No. _____

IN THE

Supreme Court of the United States

MATTHEW P. LEIPART,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In opening statements for a litigated sexual assault case, defense counsel in a "spot of the moment" decision asked the military judge sitting as the factfinder to be "aware" of Technical Sergeant (TSgt) Matthew P. Leipart's earlier guilty plea. TSgt Leipart was not consulted on this decision. His prior admissions for other offenses against the same victim during the guilty plea effectively conceded guilt on the remaining litigated offenses by corroborating the victim, who was the sole source of evidence. In effect, TSgt Leipart was forced to testify against himself and concede guilt without his consent. Furthermore, the prosecutor invoked the substance of the plea during closing arguments to rehabilitate the victim's credibility. There was no objection by defense counsel and no intervention by the military judge. This case presents two constitutional questions:

I. Is it unconstitutional for defense counsel to effectively concede guilt without consulting their client, thereby overriding the accused's expressed objective to contest the charged offenses?

II. Was the prosecutor's "clear" constitutional error in closing argument—leveraging the accused's guilty plea to prove guilt of the litigated offenses—harmless beyond a reasonable doubt?

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. Leipart*, No. 23-0163 (C.A.A.F.) decided August 1, 2024.
- *United States v. Leipart*, Nos. ACM 39711, 2021-03 (A.F. Ct. Crim. App.), decided January 26, 2023.
- *In re KC*, Misc. Dkt. No. 2021-06 (A.F. Ct. Crim. App.) decided November 9, 2021.
- *United States v. Leipart*, Nos. ACM 39711, 2021-03 (order) (A.F. Ct. Crim. App), decided June 14, 2021.

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INTRODUCTION

Technical Sergeant (TSgt) Matthew P. Leipart was accused by his then-spouse, KC, of serious threats, vicious assaults, and violent sexual assaults. Faced with his defense counsel's advice to plead guilty to the threats and assaults, TSgt Leipart pleaded guilty to threating to assault and disfigure KC, choking her and hitting her on the back of the head, and holding a screwdriver to her throat in a way that could have killed her. He pled not guilty to the worst offenses: sexually assaulting KC.

Minutes after pleading guilty to threating and assaulting KC, defense counsel gave an opening statement for the remaining sexual assault offenses. During his statement, he referenced TSgt Leipart's guilty plea. At the end of his statement, the military judge, sitting as the factfinder, asked defense counsel whether defense counsel was asking for "consideration, or the factfinder being aware that there has been previous guilty pleas?" Defense counsel said he was not necessarily asking for him to consider it, but it was "appropriate" to bring it to the military judge's attention. The military judge announced he was "aware" of the plea in his role as the factfinder. Defense counsel did not discuss making the military judge aware of the guilty plea with TSgt Leipart or with the other two defense counsel present.

TSgt Leipart's guilty plea reappeared explicitly and substantively in closing argument when the prosecutor invoked it to prove KC was a credible witness. Throughout trial, defense counsel attacked KC's credibility. She was the sole evidence for the sexual assault specifications; the Government's case rested entirely on her. Understanding this, the

prosecutor invoked the plea to show KC was telling the truth about all the allegations—from the threats, to the assaults, to the sexual assaults. Defense counsel did not object. The military judge also did not interrupt to correct this error, although throughout trial—and minutes before—he had stopped counsel for other objectionable statements.

The military judge convicted TSgt Leipart for the two sexual assault offenses that did not have charging defects. The acquitted offenses failed not because of KC's credibility but because of an incorrect timeframe, a missing mens rea, and Government failure to elicit necessary elements from KC or any other witness.

The Air Force Court of Criminal Appeals (AFCCA) found defense counsel were not ineffective by making the military judge "aware" of the plea because being "aware" was different than "considering." However, all three judges agreed the prosecutor committed prosecutorial misconduct by invoking TSgt Leipart's guilty plea to prove the remaining offenses. One judge would have overturned the conviction, while the majority found the Government carried its burden of proving harmlessness beyond a reasonable doubt. The Court of Appeals for the Armed Forces (CAAF) affirmed, using almost identical reasoning.

Defense counsel, without consulting TSgt Leipart, invoked his guilty plea in a way that conceded guilt of the litigated offenses while also forcing him to testify against himself. The prosecutor capitalized on this, using TSgt Leipart's own words to bolster the only eyewitness to the offenses. Based on the weakness of the Government's case and indicators that the military judge did not know or follow the law, reversal is required.

PETITION FOR A WRIT OF CERTIORARI

TSgt Matthew P. Leipart, 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 August 1, 2024, opinion of the CAAF is pending publication in the military justice reporter. It is available at 2024 CAAF LEXIS 439 and reproduced at pages 1a-32a of the Appendix. The January 26, 2023, decision of the Air Force Court of Criminal Appeals (AFCCA) is unreported. It is available at 2023 CCA LEXIS 39 and reproduced at pages 33a-111a of the Appendix. The November 9, 2021, order of the AFCCA denying KC's petition for extraordinary relief is unreported. It is available at 2021 CCA LEXIS 593 and reproduced at pages 112a-117a of the Appendix. The June 14, 2021, order of the AFCCA directing a post-trial factfinding hearing is unreported. It is available at 2021 CCA LEXIS 595 and reproduced at pages 118a-125a of the Appendix.

JURISDICTION

The CAAF issued its decision on August 1, 2024. On September 23, 2024, the Chief Justice extended the time in which to file a petition for certiorari to December 29, 2024. This Court has jurisdiction under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment, in pertinent part, provides: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment, in pertinent part, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Article 59(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 859 (2018), provides: "A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."

STATEMENT OF THE CASE

A. Background

TSgt Leipart met KC, an Australian woman, in January 2016 through an online dating platform. CAAF.JA 150. KC, a former model with a bachelor's degree in psychology and a juris doctor degree, worked for an Australian criminal defense law firm and served on a professional legal panel specializing in defending sex crimes. CAAF.JA 177, 196, 558. Conversely, TSgt Leipart was five years older and had no college degree—along with three children from a previous marriage. CAAF.JA 184. He lived in Sedalia, Missouri, more than 10,000 miles away from KC's residence in Perth, Australia. CAAF.JA 149, 182.

