No. _____

IN THE
Supreme Court of the United States

RAIDEN J. ANDREWS,
QUARTERMASTER SEAMAN APPRENTICE,
UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the lower court erred in failing to apply the harmless error standard to the prosecution's improper arguments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals for the Armed Forces

United States Court of Appeals for the Second Circuit

United States Court of Appeals for the Third Circuit

Statutes

Other Authorities

INTRODUCTION

As this Court has "underscored" on several occasions, the "American prosecutor" plays a "special role . . . in the search for truth in criminal trials."[1] This holds true for both state and federal prosecutors, civilian and military.

For civilian federal and state prosecutors, this Court, more than eighty years ago, made clear the special role they hold. Prosecutors are a "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 the case, but that justice shall be done."[2]

Where a prosecutor departs from this special role and presents a jury with a closing argument that is both improper and infringes on a defendant's constitutional rights, this Court has long held that on appeal the government must prove the violation was harmless beyond a reasonable doubt.[3] And for

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[1] *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (quoting *Strickler v. Greene*, 527 U.S. 263, 281 (1999); citing *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995); *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985); *Berger v. United States*, 295 U.S. 78, 88 (1935)).

[2] *Berger*, 295 U.S. at 88.

[3] *Chapman v. California*, 386 U.S. 18, 24 (1967). "In modern criminal cases . . . the closing argument is often viewed as the most important part of the trial[.]" Michael Lyon, *Avoiding the* Woods*hed: The Third Circuit Examines Prosecutorial Misconduct in Closing Argument in* United States v. Wood, 53 VILL. L. REV. 689, 689 (2008) (citing Michael Frost, *Ethos, Pathos, and Legal Audience*, 99 DICK. L. REV. 85, 113 (1994)).

defendants, application of this harmless error standard is critical, as "[t]he allocation of the burden of proving harmlessness can be outcome determinative[.]"[4]

Military prosecutors, like those involved in the prosecution of Quartermaster Seaman Apprentice (QMSA) Raiden J. Andrews, United States Navy, represent the same sovereignty as federal prosecutors in a criminal prosecution—the United States—and fill the same role as federal and state prosecutors in their duty to ensure justice. The role that military prosecutors play is no less important to the truth-seeking process of a criminal trial, and their misconduct is no less corruptive.

Yet as the Court of Appeals for the Armed Forces' (CAAF) opinion in QMSA Andrews' case demonstrates, the CAAF generally tests a prosecutor's improper arguments for prejudice under Article 59(a), Uniform Code of Military Justice (UCMJ)[5]—a prejudice standard that is both more forgiving than the harmless error standard this Court articulated in *Chapman v. California*[6] and different than the standard that many federal and state civilian courts use.

This difference in standards occurs because unlike many federal and state courts, the CAAF's framework for addressing issues of improper argument does not include, as a threshold matter, a

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[4] *Gamache v. California*, 562 U.S. 1083, 1085 (2010) (Sotomayor, J. concurring).
[5] 10 U.S.C. § 859(a).
[6] 386 U.S. 18, 24 (1967).

question on whether the improper argument infringed on the accused's[7] constitutional rights.[8] Consequently, with the exception of cases where a military prosecutor comments directly on an accused's silence at trial, the CAAF does not place the burden on the government to prove the harmlessness of a prosecutor's improper argument.[9]

Accordingly, the CAAF's improper argument precedent, as cemented in the subject case, is inconsistent with the decisions of several federal and state courts, as well as this Court. The CAAF does not adequately distinguish between the improper arguments of military prosecutors that infringe on an accused's constitutional rights and those that do not.

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[7] "Accused" is the military term for a defendant in a criminal proceeding. *See, e.g.*, *United States v. Scheffer*, 523 U.S. 303, 308 n.4 (1998) ("In reference to . . . the military . . . the terms 'court,' 'court members,' or 'court-martial' are used throughout, as is the military term, 'accused,' rather than the civilian term, 'defendant.'").

[8] This is problematic because "[i]n many cases, improper prosecutorial arguments violate a defendant's due process rights and, depending on the particular argument, other constitutional rights." Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 891 (2018) (citing *Griffin v. California*, 380 U.S. 609 (1965); *State v. Jackson*, 444 S.W. 3d 554, 589 (Tenn. 2014); *State v. Jorgensen*, 754 N.W.2d 77 (Wis. 2008)).

[9] *Compare United States v. Flores*, 69 M.J. 366, 369-72 (C.A.A.F. 2011) (applying the harmless error standard to test the prejudice of a prosecutor's comments on an accused's silence at trial) *with United States v. Andrews*, 77 M.J. 393, 398-404 (C.A.A.F. 2018), *recon. denied*, 2018 CAAF 362 (C.A.A.F. June 27, 2018) (applying Article 59, UCMJ, to test the prejudice of a prosecutor's presentation of "admissions" the accused never made in a case where the accused elected to not testify at trial).

Instead, the CAAF opts to test a military prosecutor's improper arguments for prejudice under the more forgiving Article 59(a), UCMJ, standard, regardless of whether the prosecutor's improper arguments infringed on the accused servicemember's constitutional rights.[10]

For the military court-martial system to "closely resemble[] civilian structures of justice[,]" as this Court envisioned in *Ortiz v. United States*,[11] the military appellate courts must apply this Court's harmless error precedent and require the government to demonstrate harmlessness in situations that warrant it. This burden allocation is imperative where, as here, the prosecutors who made the improper arguments work in a system that is under "external pressure" to produce convictions.[12] Therefore, to ensure application of the harmless error standard happens in both the subject case and military appeals with a similar issue going forward, QMSA Andrews respectfully seeks this Court's review.

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[10] As the CAAF noted in *Flores*, arguing that an accused was not "forthcoming" in his or her "version of facts . . . in cases where the accused does not testify," is a "tactic [that] is fraught with danger as it often implicates an accused's right to remain silent." 69 M.J. at 370 n.4. In QMSA Andrews case that is exactly the tactic the prosecution used, repeatedly accusing QMSA Andrews of lying and attributing admissions to him that he never made. *See infra* pp. 7-14. Yet the CAAF, departing from its opinion in *Flores*, did not examine whether the prosecution's improper arguments implicated QMSA Andrews' right to remain silent. Accordingly, it is not clear how the CAAF squares its opinion in *Andrews* with *Flores*.

[11] 138 S. Ct. 2165, 2170 (2018).

[12] *See infra* pp. 27-34.

PETITION FOR A WRIT OF CERTIORARI

Quartermaster Seaman Apprentice Raiden J. Andrews, United States Navy, respectfully petitions this Court for a writ of certiorari to review the CAAF's decision.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Armed Forces appears at pages 2a through 25a of the appendix to this petition. It is reported at 77 M.J. 393. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals appears at pages 26a through 64a of the appendix. It is available at 2017 CCA LEXIS 283.

JURISDICTION

The United States Court of Appeals for the Armed Forces issued its decision on May 22, 2018 and denied reconsideration on June 27, 2018. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).[13]

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: (1) "No person shall be . . . compelled in any criminal case to be a witness against himself," and (2) "No person shall be . .

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[13] *See also Ortiz*, 138 S. Ct. at 2170 ("[T]his Court has jurisdiction to review decisions of the CAAF, even though it is not an Article III court.").

. deprived of life, liberty, or property, without due process of law[.]"[14]

STATUTE INVOLVED

The text of Article 59, UCMJ, 10 U.S.C. § 859, appears at page 1a of the appendix to this petition.

STATEMENT OF THE CASE

I. QMSA Andrews exercised his Fifth Amendment right and did not testify during the contested portion of his trial.

QMSA Andrews did not testify during his trial on the merits.[15] Instead, he relied on his statements to Naval Criminal Investigative Service (NCIS) for his defense.[16] During closing argument, however, the prosecution misrepresented QMSA Andrews' statements. As both the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the CAAF found, the prosecution "invented"[17] new admissions not contained in Prosecution Exhibits 4 and 5—QMSA Andrews' statements to Naval Criminal Investigative Service (NCIS)—and argued these "wholly fabricated admission[s]"[18] established QMSA Andrews' guilt as to Specification 3 of Charge V—an alleged violation of Article 120, UCMJ.[19]

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[14] U.S. CONST. amend V.
[15] R. at 632.
[16] Pros. Exs. 4, 5; Appellate Ex. XXXIX.
[17] *United States v. Andrews*, No. 201600208, 2017 CCA LEXIS 283, at *16 (N-M. Ct. Crim. App. Apr. 27, 2017).
[18] *Andrews*, 77 M.J. at 402.
[19] 10 U.S.C. § 920.

II. Using three alternative theories of liability, the prosecution charged QMSA Andrews with violating Article 120, UCMJ.

Specification 1 of Charge V alleged that QMSA Andrews committed a sexual act on Ms. AB "by causing bodily harm to her."[20] Specification 2 of Charge V alleged that he committed a sexual act on Ms. AB when he "knew or reasonably should have known that Ms. AB was unconscious or asleep."[21] And Specification 3 of Charge V alleged that he committed a sexual act on Ms. AB while she was "incapable of consenting to the sexual act due to impairment by alcohol, and that condition was known or reasonably should have been known" to QMSA Andrews.[22] A panel of enlisted and officer members[23] acquitted QMSA Andrews of Specifications 1 and 2, and convicted him of Specification 3.

III. QMSA Andrews stated to NCIS that he believed Ms. AB consented to sexual intercourse.

From the onset of the NCIS investigation through the closing arguments of his contested trial, QMSA Andrews never wavered on his statement

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[20] Charge Sheet.

[21] *Id.*

[22] *Id.*

[23] "A court-martial is tried, not by a jury of the defendant's peers," but by "a panel" that can be comprised of officer and enlisted servicemembers pursuant to the requirements of Article 25, UCMJ; 10 U.S.C. § 825. *O'Callahan v. Parker*, 395 U.S. 258, 263-64 (1969).

about what happened. At the end of the night, after drinking and socializing with a large group at a friend's house, he believed that Ms. AB consented to sexual intercourse with him.[24] While in bed with her, he asked if she wanted "to have sex."[25] She responded "yes."[26] And while Ms. AB did vomit before she agreed to the sexual intercourse, she also "took her pants off" after she provided verbal consent.[27] Ms. AB and QMSA Andrews then "began having sex in the missionary position."[28]

Elaborating further, QMSA Andrews explained that AB "had her arms around" him and moaned.[29] In response, he "started to go faster."[30] Ms. AB then "reached down" to QMSA Andrews' "lower back and scratched" him.[31] Later, a witness who observed these scratches crassly described them as the type that happen "when you're hitting it just right."[32]

After Ms. AB vomited, said "yes," took off her pants, put her arms around QMSA Andrews, moaned, and scratched his lower back, she "pulled him closer" and "grabbed" his "hair for a few seconds."[33] She then

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[24] Pros. Exs. 4, 5; Appellate Ex. XXXIX.
[25] Pros. Ex. 5 at 1.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 2.
[31] *Id.*
[32] R. at 193.
[33] Pros. Ex. 5 at 2. Regarding the relevance of Ms. AB's words and conduct, it is important to note that under Article 120, UCMJ, the CAAF views "incapable of consenting" as meaning that an individual lacks the ability to make or communicate a

changed her mind about the sexual intercourse and said "stop."[34] QMSA Andrews, in response, stopped the sexual intercourse, and as he described to NCIS, he "went back to the other side of the bed."[35] QMSA Andrews then watched Ms. AB get out of the bed and leave the room.[36]

IV. QMSA Andrews never stated to NCIS that he knew Ms. AB was so intoxicated that she would confuse him with another person or that he intended to use her confusion to induce her consent to sexual intercourse.

