No. _____

IN THE

Supreme Court of the United States

ANDREW P. WITT,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The prosecutor repeatedly exhorted the panel members to consider how their sentence would reflect on them personally and professional and suggested that the members would be responsible for any future harm committed by Senior Airman Witt. Did this misconduct deprive Senior Airman Witt of due process protections and render the sentencing fundamentally unfair?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption on the cover page of this petition.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

The following is a list of all proceedings related to this case within the meaning of Rule 14.1(b)(iii):

- *United States v. Witt*, No. 22-0090 (C.A.A.F.), decided June 5, 2023.
- *United States v. Witt*, No. ACM 36785 (reh) (A.F. Ct. Crim. App.), decided November 19, 2021.
- *United States v. Witt*, No. 15-0260 (C.A.A.F.), decided July 19, 2016.
- *United States v. Witt*, No. ACM 36785 (recon) (A.F. Ct. Crim. App.), decided June 30, 2014.
- *United States v. Witt*, No. ACM 36785 (A.F. Ct. Crim. App.), decided August 9, 2013.

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INTRODUCTION

Senior Airman (SrA) Andrew P. Witt was convicted of premeditated murder and attempted premeditated murder. At the sentencing rehearing, the prosecutor repeatedly asked the panel members to consider how the sentence would reflect on them personally and professionally. These arguments coerced the panel members into rendering a more severe sentence based on concerns that they would be adversely judged by hypothetical future victims' families, the United States Air Force, and the public. The prosecutor essentially told the members that they would be accepting personal responsibility for any future victim if they sentenced SrA Witt to anything less than death. Defense counsel argued that the panel should give SrA Witt a "second chance at life" by sentencing him to confinement for life with the possibility of parole. In effect, the prosecutor pressured the members to impose a sentence based on fear, apprehension, and feelings of guilt rather than on the evidence presented.

The military judge gave no curative instruction. And though defense counsel presented evidence in mitigation and evidence of SrA Witt's rehabilitative potential, the panel—under significant pressure from the prosecutor—sentenced SrA Witt to confinement for life without the possibility of parole.

The Air Force Court of Criminal Appeals (AFCCA) correctly concluded that the prosecutor's arguments were improper, but the court concluded there was no prejudice. Without addressing whether the prosecutor's argument was improper, the Court of Appeals for the Armed Forces (CAAF) affirmed based on a lack of prejudice.

The weight of the mitigating evidence, combined with the pervasiveness of the prosecutor's inflammatory arguments and the complete absence of any curative measures, requires vacating the sentence.

PETITION FOR A WRIT OF CERTIORARI

SrA Andrew P. Witt, United States Air Force, respectfully petitions for a writ of certiorari to review the decision of the Court of Appeals for the Armed Forces.

OPINIONS BELOW

The June 5, 2023, opinion of the CAAF is reported at 83 M.J. 282 and reproduced at pages 1a-20a of the Appendix. The November 19, 2021, decision of the Air Force Court of Criminal Appeals (AFCCA) after a sentence rehearing is unreported. It is available at 2021 CCA LEXIS 625 and reproduced at pages 21a-155a of the Appendix. The July 19, 2016, opinion of the CAAF is reported at 75 M.J. 380 and reproduced at pages 156a-166a of the Appendix. The June 30, 2014, decision of the AFCCA upon reconsideration is reported at 73 M.J. 738 and reproduced at pages 167a-408a of the Appendix. The August 9, 2013, decision of the AFCCA is reported at 72 M.J. 727 and reproduced at pages 409a-516a of the Appendix.

JURISDICTION

The CAAF issued its decision on June 5, 2023. On August 29, 2023, the Chief Justice extended the time in which to file a petition for certiorari to November 2, 2023. This Court has jurisdiction under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. Background

SrA Witt confessed to killing SrA A.S. and his wife, J.S., and to stabbing then-SrA J.K. CAAF.JA 493-95.[1] SrA Witt was friends with the married couple, but they had a falling out after he tried to kiss J.S. CAAF.JA 487. After J.S. told SrA A.S. about the kiss, SrA A.S. and his friend SrA J.K. called SrA Witt multiple times. CAAF.JA 452-53, 464, 466, 487. SrA A.S. threatened to inform SrA Witt's leadership about the attempted kiss (CAAF.JA 482), as well as an affair that SrA Witt was purportedly having with an officer's wife. CAAF. JA 482.