Approximately three months after connecting with TSgt Leipart online, KC visited him in the United States. CAAF.JA 151-52. She stayed for a few weeks, during which she became pregnant. CAAF.JA 153. The two married in September 2016. CAAF.JA 189-90.

TSgt Leipart's and KC's whirlwind relationship did not last. She accused him of physical assaults and threats, and in later reports, sexual offenses; these

allegations were referred to trial by general court-martial. CAAF.JA 53-58.

B. Entry of Pleas

At trial, TSgt Leipart was represented by Mr. Daniel Conway, Mr. James Culp, and Captain (Capt) Charles R. Berry. CAAF.JA 59, 65-66. Mr. Conway served as lead counsel. CAAF.JA 607. Mr. Culp, at Mr. Conway's request, joined the defense team three weeks before trial. CAAF.JA 606. Capt Berry was the assigned military counsel; it was his first felony-level trial. CAAF.JA 675, 677.

Four days prior to trial, Mr. Culp told TSgt Leipart he "had to plead guilty." CAAF.JA 825. KC had recorded a number of the threats and assaults, which Mr. Culp told TSgt Leipart "he couldn't explain." *Id*. TSgt Leipart was very upset by his counsel's insistence the evidence suggested he was guilty, and he was "very heated" about the idea of pleading guilty. CAAF.JA 666-67. The strategy behind pleading guilty involved TSgt Leipart taking responsibility for what he was guilty of while denying responsibility for what he was not—the sexual assaults. CAAF.JA 645. Ultimately, TSgt Leipart followed his counsel's advice and entered mixed pleas. CAAF.JA 826; CAAF.JA 68-69.

TSgt Leipart pleaded guilty to communicating threats and physically assaulting KC; he pleaded not guilty to sexually assaulting her. CAAF.JA 68-69. Upon the entry of pleas, the military judge advised TSgt Leipart that by pleading guilty he was giving up the right against self-incrimination, the right to a trial of the facts, and the right to confront any witnesses called against him. CAAF.JA 72. The military judge emphasized, "But you are giving up these three rights

only with respect to those offenses to which you've pled guilty. You still have the rights with respect to the other offenses. Do you understand that?" CAAF.JA 71. TSgt Leipart responded affirmatively. *Id*.

TSgt Leipart agreed anything he told the military judge during his guilty plea could be used against him in sentencing. *Id*. He did not agree—at the entry of pleas or at any other time throughout his trial—that anything he said during his guilty plea could be used against him in the contested sexual assault case.

The military judge questioned TSgt Leipart about the two threat allegations and three physical assaults involving KC. For the first threat specification, TSgt Leipart admitted to threatening to injure KC at least 20 times, which included threats of choking her, killing her, and breaking her bones. CAAF.JA 83, 86-88, 90-92. As to the second threat specification, TSgt Leipart admitted he threatened KC over the phone by saying, "I'm going to disfigure you," so that "nobody would want you." CAAF.JA 98-99. The three physical assaults TSgt Leipart pled to included grabbing and choking KC with his hand and arm, hitting KC in the back of the head, and holding a screwdriver to KC's neck in a way that could have killed her due to its size and his level of rage. CAAF.JA 113-14 ,116, 119, 121, 126-127.

The military judge accepted the guilty plea. CAAF.JA 133. For the litigated offenses, TSgt Leipart elected to be tried by the same military judge. Pet.App. 34a.

C. In Opening, Defense Counsel Made the Judge "Aware" of the Guilty Plea

The litigated phase of the court-martial contested all of KC's sexual allegations. The parties began opening statements 90 minutes after TSgt Leipart pleaded guilty. CAAF.JA 132. During Mr. Conway's opening, he directly referenced TSgt Leipart's guilty plea when discussing KC's prior inconsistent statements to law enforcement. CAAF.JA 142-45.

This prompted the military judge to inquire what Mr. Conway's "position" was on "consideration, or the factfinder being aware that there has been previous guilty pleas." CAAF.JA 145. Mr. Conway responded that he knew defense could disclose to the factfinder the "existence of the plea." *Id*. He thought that was "appropriate" because there would be impeachment and prior inconsistent statements about "the content of the mixed plea." *Id*. Mr. Conway noted, "I wasn't necessarily asking you to, as the fact-finder, to necessarily consider that mixed plea. But, I was alerting you to the fact of what you're going to hear on the cross-examination" of KC. CAAF.JA 145-46.

The military judge sought further clarification, asking whether "we're operating in a world where I'm aware of the previous guilty plea?" CAAF.JA 146. Mr. Conway replied, "Of course, sir; yes." *Id*. Accordingly, the military judge announced he was "aware" of the plea in his role as the factfinder. *Id*. The military judge never clarified what "being aware" of the previous guilty plea meant.

The military judge also never engaged in a colloquy with TSgt Leipart to determine whether TSgt Leipart understood and personally approved of the decision Mr. Conway made on his behalf.

D. KC Was the Only Source of Evidence for the Sexual Assault Allegations

At trial, KC provided the Government's sole evidence regarding the five charged sexual offenses. She testified that the first sexual assault occurred during her visit to the United States in May 2016, well outside the charged time frame. CAAF.JA 152-54. TSgt Leipart was acquitted of this offense. CAAF.JA 396.

During a subsequent visit, KC testified that she endured a second violent sexual assault. CAAF.JA 159-61. TSgt Leipart was convicted of this offense. CAAF.JA 396.

During the same visit, KC testified that TSgt Leipart sexually assaulted her a third time. CAAF.JA 165. This offense required a specific intent element. *See* 10 U.S.C. § 920 (2012) (requiring heightened mens rea). None was alleged, proven, or argued, and TSgt Leipart was acquitted of this offense. CAAF.JA 396.

The fourth sexual assault was much like the second. CAAF.JA 168-70. TSgt Leipart was convicted of this offense. CAAF.JA 396.

The final sexual assault allegation was reduced to an attempt because KC testified that TSgt Leipart did not penetrate her. CAAF.JA 172, 329. Based on KC's testimony, no substantial step or overt act was shown or proven, and TSgt Leipart was acquitted of this offense. CAAF.JA 396.