During his "NCIS interrogation" QMSA Andrews discussed why he believed that AB ended the sexual intercourse after she initially consented.[37] As the NMCCA explained, QMSA Andrews "discussed what may have gone into Ms. AB's decision to have sex with him based on his retrospective thoughts, including the information he learned after the encounter during the six months before he spoke to NCIS[.]"[38] QMSA Andrews described his decision to go into the bedroom as "[s]tupidity," and explained that after that night he "found out" that Ms. AB had a "prior relationship" with another sailor, Petty Officer Jake Hills.[39] Therefore, when the NCIS agent

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decision. *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016).

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Andrews*, 2017 CCA LEXIS 283, at *17.

[38] *Id.* at *18.

[39] *Id.* at *19.

asked him to explain why Ms. AB agreed to have sexual intercourse with him, QMSA Andrews stated "I assumed she thought I was Hills."[40] This was QMSA Andrews' reasoning behind why Ms. AB initially consented to sexual intercourse but then changed her mind.

During the interrogation, however, the NCIS agent seized on this statement in a different way, using it to challenge QMSA Andrews' belief that AB consented. The agent pressed: "what it looks to me is you thought you could go in there and she would think you were Hills."[41] In response to the agent's question, QMSA Andrews replied, "No."[42]

Later, during the course of the interview, the NCIS agent came back to same accusation:

> **NCIS Agent:** . . . I 100 percent think you know – I know that you know what you were doing. You know that she would not know it was you and you know that you could take advantage of the situation because she was drunk. I know those things.
>
> **QMSA Andrews:** That's not what I was trying to do.
>
> **NCIS Agent:** I know those things. I feel very strongly and I know that's what's going on here. Do I think you are a rapist? No. Do I think you do this

[40] Pros. Ex. 4; Appellate Ex. XXXIX at 15-16.
[41] Pros. Ex. 4; Appellate Ex. XXXIX at 16.
[42] Pros. Ex. 4; Appellate Ex. XXXIX at 16.

> regularly? No. But I absolutely know that on this one occasion that that's exactly what happened.
>
> **QMSA Andrews:** That's not what happened.[43]

Despite these repeated and express denials, during their closing argument the prosecution argued that QMSA Andrews admitted he knew AB was so impaired that she would not be able to identify him, and that QMSA Andrews intended to take advantage of that confusion to obtain AB's consent to sexual intercourse. The prosecution stated:

> Seaman Apprentice Andrews was counting on [Ms. AB] not recognizing him. He was counting on that, and so that's why that factor is so important. *He admits, and in fact, he says that he was counting on the fact that I hope that she will confuse me with Hills. Maybe she'll think I'm Hills.*[44]

The prosecution pressed even further, dispelling any notion that their "invented admission"[45] from QMSA Andrews' was just a misguided attempt to draw an inference from the evidence. As the prosecution explained, QMSA Andrews was "counting on it, and that's *evidence* that she was impaired that he knew she was impaired, and its *evidence in of* [sic] *itself*."[46]

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[43] Pros. Ex. 4; Appellate Ex. XXXIX at 27.
[44] R. at 675 (emphasis added).
[45] *Andrews*, 2017 CCA LEXIS 283, at *16.
[46] R. at 675 (emphasis added).

Prosecution Exhibits 4 and 5, however, do not contain the statements "I hope that she will confuse me with Hills" or "Maybe she'll think I'm Hills." Nevertheless, the prosecution presented those statements as "evidence" in the case against QMSA Andrews. More specifically, the prosecution presented them as *admissions* establishing that QMSA Andrews "knew she was impaired"[47] and then relied on them to meet their burden of proof: "you can be firmly convinced that [QMSA Andrews] sexually assaulted her because of what he is saying."[48]

After the prosecution made this argument, defense counsel objected, stating:

> I object to a portion of trial counsel's closing argument, specifically, and I wrote it down verbatim a few minutes ago. "Andrews is counting on her not recognizing him before he goes in the room." And then again, before he goes in the room, "I hope she will confuse me with Hills."[49]

As a remedy, defense counsel asked for a curative instruction from the military judge that instructed the members "to ignore" the "improper argument."[50] The military judge refused to give a curative instruction, stating that she did not "see a remedy for the defense."[51] Nevertheless, defense

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[47] *Id.*
[48] R. at 665.
[49] R. at 680.
[50] *Id.*
[51] *Id.*

counsel proposed a curative instruction, and in the absence of the proposed curative instruction, moved for a mistrial.[52] The military judge denied both, but recognized that defense counsel's objection was "certainly noted for the record."[53]

Following closing arguments, a panel of enlisted and officer members deliberated for less than three hours and then convicted QMSA Andrews of Specification 3, finding he "knew or reasonably should have known" that AB "was incapable of consenting . . . due to impairment by alcohol."[54]

V. The prosecution's use of invented admissions constituted severe prosecutorial misconduct.

Conducting de novo reviews, both the CAAF and the NMCCA found the prosecution's use of "invented admissions" constituted "severe" misconduct.[55] The CAAF described the prosecution's use of invented admissions as "[t]hrice quot[ing] or refer[ing] to a wholly fabricated admission."[56] The NMCCA expounded more, stating the prosecutor's "attribution to the appellant of *statements* he never made—purportedly *admitting* that 'he was *counting* on' and '*hop[ing]* that [AB] will confuse me' with [Petty Officer Jake Hills]—are fundamentally different than

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[52] R. at 683, 689-90.
[53] R. at 689-90.
[54] R. at 725-28.
[55] *Andrews*, 77 M.J. at 402; *Andrews*, 2017 CCA LEXIS 283, at *29.
[56] *Andrews*, 77 M.J. at 402.

simply arguing an inference of the appellant's intent from his actual statements to NCIS."[57]

Citing Judge Sullivan's concurrence in *United States v. Dimberio*,[58] the NMCCA even went on to highlight the harm that results from using invented admissions to establish an accused's guilt as opposed to making an argument based on inferences from the actual statement. "Direct evidence of th[e] state of mind in the form of an admission . . . [is] certainly stronger than the circumstantial showing of [the] same state of mind[.]"[59]

VI. In addition to the use of invented admissions, the prosecution engaged in several more types of severe prosecutorial misconduct.

The CAAF also found that the prosecution:

(1) "Repeatedly and consistently made inflammatory and disparaging statements, from calling Appellant a liar more than twenty-five times to referring to him as 'Don Juan[;]'"

(2) "Accused defense counsel of not believing Appellant's version of events[;]" and

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[57] *Andrews*, 2017 CCA LEXIS 283, at *20-21 (emphasis in original).
[58] 56 M.J. 20, 30 (C.A.A.F. 2001).
[59] *Andrews*, 2017 CCA LEXIS 283, at *21 n.54.

(3) "Misstated the law when he analogized consenting to sex to enlisting in the Navy or having plastic surgery[.]"[60]

The CAAF adopted the NMCCA's conclusion that these improper arguments amounted to plain and obvious error, and then went on to apply the three-pronged prejudice test it first articulated in *United States v. Fletcher*.[61] The three prongs are: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[62]

On the first prong, the CAAF concluded that the prosecution's misconduct "was severe."[63] Next, the CAAF reviewed whether the military judge cured the prosecutorial misconduct and determined the military judge failed to offer any "specific, timely curative instructions."[64] Accordingly, the CAAF stated that the absence of curative instructions, "weigh[ed] in favor of finding prejudice."[65]

VII. Following a de novo review, the CAAF affirmed QMSA Andrews convictions and sentence.

Despite finding the first two prongs of its prejudice test weighed in favor of "finding prejudice," the CAAF affirmed QMSA Andrews' conviction on

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[60] *Andrews*, 77 M.J. at 402.
[61] 62 M.J. 175 (C.A.A.F. 2005).
[62] *Fletcher*, 62 M.J. at 184.
[63] *Andrews*, 77 M.J. at 402.
[64] *Id.* at 403.
[65] *Id.*

Specification 3 of Charge V, just as the NMCCA had done. Relying on its decisions in *United States v. Sewell*,[66] *United States v. Hornback*,[67] and *United States v. Fletcher*,[68] the CAAF applied the Article 59(a), UCMJ, prejudice standard and found "no prejudice to Appellant's substantial rights." In doing so, the CAAF relied on the third prong—the weight of the evidence supporting conviction—and explained that in many instances, the "evidence 'so clearly favor[s] the government that *the appellant cannot demonstrate prejudice*."[69] At no time did the CAAF distinguish between constitutional and non-constitutional improper arguments nor did it require *the government* to prove the harmlessness of any improper argument. The CAAF did not even apply the harmless error standard to the prosecution's use of wholly fabricated, invented admissions.

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[66] 76 M.J. 14 (C.A.A.F. 2017) (affirming after finding a prosecutor's improper arguments resulted in "no material prejudice to Appellant's substantial rights" under Article 59(a), UCMJ).

[67] 73 M.J. 155 (C.A.A.F. 2014) (finding that "significant prosecutorial misconduct occurred," but that "Appellant's substantial right to a fair trial" was not "materially prejudiced").

[68] 62 M.J. at 175.

[69] *Andrews*, 77 M.J. at 402 (quoting *Sewell*, 76 M.J. at 18) (emphasis added).

REASONS TO GRANT REVIEW

I. The CAAF decided QMSA Andrews' case in a way that conflicts with decisions from other United States courts of appeal and state courts of last resort.

Ensuring the harmless error standard is appropriately employed in response to a prosecutor's improper argument requires appellate courts, as a threshold matter, to assess whether the error is constitutional. As discussed below, while they are not uniform in their approach, several U.S. courts of appeals and state courts of last resort engage in this threshold examination. Yet the CAAF's improper argument precedent, as cemented in the subject case, does not. And as a result, the CAAF permits constitutional errors resulting from a prosecutor's improper arguments, like the prosecution's use of invented admissions in QMSA Andrews' case, to survive on appeal without meeting the requirements of the *Chapman* harmless error standard.

Therefore, while the prosecution's use of invented admissions in QMSA Andrews case may not be a *Griffin* error (a direct comment on a defendant's silence at trial)[70] or a *Doyle* error (a prosecutor's use of a defendant's post-*Miranda* silence to impeach the defendant's exculpatory statements),[71] it is still akin to both. Like a *Griffin* or *Doyle* error, a prosecutor's use of invented admissions allows the government to capitalize on a criminal defendant's decision to remain

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[70] *Griffin*, 380 U.S. at 609 (1965).
[71] *Doyle v. Ohio*, 426 U.S. 610 (1976).

silent in a way that contravenes the Fifth Amendment.[72]

Yet despite finding the prosecution used invented admissions in its case against QMSA Andrews, the CAAF neither characterized the error as constitutional nor placed the burden on the government to demonstrate harmlessness.[73] As a result, the CAAF allocated the prejudice burden in a way that contravened the *Chapman* harmless error precedent and conflicted with the decisions of several U.S. courts of appeal and state courts of last resort.

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[72] "Modern prosecutors normally do not *explicitly* argue that a defendant's silence at trial means that he or she is guilty." Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887, 898 (2018) (emphasis in original). "Such a bold claim" is a "blatant" error, even if a reviewing court deems it non-prejudicial through application of the harmless error standard. *Id.* Instead, prosecutors who overstep the bounds of proper argument will "maintain[] the thrust" of such an argument, "while at the same time" maintaining "deniability." *Id.* In other words, they take advantage of a defendant's silence through "disguised" arguments that indirectly violate a defendant's "Fifth Amendment privilege against self-incrimination." *Id.* at 898-99. Such a violation is even worse when the prosecutor combines an additional type of improper argument, "creating evidence out of thin air," to capitalize on a defendant's silence and present admissions to a jury in closing argument that the defendant never made. *Id.* at 905.