After the phone calls, SrA Witt drove to SrA A.S.'s home where SrA A.S., SrA J.K. and J.S. were located. CAAF.JA 501, 503. A physical confrontation ensued. CAAF.JA 501. SrA Witt stabbed SrA J.K., SrA A.S., and J.S., killing SrA A.S. and J.S. CAAF.JA 492-96.

In recalling what happened, SrA Witt described how he "lost it" and was in a "dream-like" or "drunken-like" state. CAAF.JA 498-99, 506. He further maintained "it was all a blur." CAAF.JA 498.

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[1] "CAAF.JA" refers to the joint appendix filed with the CAAF.

B. Evidence in Extenuation and Mitigation

During SrA Witt's sentencing rehearing, the military judge instructed the panel to consider extenuating and mitigating factors. CAAF.JA 753-55. Among them were mental health issues—affecting both SrA Witt and his family—and a traumatic brain injury SrA Witt suffered just four months prior to the killings.

1. Family History of Mental Illness

The Defense introduced evidence that multiple relatives had not only experienced significant mental health problems, but many had been committed to psychiatric facilities. CAAF.JA 119, 122, 599. As summarized by the Defense's mitigation expert, who interviewed numerous relatives and reviewed thousands of documents:

> [T]here were five members of Airman Witt's family whose -- where mental health providers made notes that there were paranoid features or paranoia. Four of the relatives had hallucinations. Three had psychosis or psychotic episodes. And then five of them -- when I say "suicide or suicidal," there's one completed suicide, one family member that committed suicide, there's another person who attempted suicide. And then three other folks when they were in the psychiatric facility, there were suicidal ideation was noted.

CAAF.JA 599-600. Among those who suffered from mental health problems was SrA Witt's maternal grandfather, who was diagnosed as a paranoid schizophrenic and spent considerable time in psychiatric care. CAAF.JA 601-603; *see also* CAAF.JA 123-28, 129-219, 244-45. SrA Witt's mother also

possessed "borderline and paranoid traits," and was admitted to the hospital for depression when SrA Witt was about 14 years old. CAAF.JA 604, 606. Prior to this, she had been homeschooling SrA Witt for several years, which effectively meant that SrA Witt "was in the home 24 hours a day with a mentally ill patient." CAAF.JA 605-606; *see also* CAAF.JA 634-35. By this time, SrA Witt's parents had long been divorced, but he maintained contact with his father. CAAF.JA 608, 631. His father was similarly mentally disturbed (CAAF.JA 630), having been rejected for military service during the Vietnam War as a "mental case." CAAF.JA 607; *see also* CAAF.JA 629. He was later diagnosed as bipolar with anxiety disorder, among other issues. CAAF.JA 620, 630.

2. Family History of Substance Abuse

Substance abuse also featured prominently in SrA Witt's family, with the disease striking his maternal grandmother (drugs), paternal uncle (alcohol), half-brother (alcohol), and maternal cousin (drugs and alcohol). CAAF.JA 611-12, 614-616, 621-23, 625-27, 636-37. It was particularly acute in his father—a long-suffering alcoholic and drug addict who used crack cocaine during his son's visits and even smoked a crack pipe in front of him. CAAF.JA 608, 617-19, 632-33.

3. Motorcycle Accident and Head Injury

Around February 2004, SrA Witt crashed his motorcycle. CAAF.JA 237, 639. A witness who encountered SrA Witt immediately after the accident described him as talking funny and not making sense. CAAF.JA 238, 664-65. Another Airman who saw SrA Witt later that day reported that SrA Witt was acting strangely—talking slower than normal,

walking as if he was dizzy, and "seemed confused or disoriented." CAAF.JA 237.

Technical Sergeant (TSgt) M.M. dated SrA Witt. CAAF.JA 235. Their relationship started around October 2003, but she ended things shortly after his motorcycle accident. CAAF.JA 235. According to TSgt M.M., SrA Witt's "behavior and personality changed in significant ways." CAAF.JA 235. He had transformed from "sweet, kind, and affectionate" to "aggressive, hostile, and angry." CAAF.JA 235. He started drinking more heavily, flirted openly with other women, acted sexually aggressive, and often behaved strangely—such as getting too dressed up for certain occasions. CAAF.JA 235. TSgt M.M. also observed SrA Witt experiencing what she called "his 'weird zone,' where he seemed to be acting under some kind of influence." CAAF.JA 235. SrA Witt told her that "when he was in this state of mind he would see the color red or blood in his mind's eye." CAAF.JA 235. TSgt M.M. asserted that SrA Witt "was not the man he had been earlier in [their] relationship," and that "[t]here is no doubt in [her] mind that SrA Witt's behavior started to change after his motorcycle accident." CAAF.JA 235.