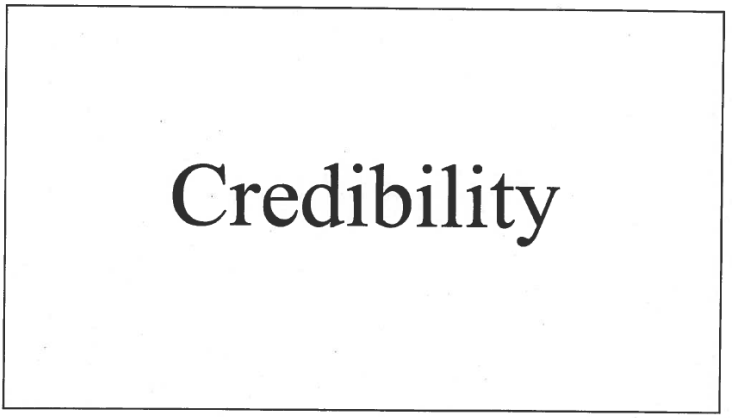
KC had numerous credibility concerns. There were child custody and divorce issues, she was inconsistent with her prior allegations, and she was the subject of professional misconduct as an attorney. CAAF.JA 171, 190, 198, 200, 257-59, 263-64, 267, 306, 410, 412.

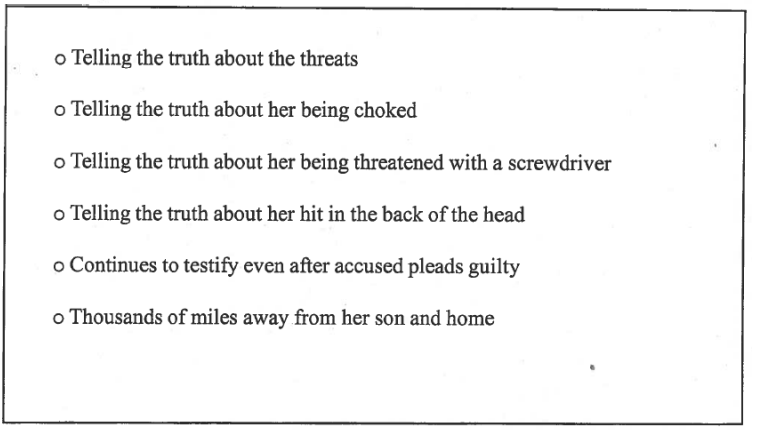
Throughout her cross-examination, KC quibbled and consistently blamed others for the circumstances she found herself in. CAAF.JA 179, 194-96, 198-99, 226, 238, 306, 410-11. Combined, KC refused to take personal responsibility for anything that tended to call her claims into question.

TSgt Leipart did not testify in the findings case.

E. The Prosecutor Used TSgt Leipart's Guilty Plea in Closing Argument

During closing argument, the prosecutor resurrected TSgt Leipart's statements during his guilty plea inquiry by tying his admissions to KC's credibility. CAAF.JA 355. The prosecutor utilized PowerPoint slides, ensuring that the military judge saw the following:





CAAF.JA 402. Only the last of these facts came from substantive evidence offered during the litigated findings proceeding; the other five came from TSgt Leipart's plea inquiry.

The prosecutor then argued that "defense counsel asked you to operate in this world where you know that he pled guilty to a number of offenses. . . . I want to talk about how that goes towards the victim's credibility." CAAF.JA 355. The prosecutor told the military judge that, as the factfinder, he could use the guilty plea admissions in assessing KC's credibility for "[w]hether or not she's telling the truth for the [sexual assault] offenses." *Id*. The prosecutor went line by line through his slide, arguing:

> [Y]ou know that she's telling the truth when she says the accused threatened her. You know that, Your Honor. Undeniable.
>
> You know that she's telling the truth about her being choked by the accused. Undeniable.

> You know that she's telling the truth about her being threatened with a screwdriver. That is undeniable.
>
> You know she's telling the truth about being hit in the back of the head by the accused. You can't deny it.
>
> You know that even after she sat right where she's sitting right now, and heard the accused plead guilty, she still continued to testify -- but she could have left. . . . I ask you to consider all of that.

CAAF.JA 355.

The prosecutor again brought up the guilty plea later in his argument to combat the defense theory that KC was a liar, highlighting KC would have to be a "partial liar," since she "lied about some things, but not lied about others." CAAF.JA 357. He concluded his argument by telling the military judge he can "know for a fact she's telling the truth about X, Y, and Z," which "increases her credibility automatically." CAAF.JA 364. By doing that, the military judge could find TSgt Leipart guilty. *Id.*

The prosecutor returned to this theme in his rebuttal argument, arguing KC was telling the truth about "everything except for the one thing, the most important thing and the worst thing for . . . the accused. And she's credible." CAAF.JA 392.

No defense counsel objected to the Government's slides or argument. CAAF.JA 341-64. The military judge did not interrupt the prosecutor to ask questions about the relevant slides or the accompanying argument, but he did interrupt the prosecutor during other portions of his argument. CAAF.JA 344-48, 351-

52. He did not ask defense counsel if the prosecutor's evidentiary interpretation aligned with what defense intended to allow through opening statement. The military judge also did not engage in a discussion with TSgt Leipart to determine if he understood the way in which his guilty plea was being considered for findings.

The military judge convicted TSgt Leipart of every offense involving KC that was not legally deficient. CAAF.JA 396.

F. The Post-Trial Fact-Finding Hearing

While his case was pending a decision before the AFCCA, TSgt Leipart petitioned for a new trial based on a subsequent investigation that KC perjured herself at trial. CAAF.JA 418-561. Based on the allegations in the petition and various ineffective assistance claims levied on appeal, the AFCCA ordered a post-trial fact-finding hearing. CAAF.JA 589-90; Pet.App. 118a-125a.

At the fact-finding hearing, TSgt Leipart's three defense counsel testified. They independently acknowledged that, aside from a desire to garner goodwill with the judge for taking responsibility, they lacked any coherent strategy when Mr. Conway brought up the guilty plea in his opening statement.

Mr. Conway's testified that it was his "spot of the moment" decision to bring up the guilty plea in opening. CAAF.JA 747. He testified that he made the decision without discussing it with his defense team or TSgt Leipart. *Id*. He justified his decision as "trying to maintain goodwill" with the judge. CAAF.JA 742-44.

