

Senior Judge HARDING delivered the opinion of the court, in which Judges SPERANZA and HUYGEN joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4

HARDING, Senior Judge:

In *United States v. Voorhees*, No. ACM 38836, 2016 CCA LEXIS 752 (A.F. Ct. Crim. App. 23 Nov. 2016) (unpub. op.), this court set aside a finding of guilty for a charge and specification in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and dismissed the charge and specification with prejudice. We also set aside the

sentence.[1] We affirmed the remaining findings comprised of five specifications of conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933, and authorized a sentence rehearing on the affirmed findings. At the sentence rehearing, the military judge sentenced Appellant to a dismissal and a reprimand. The convening authority approved only the dismissal.

Appellant raises four issues for our review: (1) whether the military judge failed to grant meaningful relief for violation of Article 13, UCMJ, 10 U.S.C. § 813; (2) whether Appellant is entitled to sentence relief because the rights and privileges lost as a result of his dismissed conviction for sexual assault have not been restored; (3) whether Appellant's waiver of members for resentencing was involuntary because he did not have information about a comment made by the military judge three years prior to Appellant's forum selection; and (4) whether the sentence is inappropriately severe. We find no prejudicial error and affirm.

I. BACKGROUND

Appellant's convictions for conduct unbecoming an officer and a gentleman are rooted in the sexual comments and actions he directed toward three subordinate female Airmen with whom he deployed or

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[1] At the initial trial, officer members adjudged and the convening authority approved a sentence to dismissal, forfeiture of all pay and allowances, and confinement for three years.

went on temporary duty assignments (TDY) on different occasions. Appellant performed duty as an EC-130 pilot, aircraft commander, and co-pilot during several deployments to Afghanistan. While TDY, deployed, and transiting to and from deployment, Appellant used electronic communications to make a variety of comments with sexual undertones to Senior Airman (SrA) HB, Technical Sergeant (TSgt) BR, and Captain (Capt) MQ. The comments included telling SrA HB he wanted to take her back to his hotel room, asking all three individuals if they cheated on their husband or "significant other," and asking two of them about the under-garments they were wearing.

All five specifications state that Appellant engaged in conduct of a sexual nature with military members junior in rank to him and that the conduct "un-der the circumstances, was unbecoming an officer and a gentleman." Specification 1 of Charge II states Appellant asked SrA HB "inappropriate questions," to wit: "Have you ever cheated on your husband?"; "Have you ever sent him pictures?"; and "Can I have pictures of you?" or words to that effect. Specification 2 of Charge II states Appellant massaged SrA HB's back. Specification 1 of the Additional Charge states Appellant made an "inappropriate statement" to SrA HB, to wit: "I would like to take you back to my room" or words to that effect. Specification 3 of the Additional Charge states Appellant sent "unprofessional" texts to Capt MQ, to wit: "What I want to say could end my career and marriage"; "Your [sic] a very beautiful woman and I would love to be close to you"; "What's your definition of cheating?";

and “So if I asked what color panties you were wearing?” or words to that effect. Specification 4 of the Additional Charge states Appellant sent “unprofessional” texts to another enlisted subordinate, TSgt BR, to wit: “This is about to become a game to see what else I can say that will slip by you”; “Mind if I ask u [sic] a couple personal questions?”; “What I want to say could end my career so I just want to make sure you can keep what I say between us because you seem really cool?”; “Oh really, what’s under there?”; and “I’ve had a crush on you,” or words to that effect.

II. DISCUSSION

A. Illegal Punishment Prior to the Sentence Rehearing

On 29 December 2016, a little over a month after the issuance of our original opinion, The Judge Advocate General remanded Appellant’s case to the convening authority for action consistent with our decision. As of that date, Appellant remained confined and had served nearly two years of the original sentence. A continued confinement hearing was held on 18 January 2017 and Appellant was released.[2] Appellant asserts three violations of Article 13, UCMJ, occurred between 29 December 2016 and the date of the sentence re-hearing: (1) that he remained

[2] The continued confinement review officer determined that continued confinement was not necessary and Appellant was released. The Government did not oppose Appellant’s release.

illegally confined after 29 December 2016 until his release on 18 January 2017; (2) that his pay and allowances were not fully restored after his release (18 January 2017 to 5 April 2017); and (3) that his duty status improperly remained "prisoner" even after his release. Appellant claims on appeal that the military judge failed to grant meaningful relief for these asserted violations of Article 13, UCMJ, and that we should now do so by setting aside the dismissal. We disagree.

Prior to the sentence rehearing, Appellant filed a motion for confinement credit under Article 13, UCMJ. Appellant requested five-for-one credit for each day he was confined from 29 December 2016 until his release, and two-for-one credit for every day after his release up to the date his new sentence was announced. The military judge found no evidence of "any intent to punish [Appellant] by keeping him confined, without full pay, or designated in a particular status as [the] case moved toward a sentence rehearing." His finding of non-punitive intent was not clearly erroneous. Moreover, having examined the record, we agree with the military judge there was no punitive intent. The military judge denied Appellant's motion on the grounds raised by Appellant, but provided modest relief on a separate basis. The military judge concluded that the Government had exceeded the deadlines in Rules for Courts-Martial (R.C.M.) 305(h) and (i) and granted Appellant 19 days of confinement credit, one for each day after the 48-hour probable cause determination was missed. As there was no adjudged confinement to

apply this credit to, the military judge, consistent with *United States v. Zarbatany*, 70 M.J. 169, 177 (C.A.A.F. 2011), then considered whether the awarded credit should be applied against the adjudged sentence to a dismissal and reprimand to ensure meaningful relief. Taking into consideration the nature of the violation, the harm suffered by Appellant, whether the relief sought was disproportionate to the harm suffered by Appellant, and in light of the offenses of which Appellant was convicted, the military judge concluded that "such relief would be disproportionate within the context of this case."[3]

At the outset, we note that a lack of punitive intent coupled with legitimate government objectives inevitably lead us to deny Appellant's requested relief whether we analyze the claims of unlawful punishment as potential violations of Article 13, UCMJ, as framed by Appellant, or more generally as a basis for sentence appropriateness relief under Article 66(c), UCMJ, 10 U.S.C. § 866(c), for unlawful post-trial punishment. As noted, we agree with the military judge that there was no punitive intent and, having conducted our own review, we find that the Government reasonably pursued legitimate interests even if its pursuit was at a pace slower than Appellant would have desired.

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[3] The military judge further ruled that even if he had found an Article 13, UCMJ, violation on the grounds argued by Appellant and provided the requested relief of 259 days of confinement credit, he still would have found a set aside of the dismissal to be disproportionate relief in this case.