R.G. also spent time with SrA Witt before and after his motorcycle accident, and similarly reported a change in his demeanor. R.G. described SrA Witt as "a wonderful, genuine, friendly, nice person," devoid of malice or rudeness prior to the accident. CAAF.JA 641. Thereafter, however, "he was a different Andrew." CAAF.JA 641. R.G. had difficulty explaining it, but the change was "very obvious." CAAF.JA 643-44.

The Defense's forensic psychiatrist, Colonel (Col) S.M., reviewed SrA Witt's family medical history, transcripts from phone calls between SrA Witt and others, previous evaluations by government experts, SrA Witt's medical records, the extensive casefile from the original trial, and numerous declarations from SrA Witt's appeal. CAAF.JA 647-52. Col S.M. also met with SrA Witt. CAAF.JA 647. Based on this research, Col S.M. diagnosed SrA Witt with schizotypal disorder, moderate alcohol use disorder, and a mild neurocognitive disorder from his traumatic brain injury. CAAF.JA 650; *see also* CAAF.JA 220-34. Col S.M. opined that these disorders were interconnected with overlapping symptoms, and that some conditions could aggravate others. CAAF.JA 653-54. Due to these conditions, Col S.M. determined that SrA Witt experienced a brief psychotic episode on the night of the murders, characterized by an inability to rationally receive and respond to external realities. CAAF.JA 654-56. Consequently, Col S.M. concluded that "all three of those conditions contributed to Andrew's ability to rationally think and perceive and resist the impulse to murder [SrA A.S.] and [J.S.]." CAAF.JA 657-58.

4. Waiving Rights, Cooperating with Investigators, and Demonstrating Remorse

SrA Witt never personally blamed his mental health, family, or other issues for his actions. He took responsibility for his crimes. CAAF.JA 505-507, 586. He waived his rights to a lawyer and to remain silent, provided oral and written confessions to investigators, and helped them recover evidence. CAAF.JA 505, 508-10. He also cried after returning to SrA A.S.'s house (CAAF.JA 660), "sobbed uncontrollably" upon seeing

pictures of the crime scene (CAAF.JA 239), and repeatedly expressed remorse for what happened. CAAF.JA 241-43, 507, 584, 588, 590, 660. SrA Witt was precluded from pleading guilty because his court-martial was eligible for the death penalty, so he pleaded not guilty. *See* 10 U.S.C. § 845(b) (2000) ("A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged.").

C. Sentencing Argument

The prosecutor began his sentencing argument by challenging the panel:

> [W]hen you go back into the deliberation room and you're deciding on what your sentence will be, I want to ask yourselves [sic] what will you stand for. From E-6 to O-6, as an individual, what will you stand for as an individual, as an Airman? Where will you draw the line?

CAAF.JA 670-71. Throughout his argument, "[t]rial counsel described the members' obligations in notably personal terms, such as when he asked the members, 'From E-6 to O-6, where else in your career will you have the opportunity to draw the line as an individual, and as an Airman on what you will allow?'" CAAF.JA 699. The prosecutor further argued:

> Members, make no mistake about it; your sentence will send a message. It will send a message about what you as an individual, and what you as an Airman will accept. It will—it will tell everyone where you draw the line, and what you will stand for. It will.

CAAF.JA 751.

The prosecutor repeated this message more than seventy times, while displaying PowerPoint slides conveying the same. CAAF.JA 396, 398-99, 670-704.

"[T]rial counsel also essentially told the panel members that they would be accepting personal responsibility for any future victims of Appellant if they failed to sentence him in accordance with the Government's wishes." Pet.App. 16a. For example, the prosecutor asked the members: "What risk will you accept on another family's behalf?" CAAF.JA 702. "What risk will you accept on someone else's behalf?" CAAF.JA 699.

Defense objected twice during the prosecutor's argument. The first related to the prosecutor's comparison of SrA Witt's prison conditions to SrA J.K.'s life. CAAF.JA 703. The second objection was to SrA Witt's purported future dangerousness, in response to the prosecutor's query: "What risk will you accept on someone else's behalf?" *Id.* The military judge overruled both objections. CAAF.JA 703-04.