[73] *Andrews*, 77 M.J. at 396-404.

A. Under *Chapman v. California*, appellate courts test a prosecutor's improper argument for harmlessness beyond a reasonable doubt when it infringes on a specific constitutional right of a defendant.

Recognizing that "there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial[,]"[74] appellate courts are still required to test constitutional errors for harmlessness beyond a reasonable doubt.[75] The harmless error standard, as this Court articulated in *Chapman*, applies to constitutional errors that arise from a prosecutor's inappropriate comments to a jury.[76] And application of the harmless error standard allows appellate courts to "strike the balance between disciplining the prosecutor on the one hand, and the interest in the prompt administration of justice and the interests of the victim on the other."[77]

As outlined below, both federal and state civilian courts recognize that when they find a prosecutor engaged in improper argument they must determine whether the error was constitutional or non-constitutional. And in instances where the prosecutor's improper argument is constitutional error, these courts apply the *Chapman* harmless error standard to assess the resulting prejudice.

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[74] *United States v. Hasting*, 461 U.S. 499, 508-09 (1983).
[75] *Chapman*, 386 U.S. at 24.
[76] *Id.* at 24-25.
[77] *Hasting*, 461 U.S. at 509.

1. United States courts of appeal conduct a threshold analysis to determine whether a prosecutor's improper argument is a constitutional error that requires application of the harmless error standard.

The Seventh Circuit Court of Appeals, as it has expressly stated, uses a two-tiered system when testing improper arguments for prejudice. When the prosecutor's comments "implicate a specific trial right," the Seventh Circuit will apply the harmless error standard and only "uphold the conviction if the government proves beyond a reasonable doubt that the defendant would have been convicted absent the comments."[78] However, when the prosecutor's comments are "merely improper but do not violate a specific trial right," then the Seventh Circuit applies "a different standard."[79]

Drawing on this Court's decision in *Darden v. Wainwright*,[80] the Seventh Circuit articulated the non-constitutional standard as a "five-factor test" used to determine "whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process."[81] And while the Seventh Circuit places

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[78] *United States v. Ochoa-Zarate*, 540 F.3d 613, 619 (7th Cir. 2008).
[79] *Id.*
[80] 477 U.S. 168 (1986).
[81] *United States v. Cotnam*, 88 F.3d 487, 498 (7th Cir. 1996) (quoting *Darden*, 477 U.S. at 181) (internal quotation marks omitted).

errors such as a prosecutor's misstatement of the evidence in the latter category,[82] it does so only after conducting a threshold analysis to determine that the improper argument did not infringe on a specific trial right of a defendant.[83]

For more than twenty years, the Third Circuit Court of Appeals has also applied a threshold test to determine if a prosecutor's improper arguments warrant application of the harmless error standard. As it recognized when reviewing a prosecutor's improper arguments in *United States v. Zehrbach*, "the standard of review in determining whether an error is harmless depends on whether the error was constitutional or non-constitutional."[84]

In *United States v. Mendoza*,[85] the Fifth Circuit Court of Appeals provided its view on the types of improper argument that may give rise to a constitutional error, observing the requirement to test for harmlessness beyond a reasonable doubt "when analyzing whether constitutional error requires reversal."[86] While the *Mendoza* court viewed "a prosecutor's reference to facts not in the record" as a

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[82] *Id.* at 498 (citing *United States v. Badger*, 983 F.2d 1443, 1451 (7th Cir. 1993)).
[83] *Id.* at 498 n.11.
[84] 47 F.3d 1252, 1265 (3rd Cir. 1995); *see also United States v. Wood*, 486 F.3d 781, 789 (3rd Cir. 2007) (applying the harmless error standard to a prosecutor's improper argument); *United States v. Gambone*, 314 F.3d 163, 177 (3rd Cir. 2003) ("We make a harmless error analysis when deciding whether a new trial is warranted because of improper remarks made by the prosecutor during closing arguments.").
[85] 522 F.3d 482, 492-93 (5th Cir. 2008).
[86] *Id.* at 492-93.

"non-constitutional error," it nevertheless noted, as a general matter, that "an improper comment may become constitutional error[.]"[87] As an example, the court explained that where a "prosecutor's remarks so prejudiced . . . the privilege against compulsory self-incrimination, as to amount to a denial of that right[,]" the error is constitutional.[88]

2. State courts of last resort conduct a threshold analysis to determine if a prosecutor's improper argument is a constitutional error that requires application of the harmless error standard.

Similar to the Seventh Circuit, the Minnesota Supreme Court uses a two-tiered approach, placing improper arguments in one of two categories to determine the applicable prejudice standard. For "misconduct" that is "serious," the Minnesota appellate courts will review issues of improper argument to determine whether "'the misconduct is harmless beyond a reasonable doubt[.]'"[89] On the other hand, "[f]or less serious misconduct, the standard is 'whether the misconduct likely played a substantial part in influencing the jury to convict.'"[90]

Less than two months after the CAAF decided QMSA Andrews' case, the Minnesota Supreme Court reviewed a prosecutor's "allusion" to a defendant's

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[87] *Id.* at 493.
[88] *Id.*
[89] *State v. Powers*, 654 N.W.2d 667, 678 (Minn. 2003)
[90] *Id.*

"failure to testify," using a harmless beyond a reasonable doubt standard to test for prejudice.[91] Similarly, the Minnesota Supreme Court uses a "harmless beyond a reasonable doubt standard" to assess the prejudice that results from a prosecutor's misstatements of the evidence during closing argument.[92]

The Kansas Supreme Court has opined that it views the harmless error standard as applicable when confronting due process violations flowing from a prosecutor's improper comments:

> Synthesizing the need to constrain prosecutors within the bounds of fairness and the need to sustain convictions not so tainted by error as to call the verdict into doubt, the Court decided to evaluate prosecutorial affronts to due process using the constitutional harmless error standard from *Chapman v. California*[.][93]

Earlier this year, an intermediate appellate court in Kansas followed suit, using the "constitutional harmlessness inquiry" to test a

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[91] *State v. Johnson*, 2018 Minn. LEXIS 380, at *14-15 (Minn. 2018) (citing *State v. Whittaker*, 568 N.W.2d 440, 451 (Minn. 1997)). In *Whittaker*, the Minnesota Supreme Court made it clear that, at a minimum, the "harmless error analysis" does apply to a prosecutor's allusion to a defendant's failure to testify. *Whittaker*, 568 N.W.2d at 451.

[92] *State v. Torres*, 632 N.W. 2d 609, 618 (Minn. 2001).

[93] *State v. Sherman*, 305 Kan. 88, 99 (Kan. 2016).

prosecutor's misstatement of evidence and use of personal opinions during rebuttal for prejudice.[94]

The Tennessee Supreme Court has recognized that testing a prosecutor's improper argument for prejudice is "more than academic[.]"[95] It explained, "[b]ecause the standards differ fundamentally, a court must carefully identify the type of error at issue before undertaking an evaluation of its effect."[96] Therefore, just like the Seventh Circuit and Minnesota Supreme Court, the Tennessee Supreme Court also uses a two-tiered approach to address issues of improper argument. For improper argument of a "constitutional dimension[,]" it "places the burden on the State to prove harmlessness beyond a reasonable doubt."[97] And "[w]hen evaluating an improper prosecutorial argument that does not rise to the level of a constitutional violation," it applies a different test: "whether the improper conduct could have affected the verdict to the prejudice of the defendant."[98]

Finally, there are yet other state courts of last resort that have decided to apply the *Chapman* harmless error standard more expansively. For

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[94] *State v. Neighbors*, 2018 Kan. App. Unpub. LEXIS 205 at *6 (Kan. Ct. App. 2018) (quoting *Sherman*, 305 Kan. at 109) (internal quotation marks omitted).
[95] *Jackson*, 444 S.W.3d at 590 (quoting *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008)) (internal quotation marks omitted).
[96] *Jackson*, 444 S.W.3d at 591 (citing *State v. Climer*, 400 S.W.3d 537, 569 n.18 (Tenn. 2013)).
[97] *Id.*
[98] *Id.* at 591 n.50 (quoting *Harrington v. State*, 385 S.W.2d 758, 759 (Tenn. 1965)) (internal quotation marks omitted).

example, in Idaho, the state supreme court tests all "objected-to error" for prejudice using the "*Chapman* harmless error test."[99] And in Florida, recognizing the difficulty of establishing "a brightline test that would determine which errors rise to the level of constitutional significance," the Florida Supreme Court adopted a general rule that applied the *Chapman* harmless error standard to a prosecutor's improper closing argument even when it was a non-constitutional error.[100]

B. The CAAF's improper argument precedent, as cemented in the subject case, does not place the burden on the government to establish harmlessness beyond a reasonable doubt when a prosecutor's improper argument infringes on a constitutional right of an accused.

In its decision below, the CAAF reaffirmed the prosecutorial misconduct test it first articulated in *United States v. Fletcher*[101] and then applied it to the prosecution's improper arguments in QMSA Andrews' case. In doing so, the CAAF cemented its improper argument precedent in a way that conflicts with this Court's decisions and is also inconsistent with decisions from several United States courts of appeals and state courts of last resort.

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[99] *State v. Perry*, 2010 Ida. LEXIS 130 at *29 (Ida. 2010).
[100] *Goodwin v. State*, 751 So.2d 537, 541 (Fla. 1999) ("[O]nce the defendant has satisfied the burden of demonstrating that error has occurred . . . harmless error remains the applicable analysis to be employed . . . on direct appeal."). *But see* Fla. Stat. § 924.051 (defining prejudicial error).
[101] 62 M.J. at 175.

In its opinion in the subject case, the CAAF made no mention of the need to test a prosecutor's improper argument for harmlessness beyond a reasonable doubt. Rather, the CAAF broadly articulated, and then applied, a "prejudicial error"[102] standard grounded in Article 59(a), UCMJ—"[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."[103]

Moreover, while the CAAF has acknowledged and applied a harmless error standard to improper arguments that involve a prosecutor's comments on an accused's decision to not testify or otherwise invoke his right to remain silent, it has neither identified criteria to determine when application of the harmless error standard is required with respect to a prosecutor's improper arguments generally nor incorporated the need to distinguish between constitutional and non-constitutional improper arguments.[104]

The result of the CAAF's flawed improper argument decisions is that the court does not extend application of the harmless error standard far enough. Its decision in QMSA Andrews' case is a notable example of this flaw. It shows that the CAAF failed

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[102] *Andrews*, 77 M.J. at 398 (citing *Fletcher*, 62 M.J. at 179); *see also Hornback*, 73 M.J. at 160 ("[T]his Court reviews alleged prosecutorial misconduct for prejudicial error.").
[103] 10 U.S.C. § 859(a) (2012).
[104] *Compare Ochoa-Zarate*, 540 F.3d at 619 and *Mendoza*, 522 F.3d at 492-93 *with Andrews*, 77 M.J. at 398, *Flores*, 69 M.J. at 369-72, *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009), and *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009).

to use a harmless error standard in a case where a prosecutor presented invented admissions from an accused who did not testify and then capitalized on the accused's silence to secure a conviction in a constitutionally impermissible way.