Having considered what Appellant has alleged as three distinct Article 13, UCMJ, violations, we conclude we have jurisdiction over one of his claims. We have jurisdiction to determine whether his post-trial confinement from 29 De-cember 2016 until his release on 18 January 2017 resulted in more severe punishment than what Appellant should have experienced. As to Appellant's claims that his pay and allowances were not fully restored after his release and that the update to his duty status was delayed, we find no punitive intent and conclude that we do not have jurisdiction over these collateral matters absent such intent. *United States v. Buford*, 77 M.J. 562 (A.F. Ct. Crim App. 2017). Assuming arguendo that we have jurisdiction, we decline to exercise our authority to grant relief for administrative issues that are unrelated to the legality or appropriateness of the court-martial sentence in this case.

As to Appellant's claim he is due relief for the time spent in confinement from 29 December 2016 until his release on 18 January 2017, the Government contends Appellant is not entitled to his requested relief for three distinct rea-sons. First, citing to *United States v. Kreutzer*, 70 M.J. 444 (C.A.A.F. 2012), the Government argues that the protections of Article 13, UCMJ, and R.C.M. 305 did not apply to Appellant as he was not being "held for trial." Second, even if those protections did apply, Appellant failed to meet his burden of demonstrating his right to relief under Article 13, UCMJ, or failed to show that the military judge's determination of lack of punitive intent was clearly erroneous. Finally, the Government agrees

with the military judge that the requested relief "would be disproportionate within the context of this case."

Assuming *arguendo* a violation occurred when Appellant remained con-fined from 29 December 2016 until his release on 18 January 2017, taking into consideration the harm suffered by Appellant, whether the relief sought was disproportionate to the harm suffered by Appellant, and the offenses of which Appellant was convicted, we conclude, as the military judge did, that setting aside the dismissal would be disproportionate.

B. Illegal Punishment After the Sentence Rehearing

Appellant also asserts he is entitled to relief *from this court* because he has yet to have been restored the rights and privileges lost as a result of his sexual assault conviction, which we dismissed. Specifically, Appellant argues that, because he has not received either monies owed him from the period of time from his release until placement on appellate leave or back-pay and allowances covering the period of confinement he served, this court should intervene and grant sentencing relief by setting aside the sentence of dismissal. Appellant asserts he has been improperly denied his pay and this court has jurisdiction under Article 66(c), UCMJ, to provide a remedy. We disagree.

We note that Appellant does not challenge the legality of the approved sentence. Instead, he takes issue with the decisions of military officials and a delay in the restoration of his pay and implores us to grant sentence appropriateness relief. As this dispute over Appellant's claim to back pay concerns a matter not directly connected to the approved sentence, we must first determine whether we have jurisdiction to grant relief. We hold that we do not.

In *United States v. Dodge*, we determined an appellant's claim for back-pay was not within our statutory jurisdiction. 60 M.J. 873 (A.F. Ct. Crim. App. 2005), *aff'd*, 61 M.J. 288 (C.A.A.F. 2005) (mem.). Notwithstanding our holding in *Dodge*, Appellant, relying primarily on *United States v. Gay*, 75 M.J. 264 (C.A.A.F. 2016), contends this court has jurisdiction to remedy his lack of pay because Article 66(c), UCMJ, grants broad discretion to determine which part of a sentence "should be approved." In *Buford*, however, we noted that Gay did not recognize unlimited authority to grant sentencing relief and held that Article 66(c), UCMJ, does not grant this court jurisdiction over a pay dispute ab-sent a nexus to the approved sentence. *Buford*, 77 M.J. at 562.

Appellant further characterizes his claim as an allegation of illegal post-trial punishment. However, other than captioning this assignment of error as "Illegal Post-Trial Punishment" and asserting that this court has the authority to consider claims of illegal post-trial punishment, Appellant does not specifically claim and, more importantly, does not put

forward any evidence of punitive intent. In *Dodge*, we also considered and rejected the appellant's claim that lack of pay amounted to illegal post-trial punishment. We found the appellant fell "far short of demonstrating that a failure to restore the appellant to a pay status was based on an intent to subject him to illegal punishment" and that a bare claim of illegal punishment, absent some evidence of intent to subject an appellant to illegal post-trial punishment, did not establish jurisdiction over collateral pay issues. *Dodge*, 60 M.J. at 878. Appellant has similarly failed to present any evidence to establish that any member of his command or other military official has delayed or denied him back-pay to increase the severity of his sentence and impose illegal post-trial punishment. Following our prior decisions in *Dodge* and *Buford* and in light of Appellant's failure to demonstrate punitive intent, we thus conclude we do not have jurisdiction over Appellant's back-pay disputes.[4]

C. The Comment

Appellant asserts his waiver of members was not knowing and voluntary because full disclosure of the relevant facts that might reasonably call into question the military judge's impartiality did not occur. Specifically, Appellant claims his waiver of

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[4] Even if we had jurisdiction to grant sentence appropriateness relief for this claim, we would decline to exercise our authority to do so. Article 75, UCMJ, 10 U.S.C. § 875, applies once a judgment as to the legality of the proceedings is final under Article 71, UCMJ, 10 U.S.C. § 871, and Appellant has other available avenues of relief such as the Court of Federal Claims.

members was involuntary because the military judge failed to inform Appellant of a joking comment the judge made over three years prior to Appellant's forum selection about a favorable outcome for an appellant in another case. In that case a conviction was set aside on appeal. The military judge was a senior trial counsel at the time and made the comment to the military appellate defense counsel who obtained the favorable result for his client. According to that appellate defense counsel, he was asked by the military judge and then-senior trial counsel how it felt "helping a rapist go free?" or words to that effect. The appellate defense counsel understood the comment was intended as a joke even though he personally was not amused. He was also not personally offended or professionally concerned and did not believe that he needed to officially report the matter. Instead, he informally shared the comment with his fellow appellate defense counsel to include Appellant's military appellate defense counsel for his original Article 66, UCMJ, review.

1. Voluntary and Knowing Waiver of Members

Whether an accused's forum selection is knowing, voluntary, and intelligent is reviewed de novo. *See United States v. St. Blanc*, 70 M.J. 424, 427 (C.A.A.F. 2012). If an accused requests trial by military judge alone, "the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding." R.C.M. 903(c),

Discussion. The military judge must determine: (1) whether the accused has consulted with defense counsel, (2) whether the accused has been informed of the identity of the military judge, and (3) whether the accused has been notified of the right to trial by members. *Id* at 428 (quoting R.C.M. 903(c)(2)(A)). These requirements "ensure[,] that an accused understands the nature of the choice before waiving the right to trial by members." *Id.* at 428. In considering the scope of the voluntary and knowing requirement, the CAAF held succinctly: "R.C.M. 903 does not require that a military judge inquire into any non-enumerated factors or collateral matters that may have influenced the accused's election." *Id.* at 430. Appellant now urges that a "non-enumerated factor" and "collateral matter"—a non-disclosed potential basis for judicial dis-qualification—should be considered in determining whether his waiver of the right to trial by members was voluntary and knowing. Following *St. Blanc*, we limit our waiver analysis to the requirements of R.C.M. 903 and address the recusal issue injected by Appellant separately. We decline Appellant's invitation to conflate the two.