Defense counsel addressed the prosecutor's theme at the beginning of his own argument, stating how the members' job was "not to draw a line" or "say what [they] do or don't stand for," but "to make an individual moral decision based on the facts before them." CAAF.JA 705. Defense counsel then transitioned into the three sentencing options for SrA Witt, explaining how confinement for life with the possibility of parole could provide him a "second chance at life." CAAF.JA 706. Defense counsel next focused on various mitigating and extenuating circumstances, arguing they warranted preserving SrA Witt's life, but eventually returned to the available sentencing options and emphasized how life

with the possibility of parole was a "sentence . . . justified under the law." CAAF.JA 749. Defense counsel concluded by asking the panel for "[a] verdict that lets [SrA Witt] serve his time in jail, and offers him hope, and the possibility of redemption, and the possibility of change that have [sic] been missing for 14 years." CAAF.JA 750.

D. The AFCCA Decision

Applying a plain error standard of review, the AFCCA found error "in [the prosecutor] repeatedly asking the members what their sentence would say about them personally." Pet.App. 129a. The AFCCA concluded that the prosecutor erred by "specifically plac[ing] on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment." Pet.App. 130a. In addition, the court criticized the prosecutor for invoking the members' "sense of professional military standards and obligations." Pet.App. 131a. It opined that this tactic seemed designed to "have the members think less about determining an appropriate sentence based upon the evidence before them and more about making a public statement about how they would have their sense of personal and professional obligations be judged by others." Pet.App. 131a.

The AFCCA further found that "[t]rial counsel compounded his error by repeatedly asking the members how much risk they would personally accept by virtue of the sentence they adjudged." Pet.App. 130a. It reasoned that SrA Witt's risk for future misconduct was an "appropriate consideration" but "the suggestion that the members would be personally responsible for any such misconduct was not." Pet.App. 130a. The AFCCA then concluded that this

argument was improper as it "would lead observers to question whether an accused was sentenced based upon his or her actual offenses or upon the members' desire to be free from blame." Pet.App. 131a.

Despite these errors, the AFCCA held that there was no prejudice. Pet.App. 133a. It focused on the "brutal nature" of the offenses and the panel's unanimous decision to sentence SrA Witt to life without the possibility of parole, which it said demonstrated a "clear rejection" of the prosecutor's recommended death sentence. Pet.App. 132a.

E. The CAAF Decision

The majority did not address whether the prosecutor's arguments were improper and affirmed the lower court's decision. Pet.App. 6a. The CAAF found that "the weight of the evidence supporting the conviction [was] strong enough to establish a lack of prejudice in and of itself." Pet.App. 7a. The CAAF explained that unanimously sentencing SrA Witt to life without parole suggested that the members found "the aggravating circumstances were substantially outweighed by the extenuating and mitigating circumstances." Pet.App. 9a. The CAAF concluded, "[I]t stands to reason that [the members] applied their own critical analysis to this case given their rejection of the death sentence despite [the prosecutor's] comments." Pet.App. 9a.

Judge Hardy concurred with the conclusion that the prosecutor's sentencing argument did not materially prejudice SrA Witt's substantial rights. Pet.App. 9a. But he disagreed with how the CAAF reached its conclusion, explaining that the CAAF's "heavy reliance on the third *Fletcher* factor is problematic." Pet.App. 11a. Judge Hardy described

the CAAF's application of the third *Fletcher* factor to sentencing as the CAAF "asking whether the adjudged sentence was appropriate for the committed offense despite the improper argument," which is different from the question the CAAF claims to answer—"whether [the court] is confident that Appellant was sentenced based on the evidence alone." Pet.App. 12a.

In his dissent, Chief Judge Ohlson explained that the prosecutor "engaged in flagrant and egregious improper argument. The Chief Judge further concluded that there is no "meaningful distinction" between this case and CAAF precedent where the court "held that it was reversible error for trial counsel to 'pressure[] the [panel] members to consider how their fellow servicemembers would judge them and the sentence they adjudged instead of the evidence at hand.'" Pet.App. 19a.

REASONS FOR GRANTING THE PETITION

This Court has long emphasized that the federal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

The prosecutor owes an obligation to the Government to zealously advocate its position, but "he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused." *Handford v. United States*, 249 F.2d 295, 296 (5th Cir. 1957). A criminal prosecutor "may

prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger*, 295 U.S. at 88.