Capt Berry, the junior member of the defense team, testified that Mr. Conway's "spot of the moment decision" was "the most bizarre thing of all of this. I don't understand why he said that." CAAF.JA 699. He recalled turning to Mr. Culp and saying he was confused because "I thought that the strategy is that if he pleads guilty we don't want him to consider it, right?" *Id.* Capt Berry recognized, "[T]he issue with the guilty plea is that if he's using that – if the judge is using that for findings, then she's – KC is immediately corroborated, because she's made all these allegations. Now she's being corroborated by the guilty plea." *Id.*

G. The AFCCA Decision

For TSgt Leipart's ineffective assistance of counsel claim, the AFCCA distinguished between "awareness" and "consideration," suggesting the former was acceptable while the latter was not. Pet.App. 61a-62a. Though defense counsel's post-trial explanations were "weak," the AFCCA declined to decide whether defense counsel's performance was constitutionally deficient. Pet.App. 65a. Instead, the AFCCA concluded that TSgt Leipart failed to demonstrate prejudice in the absence of evidence the military judge misused the guilty plea. *Id.*

The AFCCA divided two-to-one on TSgt Leipart's related prosecutorial misconduct claim, but only with regard to prejudice. Pet.App. 92a, 107a. The majority agreed with TSgt Leipart that the prosecutor committed a "clear error when he used [TSgt Leipart's] guilty pleas and providence inquiry to bolster his argument that [TSgt Leipart] was guilty of the contested sexual offenses." Pet.App. 92a. Whatever "agreement" the defense made with the

military judge to be "aware" of the plea was not an invitation to "use [TSgt Leipart's] guilty pleas and his sworn statements during the providence inquiry as evidence of his guilt." *Id*. This would have "in effect, compelled [TSgt Leipart] to incriminate himself in the trial in a manner contrary to the military judge's explanations to [TSgt Leipart] and to the protections of the Fifth Amendment, and for which purpose [TSgt Leipart] never explicitly agreed." *Id*.

Although the majority found this constitutional error harmless beyond a reasonable doubt, one judge could not. Pet.App. 107a-110a. The dissenting judge would have set aside the sexual assault convictions and the sentence because he was "unable to conclude that there was no reasonable possibility that the error contributed to [TSgt Leipart's] conviction." Pet.App. 107a.

H. The CAAF Decision

For the ineffective assistance of counsel issue, the majority adopted the AFCCA's analysis. Pet.App. 13a-15a. The CAAF noted the record did not show the military judge would "use" or "consider" the plea to prove any element of the offense. Pet.App. 14a-15a. Therefore, defense counsel were not ineffective. Pet.App. 15a.

For the prosecutorial misconduct issue, the CAAF found clear error of a constitutional magnitude. Pet.App. 17a. Specifically, by using TSgt Leipart's guilty plea, the Government compelled him to testify against himself. *Id*. But the CAAF found the error harmless beyond a reasonable doubt. Pet.App. 18a. There was no reasonable possibility the error might have contributed to the conviction because the military judge was presumed to know and follow the

law. Pet.App. 18a. Trial counsel's arguments were "clearly prohibited." *Id.* But, according to the CAAF, nothing in the record suggested the military judge was unaware of that or adopted trial counsel's view of the law. *Id.*

In his concurrence, Chief Judge Ohlson agreed there was no ineffective assistance of counsel for similar reasons: being "aware" was not the same as "considering" the guilty plea. Pet.App. 22a. Chief Judge Ohlson explained that TSgt Leipart's constitutional right to silence was not implicated. This was because defense counsel did ask the factfinder to consider the specific statements made in the guilty plea. Pet.App. 25a. Therefore, making the judge "aware" of the guilty plea was within defense counsel's purview, not a choice solely for TSgt Leipart. Pet.App. 25a-26a. For this proposition, Chief Judge Ohlson cited *McCoy v. Louisiana*, 584 U.S. 414, 422 (2018). Pet.App. 26a. For the prosecutorial misconduct issue, Chief Judge Ohlson viewed the issue as a "close call." Pet.App. 29a. He acknowledged the evidence in the case was "not particularly compelling," but resolved the issue, like the majority, on the military judge knowing and following the law. Pet.App. 30a-31a. That the military judge returned mixed findings was part of his justification. Pet.App. 31a-32a.

REASONS FOR GRANTING THE PETITION

TSgt Leipart's trial was a compounding of constitutional errors. TSgt Leipart's counsel conceded or corroborated TSgt Leipart's guilt by making the factfinder "aware" of the guilty plea, while the prosecutor clearly erred by using the substance of TSgt Leipart's guilty plea to prove his guilt for the contested offenses.

This Court's review would resolve an important question left open by *McCoy* that clarifies the line between infringing on the right to autonomy and ineffective assistance of counsel. *McCoy* appears to prevent defense counsel from infringing on a client's right to autonomy by conceding guilt without client consultation. But courts are split on this issue. Additionally, the prosecutorial misconduct here was clear constitutional error. Review would correct the CAAF's erroneous interpretation and application of the harmless beyond a reasonable doubt standard under *Chapman v. California*, 386 U.S. 18 (1967), which the CAAF gutted in two ways. First, by narrowing the analysis to simply whether the military judge was silent in the face of clear error. And second, by shifting the burden to TSgt Leipart under such circumstances.

I. *McCoy* Dictates That Defense Counsel Either Violated TSgt Leipart's Right to Autonomy or Committed Ineffective Assistance of Counsel.

This case provides an avenue to resolve a circuit split and clarify what is required to trigger structural error under *McCoy*, specifically if the right to autonomy requires client consultation before defense counsel concede guilt. *McCoy* left open this question and courts are split on its application. If the right to autonomy is not triggered under *McCoy*, then defense counsel's decision to force TSgt Leipart to testify against himself without any reasonable strategy constitutes ineffective assistance of counsel. Review would clarify for the nation where the line between these constitutional requirements on defense counsel falls.

A. The courts of appeals are split over whether the right to autonomy applies when defense counsel never informs his client of his plan to concede guilt.