The military judge advised Appellant of his right to trial by members multiple times and granted Appellant's request to defer his election of forum until after motions practice was complete. At Appellant's request, the military judge also provided Appellant an overnight recess to consult with his counsel on his forum choice. During motions practice, Appellant had the opportunity to observe the judge's demeanor and

receive the judge's rulings. At an earlier session, the military judge announced his qualifications and disclosed on the record his prior assignment as a senior trial counsel and its overlap with the assignments of both the trial counsel and Appellant's trial defense counsel. The military judge also described steps he had taken upon his detail to Appellant's case to ensure that he had not been involved in any capacity in Appellant's case when it was originally tried or on appeal. Appellant not only knew the identity of the military judge when Appellant waived his right to members, but also was aware of the judge's prior assignment as a senior trial counsel and had observed the judge in court.

Appellant, after consultation with his counsel, chose to be sentenced by military judge alone, confirmed that at the time he made this selection he knew the military judge's identity, verified that his choice was a voluntary one, and that he knew he was giving up his right to trial by members. The requirements of R.C.M. 903 were satisfied and thus we conclude Appellant's waiver of the right to members was knowing and voluntary.

2. Recusal of the Military Judge

Although Appellant did not directly raise the issue of recusal of the military judge, Appellant did reference judicial disqualification in the context of the waiver of the right to trial by members. We find no abuse of discretion by the military judge for failure to

recuse himself or for failing to disclose the comment prior to Appellant's waiver of his right to trial by members.

We review a military judge's refusal to recuse himself for an abuse of discretion. *United States v. Butcher*, 56 M.J. 87, 90 (C.A.A.F. 2001) (citation omitted). The standard for identifying the appearance of bias of a military judge is an objective one: "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reason-ably be questioned." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (alteration in original) (quoting *United States v. Kincheloe*, 14 M.J. 40, 50 (C.M.A. 1982)). "There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." *United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001). "[R]emarks, comments, or rulings of a judge do not constitute bias or partiality, 'unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Id*. at 44 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). Further, the Supreme Court has made clear that "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even having being confirmed as federal judges, sometimes display[]" do not establish bias or partiality. *Liteky*, 510 U.S. at 555–56. Of course, the comment at issue

in this case was made when the military judge was a prosecutor.

Given the totality of all the surrounding circumstances attendant to the military judge's comment regarding another appellant's case when the military judge was a senior trial counsel years prior to Appellant's sentence rehearing, the comment is most aptly characterized as a light-hearted attempt at banter among professional peers and, given its benign intent and remoteness in time, is hardly the stuff recusals are made of. We find no actual or apparent bias on the part of the military judge and no abuse of discretion in the military judge's decision to not recuse himself or disclose the comment.

D. Sentence Severity

Finally, Appellant asserts that his sentence of dismissal is inappropriately severe. We disagree.

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we] find[,] correct in law and fact and determine[ ], on the basis of the entire record, should be approved." Article 66(c), UCMJ. "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States*

v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted). While we have great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 142–48 (C.A.A.F. 2010).

Appellant argues that dismissal is "an unduly harsh punishment for the relatively minor conduct" underlying his convictions when considered against "the fact that [he] is a highly decorated combat veteran with an established record of good character." We note, however, that Appellant's misconduct was not a limited one-time lapse of judgment, indiscretion, or aberration. In each instance, Appellant was a superior commissioned officer or senior aircrew member to each of the three subordinates he subjected to inappropriate comments and actions. In each instance, he recognized that he was placing his military career at risk and asked them not to report him. In each instance, he negatively affected his subordinates' morale and attitude toward military service, degraded his squadron's operational effectiveness, and disgraced himself as a military officer. After giving individualized consideration to Appellant, his record of service, the nature and severity of the offenses, and all other matters contained in the record of trial, we do not find Appellant's sentence to be inappropriately severe.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c).

Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT
/s/ Carol K. Joyce
CAROL K. JOYCE
Clerk of the Court

APPENDIX C

Not Reported in M.J., 2016 WL 11410622
Only the Westlaw citation is currently available.

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Major PAUL D. VOORHEES
United States Air Force

ACM 38836

23 November 2016

Sentence adjudged 9 January 2015 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Natalie D. Richardson

Approved Sentence: Dismissal, confinement for 3 years, and total forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Terri R. Zimmermann, Esquire (argued); Jack B.

Zimmerman, Esquire; and Major Jeffrey A. Davis

Appellate Counsel for the United States: Captain Tyler B. Musselman (argued); Colonel Katherine E. Oler; Gerald R. Bruce, Esquire.

Before

J. BROWN, HARDING, and C. BROWN
Appellate Military Judges

OPINION OF THE COURT

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4

C. BROWN, Judge:

Contrary to his pleas, a panel of officers convicted Appellant of one specification of sexual assault by causing bodily harm, in violation of Article 120, UCMJ, 10 U.S.C. § 920, and five specifications of conduct unbecoming of an officer and gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933. The adjudged and approved sentence was a dismissal, forfeiture of all pay and allowances, and confinement for three years.

Appellant raises seven assignments of error: (1) The military judge abused her discretion by admitting, over Defense objection, evidence covered by Mil. R. Evid. 412 to explain why the victim did not express a lack of consent—specifically, that she had been repeatedly sexually assaulted when she was ten years old; (2) his conviction for a violation of Article 120, UCMJ, is legally and factually insufficient; (3) plain error occurred when the trial counsel engaged in prosecutorial misconduct by injecting his personal opinion as to the credibility of the Government's case, and making inflammatory and derogatory attacks on Appellant and trial defense counsel during findings argument; (4) the military judge abused her discretion when she sua sponte instructed the members that, in assessing the sufficiency of the evidence, they could not presume that evidence the Government failed to present must be detrimental to the Government's case; (5) the specifications alleging violations of Article 133, UCMJ, fail to state an offense because they lack words of criminality; (6) his convictions for five specifications in violation of Article 133, UCMJ, are legally and factually insufficient; and (7) plain error occurred when the Government introduced irrelevant, speculative, and inflammatory evidence at sentencing.[1]

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[1] Appellant did not raise as error the presumptive unreasonable delay for the 143-day period between the conclusion of trial and the convening authority's action. Under *United States v. Moreno*, courts apply a presumption of unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial." 63 M.J. 129, 142 (C.A.A.F. 2006). Appellant did not assert prejudice and we independently find he suffered no prejudice that would authorize *Moreno* relief.

We conclude the evidence underlying Appellant's Article 120, UCMJ, conviction is factually insufficient. We thus set aside this finding of guilt and the sentence. This action moots the first and seventh assignments of error.[2] Finding no further error, we affirm the remaining convictions.