II. QMSA Andrews' case is emblematic of a problem likely to recur in the military justice system.

It is possible that the CAAF's recent improper argument decisions signal a desire for professional redress against misguided prosecutors to come from the institutional leaders within the military services. Such desire is not new nor necessarily inappropriate for an appellate court, as "a prosecutor stands perhaps unique, among officials . . . in his amenability to professional discipline by an association of his peers."[105] However, in the military justice system, given the combination of its structure and the current pressure on the military services to produce more convictions in sexual assault cases, such a desire is misplaced.[106] Rather than incentivizing institutional

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[105] *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976).

[106] *See, e.g.*, *United States v. Barry*, No. 17-0172/NA (C.A.A.F. Sep. 5, 2018) (dismissing a sexual assault conviction with prejudice after finding the Judge Advocate General of the Navy unlawfully influenced the convening authority); *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018) (reversing the appellant's conviction after finding the convening authority improperly stacked the appellant's court-martial panel with victim advocates); *United States v. Acevedo*, 77 M.J. 185, 191 (C.A.A.F. 2018) (Ryan, J. dissenting) ("In the current climate . . . neither the convening authorities nor the lower courts are immune from external pressures[.]"); *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017) (reversing an appellant's conviction due to the

leaders to address a prosecutor's improper arguments through some kind of professional responsibility review, the CAAF's opinion in QMSA Andrews' case will likely incentive institutional leaders to do nothing in response. Because of the external pressure to produce convictions, institutional leaders will likely view the CAAF's "ritualistic verbal spanking" as a "small price" for them to "pay," rather than a call to action.[107]

Make no mistake, there is a recognized "atmosphere of external pressure" to ensure "specific results" (i.e., convictions) "in sexual assault cases" in the military.[108] The CAAF's recent opinion in *United States v. Barry*[109] provides a notable example of how this pressure has infected the military justice system. In *Barry*, the Deputy Judge Advocate General of the

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appearance of unlawful command influence and noting the Judge Advocate General of the Air Force took the following position with respect to sexual assault cases: "absent a 'smoking gun,' victims are to be believed and their cases referred to trial"); *United States v. Schloff*, 2018 CCA LEXIS 350 (A.C.C.A. Feb. 5, 2018) (reversing an appellant's conviction after finding two members on the appellant's panel expressed a desire to convict him so that "politically, the United States Army" would not "seem weak on sexual harassment and assault").

[107] *Darden*, 477 U.S. at 206 (Blackmun, J. dissenting) (quoting *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631, 661 (2nd Cir. 1946)).

[108] *Riesbeck*, 77 M.J. at 166; *see also Barry*, No. 17-0162/NA, slip op. at 17 (Ryan, J. dissenting) (noting the existence of external pressure on the military justice system to produce sexual assault convictions regardless of merit "appear[s] to be . . . reasonably grounded in fact").

[109] No. 17-0172/NA, slip op. at 1-15.

Navy[110] (DJAG) "unlawfully influenced" a convening authority. Through an "improper manipulation of the criminal justice process," the DJAG focused the convening authority on the "political climate regarding sexual assault in the military"[111] and caused the convening authority to approve a sexual assault conviction even though he "believed the prosecution failed to establish [the accused's] guilt beyond a reasonable doubt."[112]

As the CAAF's decision in *Barry* illustrates, this pressure—whether from Congress or elsewhere in the Executive Branch—to focus on results in sexual assault cases has, at times, blinded institutional leaders from their duty to ensure the fair administration of justice.[113] And consequently, military prosecutors now operate in a mission-oriented, chain-of-command environment where leadership increasingly loads the military justice system against an accused without ensuring there are adequate corresponding safeguards in place to protect the fairness of their trials.[114]

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[110] He was later promoted to Vice Admiral and served as the Judge Advocate General of the Navy. *Barry*, No. 17-0162/NA, slip op. at 6 n.2.

[111] *Id.* at 10 (quoting *Boyce*, 76 M.J. at 247) (internal quotation marks omitted).

[112] *Id.* at 14 n.9.

[113] *See also Riesbeck*, 77 M.J. at 158-167; *Boyce*, 76 M.J. at 242-47.

[114] "A . . . problem with the military justice system is that it has adopted an overwhelmingly 'victim-centric approach' to sexual assault cases, without developing analogous defense capabilities." Heidi L. Brady, Note, *Justice is No Longer Blind: How the Effort to Eradicate Sexual Assault in the Military Unbalanced the Military Justice System*, U. Ill. L. Rev. 193, 216

In the Navy, one area where this structural imbalance is on display is the professional discipline process, as it does not serve as a reliable, independent safeguard. The Judge Advocate General of the Navy (JAG) is responsible for supervising both the administration of military justice[115] and the process for adjudicating professional responsibility

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(2016). Underscoring the existence of this shift, the Subcommittee to the Judicial Proceedings Panel (JPP) stated:

> The inherent difficulties in evaluating sexual assault case evidence, combined with the widespread perception that convening authorities are referring weak cases, have led to the belief by many of the Subcommittee's interviewees that the military justice system is weighted against the accused in sexual assault cases. Such one-sidedness is particularly serious in light of the potentially catastrophic effects of being accused of a sexual assault crime.

Subcommittee to the Judicial Proceedings Panel, Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases, May 2017 *available at* http://jpp.whs.mil/Public/docs/08-Panel_Reports/JPP_SubcommReport_Barriers_ Final_20170512.pdf. Lieutenant Commander Rachel Trest, JAGC, USN, even went so far as to describe the military's victim-centric approach as a "recipe for wrongful convictions." *Id.* at 22. "In her view, 'the sands have shifted in favor of the victim at the expense of the accused.'" *Id.* In a system where the Government's primary duty is two-fold—"that guilt shall not escape or innocence suffer"—maintaining an overwhelmingly victim-centric focus at the expense of the accused is counter to where prosecutors should focus their attention: on ensuring just outcomes, not only convictions. *Berger*, 295 U.S. at 88 (1935).

[115] JAG/CNLSCINST 5400.1C (2012), http://www.jag.navy.mil/library/instructions.htm ("The JAG . . . supervises the provision of all legal . . . services[.]).

complaints against the attorneys participating in it.[116] There is not an independent military authority empowered to review professional responsibility complaints against a prosecutor.[117]

Consequently, this structure produces situations like the one in QMSA Andrews' case. There is no publicly available record of the JAG taking any type of adverse action against the prosecutors who engaged in severe misconduct. Instead, as Judge Ohlson observed during oral argument before the CAAF, one of the prosecutors received an "award" from Navy JAG Corps leadership for his "100% conviction rate."[118]

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[116] JAGINST 5803.1E (2015), http://www.jag.navy.mil/library /instructions.htm (promulgating "Rules of Professional Conduct" in furtherance of the Judge Advocate General of the Navy's duty to "supervise the performance of legal services").

[117] *Cf. United States v. Kojayan*, 8 F.3d 1315, 1320 (9th Cir. 1993) ("Surely when . . . a claim [of prosecutorial misconduct] is raised, we can expect that someone in the United States Attorney's office will take an independent, objective look at the issue.").

[118] Oral Argument, *United States v. Andrews*, No. 17-0480/NA, at 10:43 (C.A.A.F. argued Feb. 28, 2018), http://www.armfor. uscourts.gov/newcaaf/CourtAudio6/ 20180228.wma. It should also be noted that the decision to reward the prosecutor for his "100% conviction rate" is consistent with the JAG's conduct in *Barry*. As the CAAF observed, the JAG—the person both responsible for the supervision of military justice and the adjudication of professional responsibility complaints—engaged in an "improper manipulation of the criminal justice system" that ensured a convening authority did not upset a sexual assault conviction. *Barry*, No. 17-0162/NA, slip op. at 12 (quoting *Boyce*, 76 M.J. at 247) (internal quotation marks omitted).

Exacerbating this lack of independent professional responsibility review is the fact that Congress housed the military justice system entirely within the Executive Branch.[119] When it comes to checks and balances among the judiciary and other branches of government, those safeguards do not exist for the military justice system in the same way that they do in federal and state civilian practice.[120] Consequently, in the military it falls to the CAAF, in a way that is different than its Article III counterparts, to reinforce the structure that safeguards an accused's constitutional rights at a court-martial, especially when dealing with a prosecutor's improper argument.

"The job of a prosecutor is to do justice; the structure in which the prosecutor works should, at a minimum, enable and encourage ethical behavior in

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[119] *Ortiz*, 138 S. Ct. at 2176.

[120] For example, this Court has reasoned that the structure of the military's judiciary complies with due process, citing two notable aspects: (1) the "entire system" is "overseen" by the CAAF, and (2) Congress "achieved an acceptable balance between independence and accountability" when it placed "judges under the control of Judge Advocates General, who have no interest in the outcome of a particular court-martial." *Weiss v. United States*, 510 U.S. 163, 180 (1994). The CAAF's recent decision in *Barry*, however, calls this Court's reasoning into question on the latter point. Given the "external pressure" Congress has placed on military leadership in recent years, including the Judge Advocates General, the balance that Congress struck between independence and accountability may have shifted. *See Barry*, No. 17-0162/NA, slip op. at 1-15. And to the extent that such a shift has occurred, it falls to the CAAF to exercise increased "vigilance" in a way that is different than an Article III court. *Weiss*, 510 U.S. at 180.

this pursuit."[121] In the Navy, and the military generally, the structure that once guided prosecutors towards justice is starting to cave under the weight of outside pressure to produce sexual assault convictions. As a result, the need for the CAAF to act as a safeguard is great, and absent this Court's review of QMSA Andrews' case, this structure may begin to crumble.

When combined with the pressure on military prosecutors to produce convictions in sexual assault cases, the CAAF's decision in QMSA Andrews' case will do more to foster a military justice environment that permits improper argument rather than deters it. Such a result is troubling, especially when the military justice system relies on the CAAF to exercise vigilance, and the CAAF has a tool at its disposal that it could use—the harmless error standard. It applies this standard to other errors that undermine a servicemember's ability to receive a fair trial,[122] and

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[121] David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 245 (2011).

[122] As recently as September 2018, the CAAF reaffirmed that the harmless error standard is applicable in situations where "unlawfully influencing a court-martial raises constitutional due process concerns . . . [that] undermine[] an accused's right to a fair trial." *United States v. Jerkins*, 77 M.J. 225, 228-29 (C.A.A.F. 2018). Citing *Chapman*, the CAAF reiterated that where such an error exists, before it could be "held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Jerkins*, 77 M.J. at 229 (quoting *United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007); *Chapman*, 386 U.S. at 24) (internal quotation marks omitted)).

there is nothing preventing the CAAF from taking the same approach here. To the contrary, this Court's precedent requires it. Accordingly, while the CAAF's decision to place the burden on QMSA Andrews to establish prejudice may represent a desire to let the Navy's professional discipline process handle issues of improper argument, doing so is short-sighted, contrary to this Court's precedent, and in need of review.

III. The CAAF's flawed decision in QMSA Andrews' case is of national importance and warrants this Court's review.

To "strike the balance" that this Court expressed concern about in *Hasting*,[123] United States courts of appeal, including the CAAF, must test an improper argument that implicates the constitutional rights of a civilian defendant or military accused for prejudice using the harmless error standard. To do otherwise fails to protect the administration of justice and shifts the balance of justice firmly in favor of prosecutors willing to "overstep the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense."[124]

Even though the military is in many ways a "specialized society separate from civilian society[,]"[125] a prosecutor's improper arguments are just as harmful to the administration of justice in military society as they are in civilian society. Yet

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[123] 461 U.S. at 509.
[124] *Berger*, 295 U.S. at 84.
[125] *Parker v. Levy*, 417 U.S. 733, 743 (1974).

when military prosecutors representing the United States decide to exploit an accused servicemember's silence at trial and present, as "evidence," "wholly fabricated"[126] pre-trial "admissions" that the accused servicemember "never made,"[127] there is not a corresponding requirement under the CAAF's current precedents for the government to show that the prosecutor's conduct was harmless beyond a reasonable doubt. The CAAF's opinion in the subject case demonstrates as much and cements a flawed precedent that will impact a significant portion of the United States' population.