The CAAF has interpreted *McCoy* to mean before a defense counsel can concede guilt, a client must be consulted. The Fourth Circuit concurs. *United States v. Hashimi*, 110 F.4th 621, 628 (4th Cir. 2024). Other courts, like the Third Circuit, disagree: consultation prior to a concession of guilt is not required. *United States v. Wilson*, 960 F.3d 136, 144 (3d Cir. 2020). TSgt Leipart's counsel deprived him of his right to autonomy by conceding his guilt through using his own words without first consulting TSgt Leipart. This is a *McCoy*-level structural error demanding review.

1. The CAAF and the Fourth Circuit agree that consultation must occur before conceding guilt.

As this Court said, "It is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *McCoy*, 584 U.S. at 417-18. As with the right to plead guilty or testify on one's own behalf, the autonomy to decide the objectives of a defense and assert innocence belongs only to the client. *Id*. at 422. A client "may wish to avoid, above all else, the opprobrium that comes with admitting" a particular act or offense. *Id*. at 423. Death, or life in prison, may be worth the risk. *Id*. Such decisions are not "about how best to achieve a client's objectives; they are choices about what the client's objectives in fact *are*." *Id*. at 422.

McCoy is clear: a client is entitled to a new trial when, over the client's objection, defense counsel admits he is legally guilty of a charged offense. What is left unanswered is what happens when an attorney never discusses the decision to concede. The CAAF's analysis on this open question aligns with the Fourth Circuit but conflicts with the Third.

The CAAF had an opportunity to analyze *McCoy* in *United States v. Hasan*, 84 M.J. 181 (C.A.A.F. 2024). There, writing for a unanimous court, the Chief Judge summarized *McCoy*'s holdings. First, "a defendant has the right to insist that counsel refrain from admitting guilt." *Hasan*, 84 M.J. at 198 (quoting *McCoy*, 584 U.S. at 417). Second, this right is the client's, not counsel's—like the right to testify on one's own behalf. *Id*. (citing *McCoy*, 584 U.S. at 42). Finally, the CAAF noted the "holding of *McCoy* is that 'it is unconstitutional to allow defense counsel to *concede guilt* over the defendant's intransigent and unambiguous objection.'" *Id*. at 213 (quoting *McCoy,* 584 U.S. at 420). But the "broader holding" of a client's right to insist upon innocence remains. *Id.* at 200.

Here, writing for himself and another judge, the Chief Judge further explained *McCoy*. Where a choice held by the client is implicated, "acquiescence" is required. Pet. App. 26a. Citing *McCoy*, the requirement for "acquiescence" is that conceding guilt or testifying are choices "an accused must personally make." *Id*. Combining *Hasan* with *Leipart* demonstrates that the CAAF's application of *McCoy* is predicated on client acquiescence. Acquiescence requires consultation. Therefore, failure to consult before infringing on a right solely held by the client is a *McCoy*-level error. *See also Seabrook v. United States,* No. 22-841, 2023 U.S. App. LEXIS 30072, at

*3-4 (2d Cir. Nov. 13, 2023) (noting judge recusal is not one of the fundamental decisions about a client's own defense implicated by *McCoy* and thus there was no requirement to consult). Despite finding this requirement from *McCoy*, neither the majority nor the concurrence found a *McCoy*-level error because the substance of TSgt Leipart's plea was not invoked when the judge was made "aware" of the guilty plea. Pet.App. 14a-15a, 25a-26a. While this conclusion was erroneous, the analysis of *McCoy* was not. Consultation is required.

The Fourth Circuit agrees—failure to consult before conceding guilt is a *McCoy*-level error. In *United States v. Hashimi*, post-trial evidence revealed Hashimi's defense counsel did not consult with him about the case, and, specifically, about conceding guilt. 110 F.4th 621, 625-26 (4th Cir. 2024). In reviewing the lower court's denial of a 28 U.S.C. § 2255 motion, the Fourth Circuit held "*McCoy* is not satisfied if a defendant fails to object because he was never given the *opportunity* to object. Were it otherwise, this loophole would swallow the *McCoy* rule, transferring the concession decision from client to lawyer so long as the lawyer never asks the client's permission." *Id.* at 630. The Fourth Circuit came to this conclusion because "*McCoy* contemplates a consultation between defense counsel and client, in which defense counsel may try to persuade a client that conceding guilt is or has become the best course. *Id.* at 628 (citing *McCoy*, 584 U.S. at 423-24).

The CAAF and the Fourth Circuit are correct that *McCoy* requires consultation for at least two reasons. First, a client cannot object "vociferously," as in *McCoy*, when he is not informed of a plan to concede. *McCoy* placed the right to autonomy on par with the

decision to plead guilty, waive the right to a jury trial, testify in one's own defense, and forgo an appeal. *McCoy,* 584 U.S. at 422. Each of these decisions, to survive scrutiny, must be knowing, voluntary, and intelligent. *See, e.g., Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (holding a guilty plea must be intelligent and voluntary); *Patton v. United States*, 281 U.S. 276, 312-13 (1930) (holding waiver of a jury trial must include the express and intelligent consent of the defendant); *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (analyzing how waiving the right to testify is constitutional in nature, such that there can be no waiver unless it is known and intentional) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). For each of these rights, some form of consultation between client and counsel is required. *McCoy* and *Florida v. Nixon*, 543 U.S. 175 (2004), support the consultation requirement. In the first sentence of *McCoy*, this Court summarized *Nixon* as a case where, "[the] defendant, *informed by counsel,* neither consents nor objects" to counsel's strategy to concede guilt. *McCoy*, 584 U.S. at 417 (quoting *Nixon*, 543 U.S. at 178) (emphasis added).

In a case like TSgt Leipart's, this flaw is apparent because the decision was a "spot-of-the-moment" concession that generated confusion from the moment it occurred. CAAF.JA 145-46. It became clear during closing that by invoking the guilty plea, defense counsel conceded TSgt Leipart's guilt with TSgt Leipart's own words. CAAF.JA. 355. TSgt Leipart's guilty plea testimony corroborated KC's allegations and bolstered her credibility in a contested trial that relied solely on KC's testimony. TSgt Leipart's other counsel did not know what was happening, and the prosecutor jumped on the concession in closing. TSgt

Leipart was never afforded the opportunity to participate in the decision to offer his guilty plea as evidence against himself. And he did not provide voluntary, intelligent, and knowing consent through his silence. *Zerbst*, 304 U.S. at 464-65 (declining to presume waiver from a silent record).