It impossible to have confidence in the outcome of this sentencing proceeding. The prosecutorial misconduct in this case was antithetical to the fair trial rights that prosecutors must uphold. The repeated and egregious improper arguments pressured panel members to consider things other than the evidence when sentencing SrA Witt. The members were bullied—bullied into thinking they would be held personally responsible by a future victim's family, bullied into thinking the public would judge them, and bullied into worrying about retaliation for the sentence they imposed on SrA Witt.

SrA Witt deserves to be sentenced by an impartial panel of those who have not been beaten into submission by a bullying prosecutor.

A. The Prosecutor's Improper Sentencing Arguments Amounted to Prosecutorial Misconduct.

A prosecutor's improper argument amounts to prosecutorial misconduct when the argument "overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Berger*, 295 U.S. at 84. The prosecutor here far exceeded these bounds when urged the members to consider how the sentence would reflect on them personally and professionally and suggested that the members would be personally responsible for any future harm caused by SrA Witt if they did not sentence him to death. It was improper to pressure the

members to consider something other than the evidence when sentencing SrA Witt.[2]

1. The prosecutor's repeated urging that the panel members consider how the sentence would reflect on them personally and professionally was improper.

The prosecutor fervently and repeatedly equated the members' sentencing responsibilities to their duties as servicemembers, arguing that their sentence would send a message regarding who they were as Airmen and what they would be willing to stand for in the Air Force. CAAF.JA 670-71, 673, 697, 699. The prosecutor drilled into the members that they had a moral responsibility as Airmen to impose a death sentence and that, if they failed to do so, there would be no line an accused could cross that would warrant capital punishment. This argument was plainly improper. It relied on a combination of fear, outrage, and the members' sense of duty rather than

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[2] *See, e.g., United States v. Young*, 470 U.S. 1, 18 (1985) (finding error in telling the jury to "do its job"); *United States v. Condon*, No. ACM 38765, 2017 CCA LEXIS 187, at *53 (A.F. Ct. Crim. App. Mar. 10, 2017), *aff'd*, 77 M.J. 244 (C.A.A.F. 2018) (finding it improper for a prosecutor to "suggest the panel base its decision on the impact of the verdict on society, a victim, and the criminal justice system as a whole, rather than the facts of the case"); *Brown v. State*, 680 S.E.2d 909, 912-15 (S.C. 2009) (finding error in asking the jury to "speak up" for the child victim); *State v. Campos*, 309 P.3d 1160, 1174 (Utah 2013) (quoting *State v. Dunn*, 850 P.2d 1201, 1224 (Utah 1993)) ("'[R]eference to the jury's societal obligation' is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society and the criminal justice system rather than the facts of the case."); *Cardona v. State*, 185 So. 3d 514, 522 (Fla. 2016) ("The argument that the case is about 'justice' for the victim or the victim's family has been uniformly condemned.").

consideration of the evidence and accepted sentencing philosophies.

A court-martial members panel is entrusted to represent the community at large in arriving at an appropriate sentence for an accused. Members should not be made to believe that they will fail to fulfill their duties as Airmen if they do not give a particular sentence. The prosecutor went far beyond the bounds of appropriate argument when he suggested that a sentence other than death would destroy Air Force culture and potentially encourage future violence by failing to draw a line for other would-be offenders. *Cf. Belford v. Collins*, 567 F.3d 225, 234 (6th Cir. 2009) (concluding that a prosecutor must not "fan the flames of the jurors' fears by predicting that if they do not convict . . . some . . . calamity will consume their community") (citation omitted).

Equally problematic was the prosecutor's refrain of "What will you stand for?" and "Where will you draw the line?", which he reiterated *more than seventy times* throughout his argument. CAAF.JA 670-704. Trial The prosecutor placed these repeated catchphrases in the context of the military community, and he directly tied this line of argument to Air Force culture. The prosecutor confirmed this connection when he argued, "From E-6 to O-6, where else in your career will you have the opportunity to draw the line as an individual, and as an Airman on what you will allow?" CAAF.JA 699. In the final paragraph of the prosecutor's argument, he again reiterated this theme, arguing "What will you stand for? Where will you draw the line? Your sentence will say it. It will tell these families, it will tell where you stand as an individual, it will tell where you stand as an Airman." CAAF.JA 704.