As the CAAF recently held, it is not only members currently serving in the military who may face a court-martial, but also military retirees.[128] During the last term, the CAAF stated it was "firmly convinced that those in a retired status remain 'members' of the land and Naval forces who may face court-martial."[129]

Accordingly, more than two million retirees[130]—people who are living civilian lives and not serving in the military in an active duty or reserve capacity—are subject to potential military prosecution, making the CAAF's decision in QMSA Andrews' case of even greater national significance. As a result, it is increasingly important for this Court

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[126] *Andrews*, 77 M.J. at 402.
[127] *Andrews*, 2017 CCA LEXIS 283, at *20-21.
[128] *United States v. Dinger*, 76 M.J. 552, 557 (C.A.A.F. 2018).
[129] *Id.*
[130] Kristy N. Kamarck, *Military Retirement: Background and Recent Developments*, Congressional Research Service (May 10, 2018), https://fas.org/sgp/crs/misc/RL34751.pdf.

to ensure in a court-martial, where the accused will have less constitutional rights than if he or she were prosecuted in a civilian court,[131] that the government bear the burden of showing constitutional trial error is harmless beyond a reasonable doubt. And where, as here, that constitutional trial error involves a prosecutor presenting invented admissions to a court-martial panel in order to secure a sexual assault conviction, fairly allocating the prejudice burden is of even greater importance.

"[W]hen specific guarantees of the Bill of Rights are involved, this Court" will take "special care to assure that prosecutorial conduct in no way impermissibly infringes them."[132] Such care, as this Court articulated in *Chapman*, requires application of the harmless error standard to a prosecutor's improper arguments when they are of a constitutional dimension, regardless of whether that misconduct occurs in a federal trial, a state trial, or a military court-martial. Several United States courts of appeals and state courts of last resort routinely provide this special care to members of civilian society, and this Court's review is warranted to ensure military servicemembers and retirees receive the same protection from a prosecutor's improper arguments at a court-martial.

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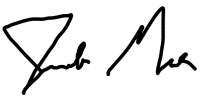
[131] For example, there is "no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen." *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing *Ex parte Quirin*, 317 U.S. 1, 39-41 (1942); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988)).

[132] *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

CONCLUSION

Accordingly, QMSA Andrews petitions for a grant of certiorari, respectfully asking this Court to either: (1) summarily vacate the judgment and remand the case to the CAAF for application of the *Chapman* harmless error standard or (2) review the case to evaluate whether the prosecution's severe misconduct was harmless beyond a reasonable doubt. While this court only conducts harmless error review "sparingly,"[133] it "plainly ha[s] the authority to do so" and can undertake its "own reading of the record."[134] For the reasons stated above, such review is warranted in QMSA Andrews' case.

Respectfully submitted,



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[133] Hasting, 461 U.S. at 510.
[134] *Id.* (quoting *Harrington v. California*, 395 U.S. 250, 254 (1969)) (internal quotation marks omitted).

10 U.S.C. § 859

Art. 59. Error of law; lesser included offense

(a) A finding or sentence of 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.

(b) Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense.

UNITED STATES,
Appellee

v.

Raiden J. ANDREWS, Quartermaster Seaman Apprentice, United States Navy,
Appellant

United States Court of Appeals for the Armed Forces

February 28, 2018, Argued;

May 22, 2018, Decided

No. 17-0480

Prior History: [**1] Crim. App. No. 201600208. Military Judge: Heather D. Partridge. *United States v. Andrews*, 2017 CCA LEXIS 283 (N-M. Ct. Crim. App. Apr. 27, 2017).

Counsel: For Appellant: Lieutenant Commander Jacob E. Meusch, JAGC, USN (argued); Rebecca Snyder, Esq.

For Appellee: Captain Sean M. Monks, USMC (argued); Colonel Valerie C. Danyluk, USMC, Major Kelli A. O'Neil, USMC, and Brian K. Keller, Esq. (on brief).

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

Opinion by: SPARKS

Judge SPARKS delivered the opinion of the Court.

A panel with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2012). The panel acquitted Appellant of two other specifications of sexual assault. Appellant was also convicted, pursuant to his pleas, of unauthorized absence, fleeing from apprehension, false official statement, use of marijuana, and larceny in violation of Articles 86, 95, 107, 112a, and 121, UCMJ, 10 U.S.C. §§ 886, 895, 907, 912a, 921 (2012).

The members sentenced Appellant to reduction to E-1, thirty-six months of confinement, forfeitures of $1,616.00 per [**2] month for thirty-six months, and a dishonorable discharge. The convening authority changed the forfeiture amount to $1,566.90,[1] but approved the rest of the sentence as adjudged. The United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence, holding portions of trial counsel's final argument contained severe, but non-prejudicial prosecutorial misconduct. *United States v. Andrews*, No. NMCCA 201600208, [*397] 2017 CCA LEXIS 283, at *31, 2017 WL 1506072, at *13 (N-M. Ct. Crim. App. Apr. 27,

[1] A sentence to forfeitures must "state the exact amount in whole dollars to be forfeited." Rule for Courts-Martial (R.C.M.) 1003(b)(2). This aspect of the sentence should be corrected to a whole dollar amount.

2017). We granted review to determine whether the lower court erred.[2]

In its brief, the Government argued the lower court erred when it applied our precedent to review prosecutorial misconduct for plain error, contending the lower court should have held Appellant waived appellate review of prosecutorial misconduct when his defense counsel failed to object at trial.

We hold: (1) the lower court was correct to review for plain error, and (2) trial counsel's statements amounted to plain, obvious error, but there was no material prejudice to Appellant's substantial rights.

Background

In May 2014, Appellant attended a party hosted by Petty Officer (PO) Eric Krueger and his then wife, Rose Wade. PO Jake Hills, PO Alejandro Garcia, PO Joshua Jones, his wife—Sarah Garza—and AB—Ms. [**3] Wade's civilian friend—also attended the party.

The party began with drinks at the beach, where AB drank two Mike's Hard Lemonades. Appellant told Naval Criminal Investigative Service (NCIS) he and PO Krueger joked about Appellant potentially "get[ting] lucky with AB." PO Krueger, however, testified he told Appellant not to "hook up"

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[2] The specific granted issue is, "The lower court found severe prosecutorial misconduct. Then it affirmed the findings and sentence, giving its imprimatur to the prosecutorial misconduct in Appellant's case. Did the lower court err?"

with AB after Appellant asked about sleeping with her. PO Krueger told Appellant AB had recently had sex with PO Hills.

The party moved to PO Krueger's house. AB testified she arrived at the house with both her own alcohol and a change of clothing, intending to sleep over. PO Krueger and Ms. Wade testified AB arrived with ingredients to prepare mixed drinks. They both testified AB drank her prepared mixed drinks all night. AB, however, never reported drinking any mixed drinks. She told NCIS she had eight drinks on the night of the party, but testified at trial that she had about fifteen drinks, including Redd's Apple Ale, beer, and more Mike's Hard Lemonade. Ms. Wade testified AB drank three quarters of a two-liter bottle of the mixed drinks AB reportedly brought to the party, and said she had never seen AB so drunk. She said AB was "[p]retty intoxicated.... [**4] stumbling, slurring words, [and was] trying to use the wall to stand up." PO Krueger testified AB was drinking beers, had "more than three" of her mixed drinks, and was getting "drunk pretty fast." Ms. Garza described AB as "trashed," said she was stumbling, had poor balance, and was not responsive. PO Jones testified AB appeared intoxicated, was slurring her speech and swaying back and forth, and did not seem sober. He said AB appeared to become more intoxicated as the night wore on and, by midnight, AB was slouched on the couch and was barely coherent. By the end of the night AB felt "very numb," could not feel her limbs, and had to crawl against the wall to support herself.

Appellant and AB had only three brief interactions before the party ended, one of which

involved Appellant asking AB whether she was going to finish her drink.[3] PO Krueger witnessed at least one of these interactions and described AB as "standoffish."

Appellant watched Ms. Wade help AB to her spare bedroom to sleep, and told NCIS AB was drunk when she went to bed. Once in the spare room AB undressed to her underwear and a tank top, plugged her phone in, got into bed, and then immediately "pass[ed] out." Ms. Wade [**5] left the room once she believed AB was asleep.

The party ended around 12:30 a.m. PO Krueger told Appellant not to sleep in the spare room—with AB—after Appellant asked if he could. When Ms. Wade saw Appellant try to enter the spare bedroom she said "[d]o not go in there ... you are on the couch." After seeing Appellant get on the couch and cover himself with blankets, Ms. Wade retreated to her own bedroom.

Appellant and AB offered drastically different accounts of what happened next. AB testified she awoke to pressure on her hips [*398] and upper thighs. She said she was "startled ... awake" by the weight, could see from the light outside someone was on top of her, and realized immediately it was Appellant. AB said she yelled stop three times, pushed Appellant off of her, and then passed out again. AB testified she was unsure whether Appellant penetrated her vulva with his penis, but denied consenting to any sexual activity with Appellant and

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[3] Rather than responding orally, AB finished her drink.

said she would not have consented had she been awake.

Appellant told NCIS he entered the spare room hoping to "get lucky" and became sexually aroused at the thought of having sex with AB. Appellant said he and AB lay in bed together for ten to fifteen minutes—neither [**6] kissing nor having any physical interaction—before they began having sex. Appellant initially told NCIS AB was awake when he entered the spare room and said she vomited before orally consenting to having sex and undressing herself.[4] He told NCIS he "didn't care" AB had just vomited. Appellant said AB was responsive during their intercourse and moaned and scratched his back.[5] Appellant said AB touched his hair and then told him to stop, at which point he immediately complied.

Around 4:00 a.m., AB fled the spare room and awoke PO Krueger and Ms. Wade. Both PO Krueger and Ms. Wade testified AB was crying and said she had been assaulted. AB threw up again before falling back asleep in Ms. Wade's room.

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[4] Appellant maintained his assertion that AB was awake when he entered the room both during a wired conversation with PO Krueger and throughout most of his NCIS interrogation. After NCIS pressed Appellant, he admitted it was possible AB was asleep or passed out.

[5] PO Krueger corroborated the presence of scratches on Appellant's back.

Discussion

I. Prosecutorial Misconduct

A. The Proper Standard of Review

The following is well established in our case law. We review prosecutorial misconduct and improper argument de novo. *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017). If proper objection is made, we review for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing Article 59, UCMJ, 10 U.S.C. § 859 (2000)). If no objection is made, we hold the appellant has forfeited his right to appeal and review for plain error.[6] *Id.; Sewell*, 76 M.J. at 18. The burden of proof under plain error review is on the appellant. *Sewell*, 76 M.J. at 18.