Second, the fundamental underpinning of *McCoy* is the client's choice to accept opprobrium. When counsel concede guilt or any element of a crime without a client's awareness, that contravenes *McCoy*'s logic. A client may want to avoid the stigma of admitting he committed a crime or any part of the charged offense. *See*, *e.g.*, CAAF.JA 392 (showing the prosecutor characterizing KC telling the truth about the sexual offenses as the "most important thing and the worst thing" for TSgt Leipart). It is the client's right alone, not the defense counsel's. And, as the Fourth Circuit notes, it is unrealistic, unnecessary, and inconsistent with *McCoy* to require a defendant to jump up in the middle of trial to exclaim he objects to his own counsel. *Hashimi*, 110 F.4th at 628. This is particularly relevant in a military context where clients are often the most junior ranking person in the room, as was the case for TSgt Leipart. CAAF.JA 65.

2. The Third Circuit, and other appellate courts, erroneously do not require consultation before defense counsel elect to concede guilt.

The CAAF's and the Fourth Circuit's reasoning stand starkly apart from other courts' analyses, including the Third Circuit's. In *United States v. Wilson*, defense counsel failed to consult with their clients about conceding the jurisdictional element of an offense. *United States v. Wilson*, 960 F.3d 136, 143–

44 (3d Cir. 2020), cert. denied 141 S. Ct. 1091 (2021). Where neither appellant "expressly asserted" and "counsel ignored" a "specific demand to fight the jurisdictional element," there was no *McCoy* error. *Id.* at 144.

Other courts have similarly found that failure to consult does not give rise to a *McCoy* violation. In *Harris v. State*, an "on the fly" decision did not violate *McCoy* because "nothing in the [*McCoy*] Court's holding requires counsel to obtain the express consent of a defendant prior to conceding guilt." 358 Ga. App. 802, 810 (Ga. Ct. App. 2021). Affirmative consent was not required. *Id.* In *Harvey v. State*, the Supreme Court of Florida reaffirmed that *McCoy* is only triggered if a defendant expressly asserts a decision to maintain innocence. 318 So. 3d 1238, 1239-40 (Fla. 2021) (failing to consult implicates right to effective assistance of counsel under *Nixon* and *Strickland v. Washington*, 466 U.S. 668 (1984), not right to autonomy under *McCoy*), cert. denied, 142 S. Ct. 1110 (2022). *See also*, *e.g.*, *Atwater v. State*, 300 So.3d 589, 591 (Fla. 2020) (finding a failure to discuss conceding guilt was covered by *Nixon* because there was no outright objection); *Pennebaker v. Rewerts*, No. 17-12196, 2020 U.S. Dist. LEXIS 131919 (E.D. Mich. July 27, 2020) (failing to consult before conceding guilt not a *McCoy* issue where there was no opposition until appeal); *People v. Santana*, No. B286320, 2019 WL 342594 (Cal. Ct. App. July 30, 2019) (finding concession of guilt more like *Nixon* than *McCoy* because the record was silent as to the defendant's objectives). But the logic behind these decisions is flawed.

These decisions that (1) disregard consulting with the client beforehand or (2) require disruptive conduct

from an accused as his counsel concedes his guilt (or both) defy the mandate of *McCoy*. It is simple: "when a client expressly asserts that the objective of '*his* defence' is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." 584 U.S. at 423. Where a client has expressed his objective to contest his guilt *at any time*, his counsel cannot circumvent this objective by refusing to consult about strategy before trial, as was done in TSgt Leipart's case.

Contrary to the Chief Judge's concurrence below, *McCoy* is at issue. This kind of structural error where there is clear circuit split requires clarification, especially when other courts are limiting this issue to an ineffective assistance of counsel claim under *Nixon*. *E.g., Wilson*, 960 F.3d at 143–44; *Atwater*, 300 So.3d at 591.

B. If *McCoy* is inapplicable, then TSgt Leipart's defense counsel committed ineffective assistance of counsel.

At a minimum, TSgt Leipart's defense counsel were ineffective—a different constitutional error. Defense counsel's decision so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. This is because by invoking the guilty plea, defense counsel negated its benefit and handed the prosecutor TSgt Leipart's confession—the sole corroborating evidence—to secure a conviction.

1. Defense counsel performed deficiently by making the factfinder "aware" of TSgt Leipart's guilty plea, which corroborated the otherwise unsubstantiated offenses.

To establish ineffective assistance of counsel, TSgt Leipart must show defense counsel's performance was deficient and the deficiency caused prejudice. *Strickland*, 466 U.S. at 698. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686. In deciding an ineffectiveness claim, a court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id*. at 690.

TSgt Leipart made damaging admissions under oath that he threatened to injure and disfigure KC on multiple occasions, that he choked her by the neck and smacked her in the head, and that he held a screwdriver to her neck. Defense counsel spontaneously decided to allow the factfinder to consider this when deliberating on findings for otherwise uncorroborated sexual assault allegations involving the same victim. This decision was constitutionally deficient for at least two reasons.

First, whether to invoke TSgt Leipart's right to remain silent as to the contested offenses was TSgt Leipart's decision, not defense counsel's. *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987). Without his consent, TSgt Leipart was compelled to testify against himself. Because he could not make that decision

without client consent this decision was not reasonable, tactical, or strategic—it was deficient.

Second, considering the reasons offered by defense counsel, the decision fell below what is expected of fallible counsel. The post-hoc justifications provided by counsel included (1) a desire to earn goodwill with the judge, and (2) TSgt Leipart's guilty plea showed he took responsibility for what he did and suggested he was not guilty of the other offenses. CAAF.JA 645-47, 742-43. These explanations, which the AFCCA called "weak" (Pet.App. 65a), were unreasonable because of how damaging the guilty plea was to TSgt Leipart. His own statements corroborated KC: she was telling the truth about violent assaults, so there was no reason for her not to be telling the truth about similarly violent sexual assaults. This "spot of the moment" decision was constitutionally deficient.