Furthermore, having considered the totality of the circumstances and the entire record, we find the post-trial delay in this case is not so egregious as to adversely affect the public's perception of fairness and integrity of the military justice system. *See Toohey*, 63 M.J. at 362. Similarly, we decline to grant relief under *United States v. Tardif*, 57 M.J. 219, 223–24 (C.A.A.F. 2002). Under Article 66(c), UCMJ, 10 U.S.C. § 866(c), this court is empowered "to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), if it deems relief appropriate under the circumstances." *Id.* at 224 (quoting *United States v. Collazo*, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000)). In *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006), our superior court held that a service court may grant relief even when the delay was not "most extraordinary." The court held, "The essential inquiry remains appropriateness in light of all circumstances, and no single predicate criteria of 'most extraordinary' should be erected to foreclose application of Article 66(c), UCMJ, consideration or relief." *Id.* This court set out a non-exhaustive list of factors we consider when evaluating the appropriateness of *Tardif* relief in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), aff'd, 75 M.J. 264 (C.A.A.F. 2016). On the whole, we find the presumptively unreasonable delay does not merit sentencing relief in this case.

[2] With regards to Appellant's now-mooted first assignment of error, we recognize that Mil. R. Evid. 412 is arguably ambiguous regarding whether an accused can invoke the rule to prohibit a willing victim from testifying about otherwise relevant sexual abuse history. Nothing prevents the President from clarifying Mil. R. Evid. 412 through amendment. *See Major Shane R. Reeves, Time to Fine-Tune Military Rule of Evidence 412*, 196 Mil. L. Rev. 47 (Summer 2008).

Background

Appellant's convictions for conduct unbecoming are rooted in the sexual comments and actions he directed toward subordinate female Airmen with whom he deployed or went on temporary duty assignments (TDY) on different occasions. Appellant is an EC-130 pilot who performed duty as an aircraft commander and a co-pilot during several deployments to Afghanistan. While TDY, deployed, and transiting to and from deployment, Appellant used electronic communications to make a variety of comments with sexual undertones to a Senior Airman (SrA), a Technical Sergeant (TSgt), and a First Lieutenant (1st Lt). The comments included telling the Senior Airman he wanted to take her back to his hotel room, asking all three individuals if they cheated on their husband or significant other, and asking two of them about the undergarments they were wearing.

The alleged sexual assault took place as Appellant and SrA HB were returning from a deployment to Afghanistan. During the deployment, Appellant served as the aircraft commander for an eight-member aircrew where SrA HB was the only female and the junior member of the crew. While in transit to their home station, the crew stopped in Baltimore, Maryland. Appellant arranged for a friend to bring food and alcohol to their hotel, and the crew ate, drank, and socialized together. SrA HB returned to her hotel room and called her husband. Appellant sent SrA HB a text message asking if he could come to her room to talk. She refused, telling him "it was not

a good idea." Appellant persisted, calling SrA HB and telling her that he would not get this opportunity again. When she relented, Appellant knocked on her door, and she let him into her room.

After entering her hotel room, Appellant engaged in conversation with SrA HB, and eventually moved to the bed where SrA HB was lying down and began to rub her hand while he talked to her. Appellant began massaging SrA HB's back and eventually took off her shirt and bra while continuing the massage. The massage led to sexual intercourse. After this first sexual encounter, Appellant and SrA HB lay together in bed and conversed for a period of 20 to 30 minutes. Eventually, Appellant performed oral sex on SrA HB and they engaged in vaginal intercourse a second time. Appellant and SrA HB lay on the bed for a few minutes until receiving a message from another crew member inviting them to breakfast. Appellant was in SrA HB's room for approximately two hours.

SrA HB reported the incident to her husband approximately seven months later, initially telling him she had cheated on him. SrA HB then reported the incident to the Air Force Office of Special Investigations (AFOSI). AFOSI asked SrA HB to conduct a recorded phone call with Appellant. During the call, SrA HB told Appellant she "didn't want [sexual intercourse] to happen" and Appellant asked her why she "didn't say something." She also asked him why he "thought it was OK," and Appellant replied, "[he] didn't."

Additional facts necessary to resolve the assignments of error are included below.

Legal and Factual Sufficiency of Article 120 Specification

We review the factual sufficiency of evidence de novo.[3] Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *see United States v. Cole*, 31 M.J. 270, 271 (C.M.A. 1990). Our assessment of factual sufficiency is limited to the evidence presented at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this court is] convinced of [Appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325; *see United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

The Specification of Charge I alleges Appellant committed sexual assault by causing bodily harm in violation of Article 120, UCMJ. To sustain a conviction for sexual assault, the prosecution was required to prove: (1) That Appellant committed a sexual act upon SrA HB, to wit: penetrating the vulva of SrA HB with his penis; and (2) That Appellant did so by causing bodily harm to SrA HB to wit: penetrating her vulva

[3] Because we find the evidence factually insufficient, we do not address legal sufficiency.

with his penis with an intent to gratify his own sexual desire. *See* Department of the Army Pamphlet 27-9, *Military Judges' Benchbook*, 3-45-14c. (10 September 2014).

The Government had the burden to prove beyond a reasonable doubt that SrA HB did not consent to the sexual act and the military judge provided the following definitions at trial regarding consent:

> Consent means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent. Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent or whether a person did not resist or ceased to resist only because of another person's actions.

Similarly, the Government was required to prove beyond a reasonable doubt that Appellant did not have a reasonable mistake of fact defense as to whether SrA HB consented to the sexual acts. As part of the instruction concerning the defense of mistake of fact, the military judge stated:

> Mistake of fact as to consent means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct as alleged. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances.

The defense of mistake of fact as to consent has both subjective and objective elements. *United States v. Paige*, 67 M.J. 442, 455 (C.A.A.F. 2009) ("[T]he mistake of fact defense requires a subjective, as well as objective, belief that [the victim] consented to the sexual intercourse . . . ."); *United States v. Jones*, 49

M.J. 85 (C.A.A.F. 1998) ("[A] mistake-of-fact defense to a charge of rape requires that a mistake as to consent be both honest *and* reasonable.") (quoting *United States v. Willis*, 41 M.J. 435, 438 (C.A.A.F. 1995)); Rule for Courts-Martial 916(j)(1) ("[T]he ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.").

The bulk of the evidence supporting the sexual assault conviction came from the testimony of SrA HB. The Government also introduced into evidence a recorded pretext phone call made by SrA HB to Appellant and text messages between the parties. SrA HB testified she did not consent to sexual intercourse on either occasion. She stated Appellant initially starting massaging her hand and then straddled her on the bed, massaging her back underneath her shirt. SrA HB stated she lay face down on the bed and did not move as Appellant removed her shirt and bra. On cross-examination, she asserted she may have moved when Appellant took off her shirt and bra, but it was not to assist Appellant in any way. Prior to the initial sexual intercourse, SrA HB told Appellant, "[They] couldn't do this," because they "were both married." When Appellant was removing her shorts, SrA HB pushed her hips forward towards the bed but did not say anything to him. During the initial sexual encounter, SrA HB testified she moaned both in pleasure and in pain. Appellant ejaculated on her back and there was a period of 20 to 30 minutes where they lay in bed and conversed. They later engaged in consensual kissing. Appellant kissed SrA HB's

breasts and then performed oral sex on SrA HB by licking her vagina. Appellant and SrA HB had sexual intercourse again with Appellant ejaculating on her stomach.