The [**7] Government relies on *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017), to argue we should depart from precedent and interpret R.C.M. 919(c) to say a defense counsel's mere failure to timely object to improper argument constitutes waiver. The Government's position is consistent with a series of Army Court of Criminal Appeals' decisions holding that R.C.M. 919(c) is a waiver provision. *See, e.g., United States v. Kelly*, 76 M.J. 793 (A. Ct. Crim. App. 2017); *United States v. Sanchez*, No. ARMY 20140735, 2017 CCA LEXIS 470, 2017 WL 3037442 (A. Ct. Crim. App. July 17, 2017); *United States v. Burris*, No. ARMY 20150047, 2017 CCA LEXIS 315,

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[6] We first considered R.C.M. 919(c) a forfeiture provision in *United States v. Burks*, in which we conflated the terms "waiver" and "plain error." 36 M.J. 447, 452 n.3 (C.M.A. 1993).

2017 WL 1946326 (A. Ct. Crim. App. May 8, 2017); *United States v. Marcum*, No. ARMY 20150500, 2017 CCA LEXIS 312, 2017 WL 1857232 (A. Ct. Crim. App. May 5, 2017).[7]

"Deviation from a legal rule is 'error' unless the rule has been waived." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (internal quotation marks omitted) (citation omitted). "While this Court reviews forfeited issues for plain error, we do not review waived issues because a valid waiver [*399] leaves no error to correct on appeal." *Ahern*, 76 M.J. at 197 (citations omitted).

Affirming the lower court's application of waiver would require us to overturn *Fletcher* and its progeny. Under the doctrine of stare decisis, we decline to do so.

> Stare decisis is defined as [t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation. The doctrine encompasses at least two distinct

[7] In *United States v. Motsenbocker*, the United States Navy-Marine Corps Court of Criminal Appeals abided by our precedent and applied forfeiture to un-objected to prosecutorial misconduct. No. NMCCA 201600285, 2017 CCA LEXIS 539, 2017 WL 4640030 (N-M. Ct. Crim. App. Oct. 17, 2017). The *Motsenbocker* court followed the correct approach. *See United States v. Davis*, 76 M.J. 224, 228 n.2 (C.A.A.F. 2017) (explaining "the services courts of criminal appeals must adhere to this Court's precedent even when they believe that subsequent decisions call earlier decisions into question" (citation omitted)).

> concepts ... : (1) "an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself" (horizontal [**8] stare decisis); and (2) courts "must strictly follow the decisions handed down by higher courts" (vertical stare decisis).

United States v. Quick, 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J., joined by Ohlson, J., dissenting) (brackets in original) (citations omitted).

"[A]dherence to precedent is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. Blanks*, 77 M.J. 239, 242 (C.A.A.F. 2018)(internal quotation marks omitted) (quoting *United States v. Sills*, 56 M.J. 239, 241 (C.A.A.F. 2002) (per curiam)). We will not overturn "precedent ... [that] has been treated as authoritative for a long time .... unless the most cogent reasons and inescapable logic require it." 20 Am. Jur. 2d *Courts* § 127, Westlaw (database updated May 2018) (footnotes omitted). Stare decisis is "most compelling where courts undertake statutory construction," as we are here. *United States v. Rorie*, 58 M.J. 399, 406 (C.A.A.F. 2003) (citations omitted). The party requesting that we overturn precedent bears "a substantial burden of persuasion." 20 Am. Jur. 2d, *supra*, § 127.

Applying stare decisis is, however, "not an inexorable command." *Blanks*, 77 M.J. at

242 (internal quotation marks omitted) (quoting *United States v. Falcon*, 65 M.J. 386, 390 (C.A.A.F. 2008)). We are not bound by precedent where "there has been a significant change in circumstances [**9] after the adoption of a legal rule, or an error in legal analysis," and we are "willing to depart from precedent when it is necessary to vindicate plain, obvious principles of law and remedy continued injustice." 20 Am. Jur. 2d, *supra*, § 127.

"We consider the following factors in evaluating the application of stare decisis: whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers; and the risk of undermining public confidence in the law." *Blanks*, 77 M.J. at 242 (internal quotation marks omitted) (citation omitted). Even if these factors weigh in favor of overturning long-settled precedent, "we [still] require 'special justification,' not just an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407, 189 L. Ed. 2d 339 (2014); *see also Dickerson v. United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); *Blanks*, 77 M.J. at 242 (citations omitted); Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 Notre Dame L. Rev. 2189, 2189 (2014) ("The prudential doctrine of stare decisis is meant to ameliorate these costs by counseling judicial adherence to precedent *even in those cases where a judge believes the prior decision was wrong*." (emphasis added) (citation omitted)).

Applying each of these factors to R.C.M. 919(c) and considering general stare decisis jurisprudence, we [**10] are compelled to uphold *Fletcher* and to continue to review unobjected to prosecutorial misconduct and improper argument for plain error.

1. Whether *Fletcher* is unworkable or poorly reasoned

"Under the doctrine of *stare decisis*, the question is not whether the interpretation [at issue] is plausible; it is whether the ... decision is so unworkable or poorly reasoned that it should be overruled." *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000). In *Fletcher*, we applied forfeiture to review un-objected to prosecutorial misconduct for plain error, notwithstanding the [*400] R.C.M. 919(c) language that, "Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute *waiver* of the objection." 62 M.J. at 179 (emphasis added); R.C.M. 919(c) (emphasis added). "[C]ourts must give effect to the clear meaning of statutes as written" and questions of statutory interpretation should "begin and end ... with [statutory] text, giving each word its ordinary, contemporary, and common meaning." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010, 197 L. Ed. 2d 354 (2017) (internal quotation marks omitted) (citations omitted); *see also United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013) ("Unless the text of a statute is ambiguous, the plain language of a statute will control unless it leads to an absurd result." (internal quotation marks omitted) (citation omitted)). [**11] Thus, "[a]s a first step in statutory

construction, we are obligated to engage in a 'plain language' analysis of the relevant statute," *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017), and to "apply the common and ordinary understanding of the words in the statute." *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011).[8] Without question, R.C.M. 919(c) says "waiver" and does not mention "forfeiture."

We are, however, not convinced this acknowledgment requires us to overturn any case law. Although the United States Supreme Court has "from time to time ... overruled governing decisions that are unworkable or are badly reasoned, [it has] rarely done so on grounds not advanced by the parties" and has declined to do so where the petitioning party has failed to establish unworkability. *United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (internal quotation marks omitted) (citations omitted). The Government has only argued *Fletcher* ignored R.C.M. 919(c)'s plain language and has neither established that *Fletcher* is now unworkable nor has it advanced any argument to that effect.[9] We decline to make this argument for the

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[8] We apply these principles when we interpret the rules and other provisions in the *Manual for Courts-Martial, United States* (*MCM)* as well.

[9] While *Fletcher's* application of forfeiture remains workable, applying waiver instead of forfeiture would render much of *Fletcher's* prejudice analysis unworkable where, as here, defense counsel objected to some misconduct. In *Fletcher*, we applied three factors to determine whether prosecutorial misconduct was prejudicial, the first of which was the severity of the misconduct. 62 M.J. at 184. To determine how severe the

Government, and in any case, we find the majority of the remaining factors weigh in favor of applying stare decisis to uphold *Fletcher*.

2. Any intervening events

When a court is [**12] "clearly convinced that [precedent] ... is no longer sound because of changing conditions and that more good than harm will come by departing from precedent, [the Court is] not inexorably bound by [its] own precedents." *State v. Mauchley*, 2003 UT 10, 67 P.3d 477, 481 (Utah 2003) (first alteration in original) (internal quotation marks omitted) (citation omitted). The Government argues our decision in *Ahern* constitutes a change requiring departure from precedent. *Ahern* is distinguishable from this case in the following respects. First, while this case concerns R.C.M. 919(c), *Ahern* involved Military Rule of Evidence 304. 76 M.J. at 197. Second, issues relating to closing arguments are altogether different from the evidentiary issue in *Ahern* that arose during the pretrial stage, when defense counsel had ample opportunity to object. *Id.* at 195-98. Third, while Appellant's counsel failed to object here, Ahern's defense counsel repeatedly affirmatively waived

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misconduct was, we applied five more factors, including "(1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, [and] (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole." *Id.* Were we to hold Appellant waived the misconduct his counsel did not object to, we would have to review the one instance of objected-to misconduct in a vacuum. To do so would be unjust and illogical, as it would result in an inaccurate evaluation of the prejudicial effect of trial counsel's arguments.

objection to the evidence at issue. *Id.* at 196-98. Consequently, *Ahern* by itself is not the type of changed condition or intervening event necessitating a departure from precedent. *Cf. United States v. Boyett*, 42 M.J. 150, 155 (C.A.A.F. 1995) (explaining "significant changes in the structure [*401] and organization of the armed forces" and changes in military regulations warranted a departure from precedent); *Mauchley*, 67 P.3d at 481-86 (deciding an old evidentiary [**13] rule should be overturned where "the federal courts and a growing number of state courts" had adopted a new rule). Thus far, there have been no changes in regulation, rule, or military structure necessitating the application of waiver in this case.[10]

3. The reasonable expectations of servicemembers

We concede servicemembers have not relied on *Fletcher* in any way that would compel us to continue to interpret R.C.M. 919(c) as a forfeiture provision.

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[10] here has, however, been a change to the military justice system weighing in favor of upholding *Fletcher*. Effective January 1, 2019, R.C.M. 919(c) will read "Failure to object to improper argument before the military judge begins to instruct the members on findings shall constitute *forfeiture*of the objection." Exec. Order No. 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018) (emphasis added). While this modification has no direct impact on this case, it would be frivolous to overturn fifteen years of precedent for an eight-month period.

4. The risk of undermining public confidence in the law

Just as overturning precedent can undermine confidence in the military justice system, upholding precedent tends to bolster servicemembers' confidence in the law. *See* Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 753 (1988) ("If courts are viewed as unbound by precedent, and the law as no more than what the last Court said, considerable efforts would be expended to get control of such an institution—with judicial independence and public confidence greatly weakened."). This is especially true where, as here, the precedent involves appellate review of prosecutorial misconduct—an issue that may, on its own, undermine confidence in the military justice system. *See United States v. Olsen*, 737 F.3d 625, 632 (9th Cir. 2013) (order denying [**14] petition for rehearing en banc) (Kozinski, C.J., joined by Pregerson, J., Reinhardt, J., Thomas, J.; Watford, J., dissenting) (explaining prosecutorial misconduct "erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law").

5. Whether any special justification weighs in favor of overturning *Fletcher*

Finally, the Government advances no "special justification" requiring us to depart from precedent, nor can we conceive of one. Overturning *Fletcher* to hold un-objected to improper argument must be waived absent a special justification would allow this form of prosecutorial misconduct to persist, largely

unchecked, and would thus risk egregious harm to our justice system. *Cf. Payne v. Tennessee*, 501 U.S. 808, 834, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (Scalia, J., joined as to Part II by O'Connor, J., and Kennedy, J., concurring) (arguing a special justification should *not* be required to overturn precedent that "significantly harms our criminal justice system and is egregiously wrong") (emphasis added)).

In any case, given that the Government failed to provide a special justification or advance any argument beyond *Fletcher* wrongly interpreting R.C.M. 919(c), and that four of the five above factors weigh in favor of upholding [**15] *Fletcher*, we conclude that Appellant forfeited his challenge to trial counsel's improper argument.

B. Plain Error

"Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Fletcher*, 62 M.J. at 179 (citations omitted).

Appellant's defense counsel only objected to one instance of misconduct. Technically we review that instance of misconduct as preserved error, while we review the remainder of the asserted improper argument for plain error. Both standards, however, culminate with an analysis of whether there was prejudicial error. *See Sewell*, 76 M.J. at 18 ("In either case, reversal is warranted only 'when the trial counsel's comments taken as a whole were so damaging that we cannot be confident that the members convicted the appellant [*402] on the basis

of the evidence alone.'" (quoting *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014))).