On semantics, the CAAF concluded "awareness" was not "consider." Pet.App. 13a-15a. Therefore, there was no concern defense counsel invoked the substance of the guilty plea or asked the military judge to use the guilty plea. *Id.* But the CAAF, predominantly adopting the lower court's rationale, oversimplified this dynamic. In a case like this, "awareness" was equivalent to "consider."

"Aware" means "having or showing realization, perception or knowledge." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 86 (11th ed. 2020). Awareness of something "implies vigilance in observing or alertness in drawing inferences from what one experiences." *Id.* "Consider" is to "think about carefully." *Id.* at 265. It includes "to take something into account," and "may suggest giving

thought to arrive at a judgment or decision." *Id*. at 265-66.

Being aware of the guilty plea versus considering the guilty plea is synonymous here. The military judge had knowledge of the guilty plea and could draw whatever inferences he wanted since that awareness was without limit. He could take it into account, in other words, he could *consider it.* In fact, when the military judge spontaneously asked about the reference to the guilty plea, he asked what counsel's position was on his "consideration" of the plea. CAAF.JA 146. "Aware" meant "consider."

The effect of being aware of the plea is enormous because TSgt Leipart's words instantly corroborated KC. The military judge knew KC was telling the truth for the threats and the physical assaults since TSgt Leipart admitted that conduct. KC also testified to many of the things TSgt Leipart pleaded guilty to. *E.g.*, CAAF.JA 296-97. In a vacuum, this testimony does nothing for her credibility. But with TSgt Leipart's guilty plea, it demonstrated KC was telling the truth. As the prosecutor noted, KC would have to be a "partial liar" to fabricate a story about TSgt Leipart threatening her with a screwdriver to her neck but not about two similarly violent and controlling sexual assaults. CAAF.JA 357.

The mixed findings from the judge are irrelevant to this analysis. Each offense TSgt Leipart was found not guilty of that related to KC was legally flawed: KC testified to an uncharged timeframe; the Government failed to allege or prove a required mens rea; and the attempted sexual assault simply did not amount to a legal attempt. None of these situations mean KC was lying about the conduct she alleged and testified

occurred. Rather, the Government failed KC with its charging scheme on those offenses.

Under these circumstances, there was no reasonable purpose to bring the guilty plea into the findings case. By invoking the guilty plea, conduct that was once off the table for consideration was back. *See* CAAF.JA 699 (Capt Berry stating he "thought that the strategy is that if he pleads guilty we don't want them to consider it, right?"). Defense counsel's deficient decision undid the benefit of the mixed plea, making it worse than if TSgt Leipart had pleaded not guilty to everything. Had TSgt Leipart pleaded not guilty across the board, the prosecutor would never have felt empowered to argue, with prepared slides, that KC was credible because TSgt Leipart's own admissions under oath proved as much. So even if defense counsel could make this decision for TSgt Leipart without consultation, it was unreasonable for him to do so.

2. Without defense counsel's invocation of the plea, there is a reasonable probability TSgt Leipart would have been acquitted of all litigated offenses.

But for defense counsel's decision, there is a reasonable probability of a different result. *Strickland*, 466 U.S. at 694. The prejudice here can be understood in at least three dimensions.

The first is the weakness of the Government's findings case on the litigated specifications, which centered around otherwise uncorroborated allegations of sexual assault and a complaining witness with compromised credibility. Defense counsel's deficient performance handed the prosecution the chance to repair KC's credibility and thus tipped the balance

against TSgt Leipart. It was a focal point of the prosecutor's argument (CAAF.JA 355, 357, 364) and rebuttal argument (CAAF.JA 392). Evaluating the underlying substance of the guilty plea is the only thing that could have gotten the military judge to convict on two specifications of sexual assault. Without defense counsel's error, there is at least a reasonable probability that the military judge would have harbored sufficient doubts about the credibility of KC's otherwise uncorroborated sexual assault allegations to fully acquit TSgt Leipart as to the contested offenses.

Second, while judges are presumed to know and apply the law in making their decisions, *see Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997), clear evidence to the contrary can overcome that presumption. *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). The military judge should not enjoy the presumption because there are clear indicators he did not know and follow the law.

When defense counsel invoked the plea in opening, the judge erroneously agreed he was "aware" of the guilty plea as factfinder. But, the military judge did so without ensuring that it was TSgt Leipart's knowing and informed choice. Then, the military judge permitted the prosecution to discuss—at length—the substance of TSgt Leipart's guilty plea during closing argument. This suggests that the military judge believed he could use the substance of that plea for findings.

This was not a judge who was silent in the face of other errors. He interrupted the prosecutor in closing on the charged timeline. CAAF.JA 344-48. He interrupted the prosecutor right before the credibility

slide was presented to correct the description of the attempt charge. CAAF.JA 351-52, 401. He chastised defense counsel for throwing around the word "rape" when all the offenses were "sexual assault." CAAF.JA 281. He announced that if the prosecutor was doing this, "I would stop them." *Id*. On his own accord, he reconsidered some prior bad act evidence when KC testified. CAAF.JA 325-26. Contrast this repeated intervention with his silence when the prosecutor began using the guilty plea. This shows that, at least for this one limited area, the military judge did not know or follow the law.

Finally, the most glaring prejudice from defense counsel's decision was the prosecutor's "clear error" to leverage the plea to revive KC's diminished credibility in a case with uncorroborated allegations of sexual assault. Without the "awareness" of the plea, the prosecutor would not have been able to recover KC's credibility. Absent defense counsel's decision, based on the strength of this case, there is a reasonable probability of a different result. Defense counsel's errors coupled with the effect on the prosecutor demand review and reversal.

II. The CAAF Reduced *Chapman* to a "Silence Is Sufficient" Standard, Eliminating the Government's Burden to Prove the Clear Error Was Harmless Beyond a Reasonable Doubt in Judge Alone Trials.

Throughout TSgt Leipart's case, the only judge who did not announce that the prosecutor's use of TSgt Leipart's guilty plea was "clear error" was the military judge sitting as the factfinder. The military judge allowed the error to proceed without comment.

Every appellate judge has found "clear error" by the prosecutor. Pet.App. 17a, 27a, 92a, 110a.