During her direct examination, SrA HB related she had been repeatedly raped by a foster parent-type figure when she was 10 years old. She further testified that she did not scream or leave the room before or during the sexual encounters with Appellant because she felt like she was back in her childhood situation and she "knew what was going to happen and [she] just wanted it to be over with." She stated she did not cry out or call 911 while Appellant was straddling her and massaging her back because she "just wanted it over with." She explained she engaged in the consensual kissing between the first and second sexual intercourse because when she was abused during her childhood if she "showed interest or didn't fight . . . it would just be quicker. It would just be over with and that's what [she] wanted to happen."

In this case, factual sufficiency turns on whether Appellant had a reasonable belief that SrA HB consented to the sexual acts. SrA HB testified that she talked with Appellant about her childhood and shared personal issues with him over Facebook while they were deployed. But she did not testify to what, if anything, she told Appellant about her childhood sexual abuse or her learned defense mechanisms of feigning interest or not resisting. We find these brief and fairly broad snippets of testimony concerning Appellant's knowledge of SrA HB's childhood

insufficient to overcome a reasonable mistake of fact defense. SrA HB stated she did not say anything to Appellant to indicate she did not want to have sex with him and the only words in the record putting Appellant on notice that she was not a willing participant in the sexual acts were SrA HB saying they "couldn't do this" because they "were both married," while Appellant was massaging her back. SrA HB did testify she moved her hips towards the bed when Appellant initially tried to take off her shorts, but that appears to be the only outward physical behavior which might have put Appellant on notice of her lack of consent to the sexual intercourse. The testimony that SrA HB "showed interest" by consensually kissing Appellant to get the encounter "over with" more quickly coupled with SrA HB's testimony that her body betrayed her and she moaned in pleasure during both instances of sexual intercourse support Appellant's assertion that he was reasonable in believing SrA HB was a willing participant to the sexual intercourse.

Having reviewed the entire record of trial and making allowances for not personally observing the witnesses, we are not convinced of Appellant's guilt beyond a reasonable doubt. We find that the Government failed to prove that the defense of mistake of fact as to consent did not exist. We thus set aside and dismiss with prejudice the Specification of Charge I.

Failure of Article 133 Specifications to State an Offense

Appellant asserts that the five specifications of conduct unbecoming an officer and a gentleman of which he was convicted fail to state an offense.

Whether a specification states an offense is a question of law that we review de novo. *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012). Specifications that are first challenged after trial are viewed with greater tolerance than those challenged at trial. *United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986). "Where defects in a specification are raised for the first time on appeal, dismissal of the affected charges or specifications will depend on whether there is plain error . . . ." *United States v. Humphries*, 71 M.J. 209, 213 (C.A.A.F. 2012). "Appellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused." *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011).

> The military is a notice pleading jurisdiction. Charge(s) and specification(s) will be found sufficient if they, 'first, contain the elements of the offense charged and fairly inform a defendant of the charge against which he must defend, and, second, enable him to

> plead an acquittal or conviction in bar of future prosecutions for the same offense.'

United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011) (quoting *Hamling v. United States*, 418 U.S. 87, 117 (1974)) (citation omitted).

All five specifications, as charged, allege Appellant engaged in conduct of a sexual nature with military members junior in rank to him and that the conduct "under the circumstances, was unbecoming an officer and a gentleman." Specification 1 of Charge II alleges that Appellant asked SrA HB "inappropriate questions," to wit: "Have you ever cheated on your husband?"; "Have you ever sent him pictures?"; and "Can I have pictures of you?" Specification 2 alleges Appellant massaged SrA HB's back. Specification 1 of the Additional Charge alleges Appellant made an "inappropriate statement" to SrA HB, to wit: "I would like to take you back to my room," or words to that effect. Specification 3 of the Additional Charge alleges Appellant sent "unprofessional" texts to Captain MQ, to wit: "What I want to say could end my career and marriage"; "Your (sic) a very beautiful woman and I would love to be close to you"; "What's your definition of cheating?"; and "So if I asked what color panties you were wearing?" or words to that effect. Specification 4 of the Additional Charge alleges "unprofessional" texts from Appellant to another enlisted subordinate, TSgt BR, to wit: "This is about to become a game to see what else I can say that will slip by you"; "Mind if I ask u (sic) a couple personal questions?"; "What I

want to say could end my career so I just want to make sure you can keep what I say between us because you seem really cool?"; "Oh really, what's under there?"; and "I've had a crush on you," or words to that effect.

The elements of conduct unbecoming an officer and a gentleman are as follows: "(1) That the accused did or omitted to do certain acts; and (2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and gentleman." *Manual for Courts-Martial*, United States (MCM), pt. IV, ¶ 59(b). Regarding conduct captured under this Article, the *Manual* notes:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty.

MCM, pt IV, ¶ 59.c.(2) (2012 ed.).

Concerning the nature of the conduct for this offense, our superior court has held:

> An officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133, UCMJ. The gravamen of the offense is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission. Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out—this notwithstanding whether or not the act otherwise amounts to a crime.

United States v. Schweitzer, 68 M.J. 133, 137 (C.A.A.F. 2009) (quotation marks and citations omitted).

As Appellant did not object at trial, we liberally construe the specifications and only grant relief for plain error. But Appellant cannot show error, let alone plain error. All five specifications contain the elements of the offense of conduct unbecoming an officer and a gentleman. They serve to inform

Appellant of the specific acts against which he must defend. Finally, they are charged with sufficient specificity to prevent future prosecutions for the same offenses. This is all that is required. *Fosler*, 70 M.J. at 229.

Legal and Factual Sufficiency of Article 133 Specifications

Appellant asserts the evidence underlying his convictions for violating Article 133 is legally and factually insufficient because the language and conduct alleged do meet the definition of conduct unbecoming an officer and a gentleman. We disagree. Appellant asserts his texts were simply "innocuous chatter," and argues that while the "flirtatious" and "inappropriate" comments reflect poorly upon Appellant as a husband, they had no serious effect on the public's perception of the Air Force or the military in general. Appellant asks us to follow the rationale in *United States v. Brown*, 55 M.J. 375 (C.A.A.F. 2001), to set aside the specifications. We are not persuaded and instead rely on our superior court's holding in *United States v. Lofton*, 69 M.J. 386 (C.A.A.F. 2011).