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Fletcher*, 62 M.J. at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of [**16] some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citation omitted). Prosecutors have a "duty to refrain from improper methods calculated to produce a wrongful conviction." *Berger*, 295 U.S. at 88. "While prosecutorial misconduct does not automatically require a new trial or the dismissal of the charges against the accused, relief will be granted if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice).'" *Fletcher*, 62 M.J. at 178 (quoting *Meek*, 44 M.J. at 5).

At Appellant's court-martial, trial counsel advanced a theory of the case revolving around the idea Appellant was a scheming liar who went into AB's room on the night of the party hoping she would mistake him for PO Hills and unwittingly consent to having sex with him. Appellant now contends portions of trial counsel's argument amounted to prejudicial

prosecutorial misconduct. Appellant specifically complains trial counsel:

> 1. Repeatedly and consistently made inflammatory and disparaging statements, from calling Appellant a liar more than twenty-five times to referring to him as "Don Juan";
>
> 2. Accused defense counsel of not believing Appellant's version [**17] of events;
>
> 3. Misstated the law when he analogized consenting to sex to enlisting in the Navy or having plastic surgery; and
>
> 4. Thrice quoted or referred to a wholly fabricated admission.

Before determining whether Appellant was prejudiced, we must ask whether trial counsel's arguments amounted to plain or obvious error—or whether they were improper arguments—in the first place. *See Fletcher*, 62 M.J. at 179-84(analyzing whether each instance of alleged misconduct was error). Rather than engage in a long and searching analysis of whether each complained-of statement was an improper argument, we adopt the lower court's conclusion that the prosecutorial misconduct in this case amounted to plain and obvious error. *Andrews*, 2017 CCA LEXIS 283, at *16-23, *26-27, 2017 WL 1506072, at *7-9, *11.

II. Prejudice

"[I]t is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." *Meek*, 44 M.J. at 6. "In assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184 (citation omitted). We weigh three factors to determine whether trial counsel's improper arguments were prejudicial: "(1) the severity of the misconduct, [**18] (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* "[T]he third factor [alone] may so clearly favor the government that the appellant cannot demonstrate prejudice." *Sewell*, 76 M.J. at 18. Again, we agree with the lower court that there was severe prosecutorial misconduct, and we too conclude the weight of the evidence favors the Government such that Appellant cannot establish prejudice.

In *Fletcher*, we applied five factors to determine how severe the prosecutorial misconduct was. 62 M.J. at 184. Applying those factors to the instant case, we find trial counsel's misconduct was severe because: (1) it occurred with alarming frequency; (2) it persisted throughout the entirety of trial counsel's closing argument, including through the rebuttal; (3) the entire trial was five days long and the trial on the merits lasted for only three days; (4) the panel deliberated for less than three hours before convicting Appellant; [*403] and (5) the military judge issued

just one ruling for trial counsel to abide by and trial counsel failed to do so. All five factors indicate the misconduct was severe.

Next, the military judge's failure to offer any specific, timely curative instructions [**19] also weighs in favor of finding prejudice. When defense counsel requested an instruction as an alternative to moving for a mistrial, the military judge seemed to agree there was error, but declined to take any curative action. The only instructions she gave were standard Military Judges' Benchbook instructions and were given after the close of trial, before deliberation.

Although the first two factors weigh in Appellant's favor, the evidence "so clearly favor[s] the government that [Appellant] cannot demonstrate prejudice." *Sewell*, 76 M.J. at 18. In *Hornback*, we held the third factor was dispositive where two witnesses testified they watched the appellant commit the crime charged. 73 M.J. at 161. In *Sewell*, we held the third factor to be dispositive where the appellant admitted to being at the scene of the crime in "compromising circumstances." 76 M.J. at 19. In this case, as in *Hornback* and *Sewell*, there were multiple corroborating witnesses and Appellant admitted to being at the party in bed with AB.

To have convicted Appellant of sexual assault under Article 120(b)(3), UCMJ, the panel must have found: (1) Appellant committed a sexual act upon AB by penetrating her vulva with his penis while (2) AB was too intoxicated to consent, [**20] and (3) Appellant "knew *or reasonably should have*

known" AB was too intoxicated to consent. *MCM* pt. IV, para. 45.b.(3)(f) (2016 ed.) (emphasis added).

Regardless of trial counsel's improper arguments, there was ample evidence in support of all three elements. First, during his recorded interrogation, Appellant told NCIS he had sex with AB and discussed the intercourse with PO Krueger while PO Krueger was wearing a wire for NCIS. Defense counsel also conceded as much at trial when he argued that AB consented to the sex because she thought Appellant was PO Hills. Second, there was no dispute at trial that AB was drinking and was intoxicated. Although there was some discrepancy as to what and exactly how much AB drank, she, along with almost every other party attendee, testified she was drinking heavily and consistently all night, and Appellant told NCIS AB was drunk. There was compelling evidence, in addition to the sheer amount of liquor AB consumed, that she was too drunk to be capable of consent. Namely, AB was so drunk she lost consciousness, could not physically support herself, lost feeling in her limbs, and vomited at least twice. Finally, Appellant either knew or, at least *reasonably [**21] should have known*, AB was incapable of consenting. Everyone else at the party knew AB was extremely intoxicated—they described her as "trashed" and "incoherent," and said she was slurring her words and could not stand up. Appellant was at the party with AB all day. He watched Ms. Wade help AB to the spare room. He ignored PO Krueger and Ms. Wade's instructions not to enter the spare bedroom. He lay next to AB for fifteen minutes before they had intercourse, during which time AB was largely if not wholly unresponsive. He watched

AB vomit in the bed before they had sex. Appellant met AB on the day of the assault and they barely interacted at the party. Appellant had every reason to suspect AB was too intoxicated to consent and no reason to believe AB would knowingly consent to having sex with him.

Accordingly, we conclude the evidence against Appellant was so strong we are "confident that the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184. There was, therefore, no prejudice to Appellant's substantial rights.

Despite our finding of no prejudice, the prosecutorial conduct in this case raises concerns we feel compelled to address. We remind all military judges of their [**22] "*sua sponte* duty to insure [sic] that an accused receives a fair trial." *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999) (internal quotation marks omitted) (citation omitted); *see also United States v. Knickerbocker*, 25 C.M.A. 346, 2 M.J. 128, 129, 54 C.M.R. 1072 (C.M.A. 1977) ("At the very least, the judge should have interrupted the trial counsel before he ran the full course of his impermissible argument."). Military [*404] judges are neither "mere figurehead[s]" nor are they "umpire[s] in a contest between the Government and accused." *Watt*, 50 M.J. at 105 (internal quotation marks omitted) (quoting *United States v. Kimble*, 23 C.M.A. 251, 253, 49 C.M.R. 384, 386 (1974)). Nor can a defense counsel sit like a bump on a log—he or she owes a duty to the client to object to improper arguments early and often. *See DeFreitas v. State*, 701 So.2d 593, 602 (Fla. Dist. Ct. App. 1997) (explaining

the court is unlikely to "excuse counsel for his failure" to object because a defense counsel "has the duty to remain alert to such things in fulfilling his responsibility to see that his client receives a fair trial"). Failure to do so may give rise to meritorious ineffective assistance of counsel claims. *See* F. Emmit Fitzpatrick & NiaLena Caravasos, *Ineffective Assistance of Counsel*, 4 Rich. J.L. & Pub. Int., 67, 81 (2000) (listing federal cases in which the circuit courts found ineffective assistance of counsel for failure to object (citing *Williams v. Washington*, 59 F.3d 673, 684 (7th Cir. 1995); *Henry v. Scully*, 78 F.3d 51, 52-53 (2d Cir. 1996); *Bolander v. Iowa*, 978 F.2d 1079, 1083-84 (8th Cir. 1992); *Crotts v. Smith*, 73 F.3d 861, 867 (9th Cir. 1996); *Atkins v. Attorney General of Alabama*, 932 F.2d 1430, 1432 (11th Cir. 1991); and *Mason v. Scully*, 16 F.3d 38, 45 (2d Cir. 1994))). Finally, we remind trial counsel they [**23] are:

> 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. As such, [they are] in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.... It is as much [their] duty to refrain from improper methods calculated to produce a wrongful

> conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88. Every attorney in a court-martial has a duty to uphold the integrity of the military justice system.

Judgment

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed as to the findings and only so much of the sentence as provides for confinement for thirty-six months, reduction to pay grade E-1, forfeiture of $1,566.00 pay per month for thirty-six months, and a dishonorable discharge.

UNITED STATES OF AMERICA
Appellee

v.

RAIDEN J. ANDREWS,
Quartermaster Seaman Apprentice (E-2), U.S. Navy
Appellant

United States Navy-Marine Corps

Court of Criminal Appeals

April 27, 2017, Decidedcca

NMCCA 201600208

Reporter
2017 CCA LEXIS 283 *

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: [*1] Appeal from the United States Navy-Marine Corps Trial Judiciary. Sentence Adjudged: 3 October 2014. Military Judge: Commander Heather D. Partridge, JAGC, USN. Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, A. Staff Judge Advocate's Recommendation: Captain Andrew R. House, JAGC, USN.

Counsel: For Appellant: Lieutenant Jacob E. Meusch, JAGC, USN.

For Appellee: Lieutenant James M. Belforti, JAGC, USN; Lieutenant Robert J. Miller, JAGC, USN.

Judges: Before GLASER-ALLEN, CAMPBELL, and HUTCHISON, Appellate Military Judges.

Opinion by: HUTCHISON

OPINION OF THE COURT

HUTCHISON, Judge:

In a mixed-plea general court-martial, a military judge convicted the appellant, pursuant to his pleas, of unauthorized absence, flight from apprehension, making a false official statement, wrongful use of marijuana, and larceny, in violation of Articles 86, 95, 107, 112a, and 121, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 895, 907, 912a, and 921. Contrary to his pleas, a panel of members convicted the appellant of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920.[1] The members sentenced the appellant to 36 months' confinement, reduction to pay grade E 1, forfeiture of $1,616.00 pay per month for 36 months, and a dishonorable discharge. [*2] The convening authority approved forfeitures of only $1,566.90 pay per month for 36 months and the remainder of the sentence, as adjudged.

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[1] The members acquitted the appellant of two specifications of sexual assault, charged for exigencies of proof.

We address in detail three of the assignments of error (AOEs)[2] raised by the appellant: (1) factually insufficient evidence supports the sexual assault conviction; (2) the trial counsel (TC)[3] committed prosecutorial misconduct by repeatedly making objectionable arguments during closing arguments; and (3) exclusion of evidence of the appellant's intoxication deprived him of his constitutional right to present a defense. Having carefully considered the record of trial, the parties' submissions, and oral argument on the second AOE, we conclude the findings and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

I. BACKGROUND

On or about 10 May 2014, Petty Officer K invited the appellant, Petty Officer H, and Petty Officer G—all members of USS SAN JACINTO (CG 56)—to a party he and his wife, Ms. RW, hosted on a

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[2] In accordance with *United States v. McClour*, 76 M.J. 23 (C.A.A.F. 2017), we summarily reject the appellant's fourth AOE—that it was plain error for the military judge to instruct the members that "If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him guilty." *United States v. Clifton*, 35 M.J. 79 (C.M.A. 1992).