This constant exhortation pressured the members to base their sentencing decision on how others would view them, and how their sentence would tell the victims' families, the Air Force, and the public where they stand. This theme is patently similar to the prosecutor's improper argument in *United States v. Norwood*, coercing the members to impose the prosecutor's requested punishment out of concern for how they would be judged for the sentence they imposed. 81 M.J. 12, 19 (C.A.A.F. 2021) ("[W]hen you all return to your normal duties . . . . [A]nd someone asks you . . . . 'Wow, what did [Appellant] get for that?' Do you really want your answer to be 'nothing at all'?"). The CAAF found the argument in *Norwood* amounted to "an inflammatory hypothetical scenario with no basis in evidence" and was plain error as the prosecutor "threaten[ed] the court members with the specter of contempt or ostracism if they reject[ed] [trial counsel's] request." *Id.* at 21 (quoting *United States v. Wood*, 40 C.M.R. 3, 9 (C.M.A. 1969)).

The prosecutor's repeated argument that the members' sentence would be subject to the judgment of the victims' families, their fellow Air Force members, and the broader community merely served to inflame the emotions of the members. Similar to *Norwood*, the argument that the members' sentence would send a message about "where they stood" and "where they drew the line" threatened the court members with contempt or ostracism. This is especially true in the context of "highly visible" and "intensely scrutinized capital proceedings." CAAF.JA 067. These arguments were improper.

2. The prosecutor's suggestion that the panel members would be responsible for any future harm committed by SrA Witt was improper.

The prosecutor's arguments that the panel members would be responsible for any future harm committed by SrA Witt represent plain error. While it may have been appropriate for the members to consider SrA Witt's risk of future misconduct, it was improper for the prosecutor to tell the members that unless they returned a death sentence, they would be responsible for any possible future harm. This argument does not fit any proper sentencing philosophy such as specific or general deterrence. Instead, the prosecutor's suggestion amounted to an "inflammatory hypothetical scenario with no basis in evidence." *Id.* at 21.

"[A] prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury." *Darden v. Wainwright*, 477 U.S. 168, 192 (1986) (Blackmun, J., dissenting) (quoting ABA Standards for Criminal Justice 3-5.8(c) (2d ed. 1980)) (citing *Berger*, 295 U.S. at 88) (assessing whether prosecutorial misconduct deprived defendant of a fair trial).

In *Bates v. Bell*, prosecutors repeatedly told the jury that failure to sentence the appellant to death would make them accomplices to the appellant's future crimes. 402 F.3d 635, 642-44 (6th Cir. 2005). The Sixth Circuit found the prosecutors' arguments to be "highly improper," inciting the passions and prejudices of the jury. *Id.* at 641.

Here, rather than focusing on the actual offenses and any aggravating or mitigating factors, the

prosecutor infused his sentencing argument with the threat that the members would be personally responsible for SrA Witt's future wrongdoing. This implication is more damaging than the implication that the CAAF found improper in *Frey* given the nature of the offenses in SrA Witt's case—premeditated murder and attempted premeditated murder. It is unlikely the members sentenced SrA Witt based on the evidence given the prosecutor's repeated insinuation that the members would be blamed for SrA Witt's future misconduct. As the AFCCA properly concluded: "While Appellant's future risk of misconduct . . . was an appropriate consideration in fashioning [SrA Witt's] sentence, the suggestion that the members would be personally responsible for any such misconduct was not." Pet.App. 130a.

B. The Prosecutor's Misconduct Materially Prejudiced SrA Witt's Right to a Fair Sentencing Hearing Under the Due Process Clause of the Fifth Amendment.

The prosecutor's errors were varied and plentiful. Although the military judge had a "sua sponte duty" to ensure SrA Witt received a fair sentencing hearing, he allowed the prosecutor's improper argument and failed to provide any curative instructions. *United States v. Voorhees*, 79 M.J. 5, 14 (C.A.A.F. 2019) (quoting *United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018)). *See also United States v. Beasley*, 2 F.3d 1551 (11th Cir. 1993) (finding the impact of the prosecutor's improper comments on the jury "was neutralized to some extent by the district court's curative instructions"); *United States v. Severson*, 3 F3d 1005, 1013 (7th Cir. 1992) (citing *United States v. Radix Lab., Inc.*, 963 F.2d 1034, 1039 (7th Cir. 1992)

("Due process also requires a defendant receive a fair sentencing hearing."); *United States v. Curran*, 926 F.2d 59 (1st Cir. 1991) ("It is well settled . . . that a defendant has a due process right to be sentenced upon information which is not false or materially incorrect.") SrA Witt was denied due process.