In *Lofton*, our superior court found legally sufficient a specification alleging an officer made unsolicited sexual comments to a Chief Master Sergeant. The court noted, "Appellant's words cannot be analyzed in a vacuum. Unlike the appellant in *Brown*, Colonel Lofton was not dealing with fellow officers . . . . [T]he Government established that

Appellant . . . made these comments as a means to further his attempt to establish a personal and unprofessional relationship with CMSgt RM, an enlisted woman." *Id*. at 390.

Appellant focuses our attention to the testimony of witnesses who stated they were a "good crew" and they "bragged about being one of the best," further stating there was no evidence Appellant was unable to accomplish the mission. While Appellant asserts his conduct does not rise to the same level of "frequency and intrusiveness" as the conduct in *Lofton*, we are not persuaded.

Appellant's misconduct negatively impacted his subordinates' perception of him and their desire to serve under his command. SrA HB testified that Appellant's comments made her feel uneasy. 1st Lt MQ asked to be removed from the pending deployment where Appellant was to be her aircraft commander. She further testified that the text messages impacted her view of Appellant as a gentleman by making her feel disgusted, and she lost all sense of respect for him. TSgt BR testified that Appellant's messages caused her to not look forward to working for Appellant during the deployment. TSgt BR further testified she did not think of Appellant as a gentleman and that Appellant's actions, including his texts and "vulgar" and "lewd" sexual comments he made while deployed caused her to seek a staff job so she would not have to deploy again.

Despite Appellant's assertion that his actions were a mere failure of good judgment, we have no doubt they disgraced him personally and as an officer such that they compromised his fitness to command and to successfully complete the military mission. The charged conduct was of a sexual nature and occurred with lower ranking military members. The alleged conduct occurred while Appellant was deployed, transiting to or returning from deployment, or TDY with junior members of his unit. For three specifications, Appellant was the senior officer and aircraft commander or co-pilot of the enlisted members with whom it is alleged he committed the conduct unbecoming. For the specification involving the junior officer, Appellant was soliciting her to cheat on his wife with him. At the time, Appellant was scheduled to deploy with her in the near future where he would perform duty as the aircraft commander or co-pilot of her crew. The remaining specification alleges conduct where Appellant told a married Airman from his unit whom he would later command at a deployed location that he wanted to take her back to his hotel room. We find that there is sufficient evidence to convince a rational trier of fact beyond a reasonable doubt that the Appellant is guilty of all five specifications of conduct unbecoming an officer and a gentlemen, and that the evidence is, therefore, legally sufficient. Furthermore, after our independent review of the record and making allowances for not personally observing the witnesses, we are ourselves convinced beyond a reasonable doubt.

Improper Argument by Trial Counsel

Appellant next asserts trial counsel engaged in prosecutorial misconduct during closing argument by injecting his personal opinion as to the credibility of the Government's case and making inflammatory and derogatory attacks on Appellant and trial defense counsel.

Improper argument is a question of law that is reviewed de novo. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). Because there was no objection at trial, we review the propriety of trial counsel's argument for plain error. *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2013). To prevail under a plain error analysis, Appellant must show "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)).

Appellant cites 14 different instances where he believes trial counsel made improper argument, none of which he objected to at trial. Many of the alleged improper arguments are directly related to the sexual assault charge which we have found factually insufficient; we decline to address these as they are mooted by our setting aside of that charge. Rather than address each point individually, we will examine the arguments in terms of the prosecutorial misconduct alleged.

Appellant alleges trial counsel impermissibly attacked him by referring to Appellant as a "perverted individual," a "pig," a "narcissist," a "chauvinist," a "joke of an officer," and referring to his conduct as "disgusting." It is well established that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *United States v. Frey*, 73 M.J. 246, 248 (C.A.A.F. 2014) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Trial counsel is entitled "to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Baer*, 53 M.J. 235 (C.A.A.F. 2000). Despite our setting aside the sexual assault conviction, the evidence remains that Appellant, at minimum, as the senior officer of a deployed aircrew had sexual intercourse with the most junior enlisted member of his aircrew while re-deploying. Similarly, the alleged conduct unbecoming took place between a commissioned officer and either enlisted members or a junior officer within his unit. Appellant's conduct in having sexual intercourse with SrA HB while re-deploying and seeking to engage in personal relationships with his subordinates and making inappropriate comments with sexual undertones to them was at the center of the evidence at trial. Thus, while trial counsel's use of the above adjectives to

describe Appellant was perhaps ill-advised,[4] they do not rise to the level of plain error.

Appellant further asserts trial counsel inappropriately expressed his personal opinion regarding the Government's evidence by bolstering witnesses. Appellant claims this occurred when trial counsel called TSgt BR an outstanding Airman and stated that various witnesses, including SrA HB testified truthfully. As our superior court stated in *Baer*, 53 M.J. at 238, "our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Id.* We find trial counsel's argument did not personally vouch for the witnesses, but amounted to fair comment on the evidence presented to include commenting on the witnesses' perception of Appellant's observed behavior and also arguing that Government witnesses, including the sole witness to the sexual assault, were credible.

Appellant alleges trial counsel made multiple arguments impermissibly commenting on Appellant's right to not testify. A trial counsel "may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (quoting *United States v. Mobley*, 31 M.J. 273, 279 (C.M.A. 1990)). However, "it is permissible for trial counsel to comment on the Defense's failure to refute

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[4] *See United States v. Fletcher*, 62 M.J. 175, 182 (C.A.A.F. 2005) ("Disparaging comments are also improper when they are directed to the defendant himself.")

Government evidence or to support its own claims." *United States v. Paige*, 67 M.J. 442, 448 (C.A.A.F. 26 2009). A violation occurs "only if either the defendant alone has the information to contradict the Government evidence referred to or the [members] 'naturally and necessarily' would interpret the summation as a comment on the failure of the accused to testify." *Id*. (quoting *Carter*, 61 M.J. at 33) (quoting *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981) (alteration in original).

In *Carter*, our superior court found that trial counsel's reference to the words "uncontroverted" and "uncontradicted" 11 times during argument made Appellant's decision not to testify a "centerpiece of the closing argument." *Carter*, 61 M.J. at 34. The Court also noted that even after the military judge instructed the members that they could not draw any adverse inference from the appellant's failure to testify, trial counsel continued that type of argument. *Id*. The court found the comments "were not isolated or a 'slip of the tongue,'" and cited to *United States v. Moore*, 917 F.2d 215, 225 (6th Cir. 1990) to propose the isolated nature of comments by a prosecutor should be taken into account. *Carter*, 61 M.J. at 34.