Despite finding clear error, the CAAF presumed the military judge knew and followed the law because he was silent. Pet.App. 18a. The CAAF held that unless the military judge affirmatively adopted the prosecutor's clearly erroneous rationale, there was no reasonable possibility the error might have contributed to TSgt Leipart's conviction. *Id.*

This silence-is-sufficient standard demands review because it is an incorrect application of this Court's controlling harmless-error rule from *Chapman*. It shifts the burden off the Government from proving harmlessness beyond a reasonable doubt to requiring the Government to only point out the judge was silent at the time the clear error occurred. This makes it impossible for unobjected to constitutional errors to succeed on appeal—errors to which the *Chapman* standard applies. *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019). This is because for unobjected to constitutional errors, the military judge will almost always be silent; the judge has no requirement to speak where there is no objection.

A judge's silence should not be viewed in isolation. The presumption that a judge knows and follows the law gives way when there is clear evidence to the contrary. *United States v. Preston*, 706 F.3d 1106, 1120 (9th Cir. 2013). Considering how the judge reacted to other errors throughout trial is necessary when determining whether the judge knew and followed the law in this instance. Had the CAAF held the Government to its burden and considered how the military judge consistently reacted to other blatant

errors, it would have been impossible to uphold TSgt Leipart's conviction.

A. Leveraging TSgt Leipart's guilty plea was clear error.

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 . . . 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).

Just like their civilian counterparts, members of the armed forces cannot be compelled to incriminate themselves in a criminal case. U.S. CONST. amend. V. And a guilty plea only waives the privilege against self-incrimination for the offense to which the accused pleaded guilty. *See Boykin*, 395 U.S. at 243 (discussing what an accused must knowingly, intelligently, and voluntarily give up to plead guilty).

Here, every appellate judge has agreed there was clear prosecutorial error. The prosecutor used TSgt Leipart's guilty plea to bolster KC's credibility. CAAF.JA 355. The prosecutor used it substantively to show how KC was telling the truth about everything: the threats, the assaults, and the sexual assaults. *Id.* In doing so, the prosecutor forced TSgt Leipart to

testify against himself, violating his Fifth Amendment right.

B. The military judge's silence at the time the prosecutor committed clear error is not enough for the Government to meet its burden of harmlessness beyond a reasonable doubt under *Chapman*.

Because this is a constitutional error, the test for prejudice is harmlessness beyond a reasonable doubt and the burden is on the Government. *Tovarchavez*, 78 M.J. at 460 (citing *Chapman*). The burden and standard set forth in *Chapman* is the correct test in the military justice system. *Compare* 10 U.S.C. § 859(a) (2018) (making no distinction between preserved and unpreserved error for "material prejudice" to the accused's "substantial rights"), *with* Fed. R. Crim. P. 52 (distinguishing between preserved and unpreserved error which dictates the applicable standard of review); *see also Greer v. United States*, 593 U.S. 503, 512 (2021) (noting that unpreserved constitutional errors are subject to plain-error review under the federal rules of criminal procedure). The military justice system does not mirror Fed. R. Crim. P. 52(b) but rather has its own standard under 10 U.S.C. § 859(a). In this situation, the *Chapman* standard applies, as correctly interpreted by the highest court in the military justice system.

Consequently, based on this high burden, one judge would have overturned TSgt Leipart's convictions. Pet.App. 107a-110a. Another judge called TSgt Leipart's case a "close call," but used the mixed findings and the presumption the military judge knew and followed the law to determine the Government carried its burden. Pet.App. 29a-32a. But the mixed

findings are not persuasive and there are clear indicators that the military judge did not know and follow the law.

This Court cannot be certain the error did not taint the proceedings or otherwise contribute to TSgt Leipart's conviction. *See Chapman*, 386 U.S. at 24 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) as providing "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction").*Chapman* itself provides the answer for this Court. There, despite "reasonably strong" evidence against the petitioners, this Court *still* found it "impossible" to conclude the constitutional error did not affect the convictions. 386 U.S. at 25-26.

Here, the Government's case was far from overwhelming or reasonably strong. As the dissenting judge at the AFCCA noted, the "entirety of the Government's case on the contested specifications rested on the testimony of KC;" therefore, "her credibility was essential to the Government's case." Pet.App. 110a. Moreover, the prosecutor's use of the guilty plea was a "central pillar" of the closing argument. Pet.App. 109a. Finally, there was premeditation on the part of the prosecutor with the demonstrative slides that "focused on the use of TSgt Leipart's pleas in evaluating KC's credibility." Pet.App. 109a-110a.

The CAAF majority relied on the silence of the military judge, which it determined allowed the Government to carry its burden because there was no evidence the military judge used the guilty pleas improperly. Pet.App. 18a. The convictions defy that logic, as does the military judge's otherwise active

engagement throughout trial. His silence, when contrasted with every time he interrupted or corrected counsel, demonstrated he *did* adopt the prosecutor's position in closing. Furthermore, without the corroboration given by TSgt Leipart's guilty plea, KC was not a credible witness. Without any corroboration to her allegations, her veracity was the only difference between a conviction and an acquittal. The prosecutor understood this, which is why he made the arguments he did. Without resuscitating her credibility, the case was dead. Using the guilty plea as argued by the prosecutor resulted in convictions on every properly charged offense. But the CAAF did not discuss how the military judge acted throughout trial or the weakness of the Government's case to assess whether the military judge knew or followed the law here.

The presumption the military judge knew and followed the law should not apply here. The silence-is-sufficient standard eradicates the high burden on the Government to prove harmlessness beyond a reasonable doubt while also ignoring the record for indicators the military judge did not know or follow the law at the time the error occurred. The CAAF erred in narrowing *Chapman* to this level. By discarding the presumption, the Government cannot meet its burden to prove the clear constitutional error was harmless beyond a reasonable doubt. The egregious nature of the error coupled with the weakness of the Government's case demands review and reversal.

CONCLUSION

This Court has before it a case with structural error or, alternatively, ineffective assistance of counsel. It also has an issue of severe prosecutorial

misconduct. This uncommon fact pattern rests on an aggravating guilty plea and an exceptionally weak findings case. In granting this case, the Court can answer important and contested questions about *McCoy* with implications across the circuits. This Court can also answer questions about the *Chapman* standard. This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

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