The CAAF relied on *United States v. Fletcher*, 83 M.J. 282 (C.A.A.F. 2023), which identified three factors to determine the impact of prosecutorial misconduct: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. While these factors align with those relied on in civilian federal courts,[3] the CAAF's application is flawed.

The CAAF based the entirety of its decision on the weight of the evidence supporting conviction, finding the evidence "strong enough to establish a lack of prejudice in and of itself." Pet.App. 7a. But when discussing the strength of the evidence, particularly in a death penalty context, the court "must distinguish

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[3] *See, e.g., Lawson v. Dixon*, 3 F.3d 743, 755 (4th Cir. 1993) (citing *Darden v. Wainwright*, 477 U.S. 168, 182 (1986); *Donnelly v. De Christoforo*, 416 U.S. 637, 647 (1974)) ("In determining whether a prosecutor's comments denied the defendant fundamental fairness, the Supreme Court has emphasized the necessity of looking to the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated."); *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005) (considering four factors to determine if prosecutorial misconduct warrants relief—"(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant.").

between evidence of the defendant's guilt of the underlying criminal charge and evidence of any attendant aggravating and mitigating circumstances." *Bates*, 401 F.3d at 648. The conviction for the underlying offense "was a foregone conclusion in the sentencing hearing;" the focus must be on the appropriate punishment. *Id.* at 648. "Overwhelming evidence of guilt can oftentimes be sufficient to sustain a conviction despite some prosecutorial misconduct, but overwhelming evidence of guilt does not immunize the sentencing phase evaluation of aggravating and mitigating factors." *Id.* at 648-49. "Prosecutorial misconduct in the sentencing hearing can operate to preclude the jury's proper consideration of mitigation." *Bates*, 402 F.3d at 649. "When a prosecutor's actions are so egregious what they effectively 'foreclose the jury's consideration of . . . mitigating evidence,' the jury is unable to make a fair, individualized determination as required by the Eighth Amendment." *Bates*, 402 F.3d at 649 (citing *DePew v. Anderson*, 311 F3d 742, 748 (6th Cir. 2003) (quoting *Buchanan v. Angelone*, 522 U.S. 269, 277 (1998)).

The CAAF ignored the significant sentencing evidence presented by the Defense. The Defense's sentencing case included witnesses who discussed SrA Witt's rehabilitative potential. For example, a licensed clinical social worker with more than 30 years of experience with inmates at the Fort Leavenworth Disciplinary Barracks testified that SrA Witt had progressed well in various treatment programs while in confinement and had excellent rehabilitation potential. CAAF.JA 580, 583, 585. And while he did not equate this potential to a reintegration into society, he nevertheless discussed

how rehabilitative programs generally ensure someone "can be productive once they leave the institution." CAAF.JA 582. Other witnesses confirmed that participation in rehabilitative and educational programs assist with parole and clemency submissions (CAAF.JA 591, 596), and one of SrA Witt's instructors at Leavenworth testified that she did not view him as a threat. CAAF.JA 594.

There were a host of mitigating factors supporting SrA Witt's opportunity for parole. The military judge specifically instructed the members to consider the 26 mitigating circumstances, including evidence that SrA Witt had no prior criminal history or significant violent incidents prior to the charged offense, suffered from schizotypal personality disorder, suffered a traumatic brain injury four months prior to the charged misconduct, and committed the murders during a brief psychotic episode. CAAF.JA 753-55. Even absent these mitigating circumstances, there was no evidence adduced at trial indicating SrA Witt's crimes were truly representative of who he was as a person, or that he was so evil or irredeemable that he should be afforded no opportunity for parole. The weight of the evidence does not support the sentence of life without the possibility of parole.

The CAAF further failed to consider the significance of the prosecutor repeating his improper arguments throughout his entire sentencing argument. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974) (explaining that a prosecutor's "consistent and repeated misrepresentation" of evidence "may profoundly impress a jury and may have a significant impact on the jury's deliberations"); *Fletcher*, 62 M.J. at 184 (considering the "raw numbers—the instances of misconduct as compared to

the overall length of the argument"); *United States v. Modica*, 663 F.2d 1173, 1181 (2d Cir. 1981) (finding that while a prosecutor's occasional use of personal pronouns may be fair argument, "their constant use runs the risk that the jury may think the issue is whether the prosecutor is truthful, instead of whether his evidence is to be believed"). The prosecutor repeated his challenge of "where will you draw the line" and "what will you stand for" more than seventy times in his sentencing argument. CAAF.JA 670-704. And he reiterated his enquiry of "what risk will you accept" eight times. CAAF.JA at 673, 675, 676, 699, 702, 703. He also prominently displayed these messages in his PowerPoint slides. CAAF.JA 396, 398, 399.