Here, trial counsel's closing and rebuttal argument contained three instances where testimony was labeled "uncontradicted." Two of the three instances stem from testimony where multiple individuals were present. The final comment occurred when trial counsel stated it was "uncontradicted" that Appellant had told SrA HB she should "be more

enthusiastic" with her husband just prior to leaving SrA HB's hotel room. As SrA HB was the only person who heard Appellant's statement, this comment is information that only Appellant could contradict. Our superior court has found that the Government "is permitted to make 'a fair response' to claims made by the Defense, even when a Fifth Amendment right is at stake." *United States v. Gilley*, 56 M.J. 113, 120 (C.A.A.F. 2001) (quoting *United States v. Robinson*, 485 U.S. 25, 32 (1988)). Trial defense counsel appeared to invite this reply through his opening statement where he described Appellant's version of the sexual encounter, highlighting Appellant's "eight-hour statement" to AFOSI. Trial defense counsel also did not challenge SrA HB on the veracity of this statement despite having the opportunity to do so on cross-examination. That said, even if this argument was not an invited response or proper comment on SrA HB's credibility, we do not believe trial counsel was impermissibly drawing the members' attention to Appellant's right not to testify. We further find trial counsel's use of the term "uncontradicted" in this instance did not prejudice Appellant, particularly as we are analyzing this only as it relates to the convictions for conduct unbecoming an officer and a gentleman.

Military Judge's Instruction during Closing Argument

Appellant asserts the military judge abused her discretion when she sua sponte instructed the panel concerning evidence the Government did not present.

During closing argument, trial defense counsel argued that evidence the Government had not presented to the members was unfavorable to the Government's case. Specifically, trial defense counsel argued:

> [Y]ou can *assume*, knowing that these are skilled prosecutors, if they had 16 crew members or 15 crew members that could come in here and say this behavior was completely over the top, then we would have heard from, probably from 15 or 16 witnesses. They've picked the ones they had and that really goes to show that a majority of the people *probably don't back up their side of the case*[.] (emphasis added).

Trial defense counsel also argued:

> What about OSI agents? You—this is a lengthy investigation. You—they didn't hear from a single professional investigator; who interviewed the witnesses, who dealt with the—that investigated this case. We know OSI investigates all felonies, and this is a felony-level case. *If they had evidence that was helpful to the Government's case, you would have heard from an OSI investigator*. (emphasis added).

Trial defense counsel also questioned why the Government did not call SrA HB's husband.

> What did she really tell her husband? That's another story. That's another question you have. And it's one of those—and I said they cherry-picked the evidence and they showed you about 30 percent of it. Why wouldn't you—wouldn't it be a relevant witness to talk to, the first person she ever told this story to, for you to make your decision?

After trial defense counsel had finished his argument, but before the trial counsel provided a rebuttal argument, the military judge sua sponte instructed the members as follows:

> Before I allow Government to provide a rebuttal argument, I need to remind you of some of the instructions that I gave. That—I don't believe the argument you heard was consistent with all of my instructions. There's a couple of things I really want to foot stomp and point out to you.
>
> …
>
> [I] remind you that only matters properly before the court as a whole should be considered. You may not assume or

> presume that because the Government did not present some evidence that that evidence must have been detrimental to its case. You cannot presume or assume that that evidence that was not presented would even be legally admissible in this trial. However, the Government does have the burden of proof. So, it is the Government's burden, and the Government's alone, to present you with evidence—legal and competent evidence, that proves each element of each offense beyond a reasonable doubt before you can find the accused guilty of any element—or of any offense.

After the Government's rebuttal argument, the trial defense counsel objected to this instruction, arguing that the absence of evidence could raise a reasonable doubt as to guilt. The military judge stated that trial defense counsel "crossed the line" because he wanted the members to "presume that the Government didn't offer it because it would be detrimental to their case." The military judge noted that one portion of defense counsel's argument referenced inadmissible hearsay.

We review a military judge's decision to provide an instruction for an abuse of discretion. *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012). We review the propriety of the instructions given by a military judge de novo. *United States v. Quintanilla*, 56 M.J. 37, 83 (C.A.A.F. 2001).

A negative inference drawn from missing evidence has its origin in the nineteenth century case of *United States v. Graves*, 150 U.S. 118, 120 (1893). There, the United States Supreme Court reversed a conviction where the prosecution argued for the jury to draw a negative inference against the accused from the lack of evidence from the accused's wife. *Id.* Despite reversing the conviction, the Court stated, "The rule even in criminal cases is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable." *Id.* at 121.

This missing-witness rule has been applied in courts-martial. In *United States v. Swoape*, 21 M.J. 414, 415 (C.M.A. 1986), the court held that the military judge erred in failing to instruct the members that "no inference could be drawn from the absence of . . . a witness in this case." Like *Graves*, *Swoape* involved a prosecutor's comments about the lack of evidence presented by the accused. In *United States v. Taylor*, 47 M.J. 322, 324 (C.A.A.F. 1997), the court stated, "This Court generally has not permitted a trial counsel to comment on the failure of the defense to produce evidence." The court further stated, "This missing witness inference usually may not be drawn if the witness is 'equally within the power of either party to produce.'" *Id.* (quoting United States v. Pitts, 353 F.2d 870, 871 (D.C. Cir. 1990).

Although originally a shield for an accused from a prosecutor's comments, the missing-evidence instruction may also be used as a sword against the Government.[5] In *United States v. Roberts*, 10 M.J. 308, 313 (C.M.A. 1981), our superior court stated "Under normal circumstances, a possible inference might be drawn from [a witness's] unexplained absence that [their] testimony would not support the Government or that it would be favorable to the accused." The concurring opinion rejected this

[5] The federal circuit courts of appeal provide additional examples of when this might arise as well as additional instruction on when such an instruction might be appropriate. *See, e.g. United States, v. Ramirez*, 714 F.3d 1134, 1138 (9th Cir. 2013) (noting that a missing witness instruction would be appropriate when: "(1) '[t]he party seeking the instruction must show that the witness is peculiarly within the power of the other party' and (2) 'under the circumstances, an inference of unfavorable testimony [against the non-moving party] from an absent witness is a natural and reasonable one'"); *United States v. Myerson*, 18 F.3d 153, 159 (2d Cir. 1994) (highlighting a distinction between a defense counsel arguing missing evidence and the trial judge providing a negative inference instruction and stating that "[u]nder some circumstances, it may be proper for a trial court to refuse to give a missing witness instruction to allow the defendant to argue the inference in summation"); *United States v. Wright*, 722 F.3d 1064 (7th Cir. 2013) (affirming a trial judge's declination to provide a missing witness instruction against the government when a confidential informant did not testify at trial); *United States v. Walcott*, 431 Fed. Appx. 860, 861 (11th Cir. 2011) (affirming a trial judge's refusal to provide a missing witness instruction and decision to limit the defense counsel's closing argument on the inferences that could be drawn from the absent testimony of a witness who had invoked his Fifth Amendment rights); and *United States v. Jimenez-Torres*, 435 F.3d 3, 12 (1st Cir. 2006) (drawing a distinction between a defense counsel's closing argument that highlights the missing proof to argue there was insufficient evidence and argument for the jury to draw a negative inference against the government).

position and stated, "No basis exists for an adverse inference instruction from failure to call a witness unless the party logically expected to call the witness 'has it peculiarly within his power to produce' the witness." *Id.* (Cook, Judge, concurring) (quoting *Graves*, 150 U.S. at 121.) "Equal availability 'precludes the inference.'" *Id.* (quoting *United States v. White*, 38 C.M.R. 9, 12 (C.M.A. 1967).

We note there is a difference between trial defense counsel arguing missing evidence as it applies to the Government meeting its burden of proof and arguing the members should make a negative inference from evidence not properly before them as the trier of fact. Had the Defense requested the military judge provide a negative inference instruction prior to argument, she would have been well within her discretion to decline to do so. None of the missing evidence highlighted by the trial defense counsel in closing argument was peculiarly within the Government's control—a necessary prerequisite for such an instruction. However, the question remains whether her sua sponte instruction limiting the trial defense counsel's argument on this point was an abuse of discretion. We hold that it was not.

A military judge has a wide range of options when controlling the presentation of evidence in her courtroom. *See* Mil. R. Evid. 611(a) (requiring the military judge to exercise reasonable control over the mode and order of interrogating witnesses). This includes limiting the closing arguments of counsel. *See* Rule for Courts-Martial (R.C.M.) 919, Discussion

("The military judge may exercise reasonable control over argument.") (citing R.C.M. 801(a)(3)). Perhaps better practice would have been to address the issue outside of the presence of the members; however, trial defense counsel argued the matter directly to the members. Thus, it was within the military judge's discretion to sua sponte instruct the members concerning what she believed to be improper argument.

Moreover, we find that the substance of the instruction was a correct statement of the law. Here, some of the referenced evidence was likely inadmissible under the military rules of evidence. The military judge did not abuse her discretion in sua sponte instructing the members as to what evidence they could properly consider. While the instruction precluded the members from presuming the missing evidence *must* have been detrimental to the Government's case (a mandatory inference), it did not preclude the members from reaching that conclusion if they determined that the evidence otherwise supported it (a permissive inference). In addition, the instruction did not shift the burden of proof or prevent the members for considering the missing evidence as it applied to the Government meeting its burden of proof. After providing the limits of what inferences the members could draw from the evidence that had not been presented, the military judge stated that it was "the Government's burden, and the Government's alone, to present [the members] with evidence—legal and competent evidence, that proves each element of each offense beyond a reasonable doubt." We find the

military judge did not abuse her discretion in providing this limiting instruction to the members.

Sentence Reassessment

Having dismissed the sexual assault specification, we now must decide whether we can accurately reassess Appellant's sentence based solely upon the findings on the affirmed conduct unbecoming specifications, or instead if we must return this case for a rehearing.

This court has "broad discretion" when reassessing sentences. *United States v. Winckelmann*, 73 M.J. 11, 12 (C.A.A.F. 2013). Our superior court has repeatedly held that if we "can determine to [our] satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). In determining whether to reassess a sentence or order a rehearing, we consider the totality of the circumstances with the following as illustrative factors: (1) dramatic changes in the penalty landscape and exposure, (2) the forum, (3) whether the remaining offenses capture the gravamen of the criminal conduct, (4) whether significant or aggravating circumstances remain admissible and relevant, and (5) whether the remaining offenses are the type with which we as appellate judges have the experience and familiarity to reliably determine what

sentence would have been imposed at trial. *Winckelmann*, 73 M.J. at 15–16.

Examining the entire case and applying the considerations set out in *Winckelmann*, we are unable to determine to our satisfaction that Appellant's sentence would have been at least a certain severity without the error. While this court has extensive experience in dealing with conduct unbecoming cases and, as such, are cognizant of the types of punishment and levels of sentence imposed for offenses similar to those alleged against Appellant, the remaining circumstances surrounding this case point towards a rehearing.

The dismissal of the Article 120 specification reduces the penalty landscape and exposure by 30 years, leaving a maximum possible confinement of five years. This factor alone would not automatically require a sentence rehearing. *See Winckelmann*, 73 M.J. at 13, 16 (holding that it was not an abuse of discretion to reassess the sentence where the maximum amount of confinement decreased from 115 years to 51 years). However, the reduction in confinement is far from insignificant.

More critical than the reduction in punishment exposure, however, is the fact Appellant no longer stands convicted of sexual assault. Trial counsel's sentencing argument highlighted the impact of the sexual assault on SrA HB who testified about the personal effect of the offense on her and her family.

Trial counsel discussed the conduct unbecoming convictions and their impact on the victims involved; however, the focal point of the argument to support asking members for a significant sentence was how the sexual assault effected SrA HB.

As both the penalty landscape and the available aggravation evidence is significantly reduced after the dismissal of the sexual assault charge, we believe the reassessment of the remaining sentencing evidence in this particular case is better suited for court members and, therefore, remand the case for a sentence rehearing.

Conclusion

The findings of guilt to Charge I and its sole Specification are **SET ASIDE** and **DISMISSED WITH PREJUDICE**. The remaining findings are correct in law and fact, and are **AFFIRMED**. Article 66(c), UCMJ. The sentence is **SET ASIDE**. The record of trial is returned to The Judge Advocate General for remand to the convening authority who may order a sentence rehearing on the affirmed charges and specifications. Article 66(e), UCMJ. Thereafter, Article 66(b), UCMJ, will apply.

FOR THE COURT
/s/ Kurt J. Brubaker
KURT J. BRUBAKER
Clerk of Court

APPENDIX D

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States, Appellee v. Paul D. Voorhees, Appellant	USCA Dkt. No. 18-0372/AF Crim.App. No. 38836 **ORDER**

On consideration of Appellant's petition for reconsideration of the Court's decision, *United States v. Voorhees*, 79 M.J. 5 (C.A.A.F. 2019), it is, by the Court, this 8th day of August, 2019,

ORDERED:

That the petition for reconsideration is hereby denied.

For the Court,
/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Zimmermann)
Appellate Government Counsel (Delmare)

APPENDIX E

GLOSSARY

AFCCA	-Air Force Court of Criminal Appeals.
CAAF	-U.S. Court of Appeals for the Armed Forces.
CA	-Convening Authority - the commander authorized to convene (create) a court-martial. In the USAF, for "General" courts-martial, this is usually a 2 or 3 star General.
GCM	-General Court-Martial. May try all crimes under the UCMJ, and impose any punishment authorized by law, including death.
MCM (date)	-*Manual for Courts-Martial* (year). Executive Order promulgated per 10 U.S.C. § 836(a).
Members	-Panel Members, roughly equivalent to jurors, but are of equal or higher rank than the accused.
Military Judge	-Military judge advocate assigned to a Service's judiciary (trial or appellate) billet as a judge.
Panel	-Composed of Members.
Trial Counsel	-Military prosecutor.
UCMJ	-*Uniform Code of Military Justice*, 10 U.S.C. § 801 *et seq*.