Here, as in *Fletcher*, the prosecutor's improper comments were not isolated but permeated his entire sentencing argument. 62 M.J. at 184. Not only was the content of the prosecutor's improper arguments similar to the "inflammatory hypothetical scenario with no basis in evidence" in *Norwood*, the arguments here were far more pervasive than the singular argument that the CAAF found prejudicial, thus demonstrating substantial harm to SrA Witt. 81 M.J. at 21.

"Prompt and effective action by the [judge] may neutralize the damage by admonition to counsel or by appropriate curative actions to the [panel]." *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990) (emphasis added). But the military judge did nothing to cure the harm done by the prosecutor's improper arguments. Although defense counsel objected to the prosecutor's inflammatory argument about SrA Witt's purported "future risk," the military judge overruled the objection and took no action to cure the prejudice.

CAAF.JA 703-04. The military judge's ruling signaled to the members that the prosecutor's argument was appropriate for the members to consider.

As to the prosecutor's ubiquitous coercion in the form of arguing "what will you stand for" and "where will you draw the line," while there was no objection from defense counsel, the military judge had a "sua sponte duty to [e]nsure that an accused receives a fair trial." *Norwood*, 81 M.J. at 21 (quoting *Voorhees*, 79 M.J. at 14-15) (alterations in original). The military judge failed to fulfill that duty, and provided only the standard sentencing instructions regarding argument from counsel:

> During argument, trial counsel may recommend that you consider a specific sentence in this case. You are advised that the arguments of the trial counsel and his or her recommendations are only his or her individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

CAAF.JA 670. This standard instruction failed to "convey[] a sufficient sense of judicial disapproval of both content and circumstances needed to dispel the harm in the core of the prosecutor's statements." *Simtob*, 901 F.2d at 806 (finding the trial judge's generalized comments addressing arguments he found improper were insufficient to cure the harm).

The military judge failed to provide *any* curative instructions addressing the prosecutor's improper arguments. This failure, likely detrimental in a typical case, was catastrophic in SrA Witt's case, given that it occurred during a capitally-referred sentencing rehearing when SrA Witt's very life was on the line.

Additionally, after more than four hours of total argument from the prosecutor and defense counsel, the military judge did not repeat the standard sentencing instructions or provide any tailored guidance to the members to reiterate that their sentence should be based solely on the evidence and his instructions. The military judge's silence ensured the members would deliberate on their sentence, all the while considering: (1) what their sentence would say about them personally and professionally, (2) how others would view them for the sentence they imposed, and (3) their alleged responsibility for any potential future harm committed by SrA Witt. Therefore "there was a total lack of curative measures to redress this misconduct," and SrA Witt was prejudiced by the prosecutor's improper arguments. *Norwood*, 81 M.J. at 21.

SrA Witt's crimes resulted in tragic consequences. Defense counsel did not, and SrA Witt does not now, contend that his crimes did not warrant a significant sentence. But a life sentence with the possibility of parole *is a serious punishment*—a fact notably and readily acknowledged by each member of the panel. CAAF.JA 420, 422, 424, 426, 428, 430, 432, 434, 436, 438, 440, 442. Because the panel uniformly possessed such views, they certainly *should* have considered this option—an option that was consistently undermined by the prosecutor's improper argument.

The panel had a range of options for sentencing, and there were many variables that played into their sentencing decision, not least of which were the contrasting alleged aggravating and mitigating factors. While this may make it difficult to weigh the strengths of the competing sentencing arguments in this case, the severity of the prosecutor's misconduct

and lack of any measures to cure these pervasive errors tipped the scales to the detriment of SrA Witt. SrA Witt was denied his right to a fair sentencing proceeding. He was denied due process.

As Chief Judge Ohlsen explained in his dissent, "Even in a case such as this one where the offenses are so heinous and the outcome of the sentencing proceeding is seemingly so obvious, the fundamental fairness of the court-martial process matters. Deeply." To find no prejudice when the prosecutor employed "flagrant and noxious tactics . . . bodes ill for how trial counsel will think they can conduct themselves in future sentencing proceedings." Pet.App. 20a.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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