[3] Though the assistant trial counsel made most of the arguments which the appellant alleges as error, we attribute all prosecution arguments discussed in this opinion to the "trial counsel" as a collective term—to emphasize the supervisory and subordinate trial team members' shared responsibility to ensure that the prosecution collectively abides by the rules of professional responsibility and those established in case law.

beach in Norfolk, Virginia.[4] Ms. AB, a friend of Ms. RW, also attended. That afternoon at the beach, the Navy members drank alcohol and Petty Officer K recalls [*3] the appellant asking about "hook[ing] up" with Ms. AB.[5] Petty Officer K replied this "wasn't a good idea," because Ms. AB previously had sex with Petty Officer H.[6] The appellant claimed, however, in his statement to the Naval Criminal Investigative Service (NCIS) that Petty Officer K had also joked about the appellant "get[ting] lucky" with Ms. AB.[7] The party eventually moved to Petty Officer K's house, where Ms. AB arrived with a change of clothing so she could stay the night after the party.

Testimony diverged concerning what type of alcohol and how much Ms. AB drank at the party. Ms. AB told NCIS investigators that she consumed eight drinks over the course of the night. At trial, Ms. AB recalled consuming approximately 15 drinks, specifically "some Red[d's] Apple Ale in a bottle," Mike's Hard Lemonade, and beer.[8] Ms. RW and Petty Officer K also recalled Ms. AB making a cocktail consisting of "liquor and juice" called a "Pink Panty Dropper," and that she drank at least three of these cocktails.[9] However, Ms. AB never mentioned, at trial or to NCIS, that she ever drank any such cocktail.

Petty Officer J and his wife, Ms. SG, arrived at the party around 2100. They saw Ms. AB dancing with

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[4] By the time of trial, Ms. RW and Petty Officer K had divorced.
[5] Record at 366.
[6] *Id.*
[7] Prosecution Exhibit (PE) 5 at 1.
[8] Record at 410-11.
[9] *Id.* at 334, 367.

Petty Officers [*4] K and H, and hugging Petty Officers H and G. Others saw her kiss Petty Officer H. However, no one at the party testified to ever seeing Ms. AB dance with the appellant, or even talk to him at all. The appellant tried to talk to Ms. AB on three occasions, once asking her if she was going to finish her beer. Petty Officer K testified that Ms. AB was being "standoffish" towards the appellant.[10]

To Petty Officer J, Ms. AB "didn't seem . . . sober"—she was "slurring her speech," and was unbalanced, "swaying back and forth while trying to stand still."[11] Petty Officer J noted that as Ms. AB kept drinking, her level of intoxication "rose," and her "movements became more exaggerated[.]"[12] By the time Petty Officer J and Ms. SG left at midnight, Ms. AB was "[r]eally drunk"—she was "[s]louched on the couch, barely coherent[,]" and "[e]xtremely intoxicated."[13] Petty Officer J observed that Ms. AB was still talking to others at the party, but it would take her "10 to 15 seconds" to respond to a normal question.[14] Ms. SG noted that Ms. AB "tr[ied] to pass out on the couch," and was "very not responsive to everyone else . . . trying to help her."[15] While the appellant was nearby on another couch in the living room, Ms. RW guided Ms. AB to the [*5] bathroom because Ms. AB was having difficulty walking, and

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[10] *Id.* at 368.
[11] *Id.* at 311.
[12] *Id.* at 312.
[13] *Id.* at 312-13, 315.
[14] *Id.* at 314.
[15] *Id.* at 323.

was feeling "very numb" and "out of body," like she had "never felt before."[16]

Ms. RW then assisted Ms. AB to the spare bedroom. The appellant thought Ms. AB was drunk when he saw her going to the bedroom.[17] Ms. AB recalls "craw[ling] against the wall in order to get to the room" and leaning up to twist the door handle.[18] Ms. AB undressed, removing all her clothes except a tank top and bikini underwear. Ms. AB recalls plugging her iPhone into the wall, then getting into the bed and "passing out as soon as [her] head hit the pillow[.]"[19] When Ms. AB "seemed to be going to sleep," Ms. RW turned off the lights, shut the door, and went downstairs back to the party.[20]

After the party ended at approximately 0030, Ms. RW walked back to her room and saw the appellant trying to enter the spare bedroom, where Ms. AB had just gone to bed. Ms. RW told him "[n]o," and recalled the appellant protesting that he "just wanted to sleep in a bed."[21] Ms. RW reiterated, "[d]o not go in there . . . you are on the couch."[22] After the appellant got on the couch, covered up, and said he

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[16] *Id.* at 411-12.
[17] PE 4; Appellate Exhibit (AE) XXXIX at 24-25 ("[NCIS Agent]: Okay. And you remember seeing [Ms. AB] going back to the bedroom? [The appellant]: Yes. [NCIS Agent]: How was she? [The appellant]: Drunk.").
[18] Record at 412.
[19] *Id.* at 413.
[20] *Id.* at 337-38.
[21] *Id.* at 338.
[22] *Id.*

was going to sleep, Ms. RW went upstairs to her own bedroom.

Ms. AB's next memory was waking up [*6] "to a pressure on [her] hip bone area" and "upper thighs."[23] From the light outside the door, she realized that the appellant was on top of her. She "yelled . . . 'stop' three times" and "pushed him off[.]"[24] Ms. AB denied consenting to the appellant having sex with her, though she did not know whether the appellant actually penetrated her vulva with his penis.

After pushing the appellant off of her, Ms. AB ran into the master bedroom, waking up Petty Officer K and Ms. RW. They both recall that Ms. AB was "really shaken up and crying," and that she said she had been assaulted by the "new guy."[25] Ms. RW recalled Ms. AB wearing the same clothing as when she went to bed (a tank top and bikini underwear), while Petty Officer K recalled Ms. AB not wearing any underwear (as did Ms. AB herself) when she ran into the room. Ms. AB then stumbled to the bathroom, where she threw up in the toilet before falling asleep in the master bathroom.

The appellant's account of the sexual encounter to NCIS is markedly different. He told NCIS agents that he walked into the guest bedroom and lay in the bed next to a fully-clothed Ms. AB for 15 minutes without kissing or touching her. The appellant recognized that [*7] Ms. AB was asleep. Then, Petty Officer K opened the door, looked into the room, and

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[23] *Id.* at 413.
[24] *Id.* at 414.
[25] *Id.* at 339, 370, 415.

left. The appellant claims that he asked Ms. AB if they could have sex, to which she "said nothing at first," then "thru [sic] up," at which point he asked for sex again.[26] When she said "yes," the appellant responded, "awesome."[27] Ms. AB then took off her pants, and the appellant pulled his pants down. The appellant told NCIS that he "didn't care" about the fact Ms. AB had just vomited.[28] They had sex in the missionary position with no condom and without first kissing or engaging in any foreplay. The appellant claims Ms. AB moaned, put her arms around him, scratched his lower back, pulled his hair, and only then said "stop"—at which point he moved to the other side of the bed.

Petty Officer K corroborated the appellant's assertion that he was scratched by Ms. AB. He testified that he stopped the appellant as the appellant "bolt[ed] out of the guest bedroom"[29] and noticed fresh "vertical scratches" on the appellant's "mid to lower back."[30]

A. Factual sufficiency of the evidence

We review questions of factual sufficiency *de novo*. Art. 66(c), UCMJ; *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence [*8] in the record of trial and making allowances for not having personally observed the witnesses," we are convinced of the accused's guilt

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[26] PE 4; AE XXXIX at 20; PE 5 at 1; Record at 507-08.
[27] PE 4; AE XXXIX at 35.
[28] PE 4; AE XXXIX at 20; PE 5 at 1.
[29] Record at 371.
[30] *Id.* at 371, 373, 397.

beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

In order to find the appellant guilty, we must be convinced beyond reasonable doubt that the appellant "kn[ew], or reasonably should have known" that Ms. AB was "incapable of consenting"—that she "'lack[ed] the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make [or] communicate a decision about whether [she] agreed to the conduct.'" *United States v. Solis*, 75 M.J. 759, 763-764 (N-M. Ct. Crim. App. 2016) (quoting *United States v. Pease*, 74 M.J. 763, 770, *aff'd*, 75 M.J. 180 (C.A.A.F. 2016) (second alteration in original)), *aff'd*, 76 M.J. 127, 2017 CAAF LEXIS 98 (C.A.A.F. Feb. 13, 2017).

After reviewing the entire record, we are convinced of every element of sexual assault beyond a reasonable doubt and find that the appellant's sexual assault conviction is factually sufficient. Ms. AB's testimony was persuasive, and her level of intoxication was substantially documented by the other witnesses. The appellant himself corroborates Ms. AB's level of impairment, admitting to NCIS that Ms. AB was "drunk" when she went to bed and that she was possibly asleep or passed out before he had sex with her.[31]

The appellant avers that even if Ms. AB was incapable of consenting [*9] to the sexual act because of her impairment, he was reasonably mistaken as to that level of impairment. This argument, however, is

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[31] PE 4; AE XXXIX at 25-26; PE 5 at 2.

unpersuasive. Any such belief was manifestly unreasonable given Ms. AB's lack of any meaningful interaction with him throughout the day and the appellant's admitted knowledge of Ms. AB's level of intoxication—as evidenced by the appellant's statements to NCIS that Ms. AB was "drunk" and that she vomited in the bed immediately preceding his having sex with her. These facts, coupled with Petty Officer K's testimony that he observed the appellant "bolting" out of the bedroom, all point to the appellant's subjective awareness that Ms. AB was incapable of consenting.

Consequently, we are convinced that, at the time of the sexual act, Ms. AB was incapable of consenting due to her impairment by alcohol—that is, she "'lack[ed] the cognitive ability to appreciate the sexual conduct,"' *id.*—and the appellant reasonably knew or should have known she was so impaired.

B. Allegations of prosecutorial misconduct

1. Legal error

The appellant alleges that the TC committed prosecutorial misconduct during closing arguments, when, (1) he "repeatedly called [the appellant] a liar" and "made [*10] inflammatory arguments"; (2) "invented admissions" of guilt by the appellant; (3) accused the trial "defense counsel of not believing" the appellant; (4) "improperly placed the 'prestige' of the Government behind the credibility of [Ms. AB's] statements"; and (5) "misstated the law."[32] The

[32] Appellant's Brief of 5 Dec 2016 at 27, 32 (internal citation omitted).

civilian defense counsel did not contemporaneously object to any of the aforementioned arguments.

"Prosecutorial misconduct occurs when trial counsel 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." *United States v. Hornback*, 73 M.J. 155, 159-60 (C.A.A.F. 2014) (citations and internal quotation marks omitted). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1, 7-11, 105 S. Ct. 1038, 84 L. Ed. 2d 1 (1985)). Prosecutorial misconduct in the form of improper argument is a question of law we review *de novo*. *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (citing *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011)). In determining whether an argument is improper, we consider whether "[t]he improper comments in this case were" or "were not isolated" incidents. [*11] *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005). Indeed, "the argument by a trial counsel must be viewed within the context of the entire court-martial," and as a result, "our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v.*

Baer, 53 M.J. 235, 237 (C.A.A.F. 2000) (quoting *Young*, 470 U.S. at 16) (additional citation omitted).

When a proper objection to a comment is made at trial, we review for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing Art. 59, UCMJ). When there is no objection, however, the trial defense counsel forfeits the issue, and we review for plain error. *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) (citing *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004)). To show plain error, the appellant must persuade this court that: "'(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *United States v. Tunstall*, 72 M.J. 191, 193-94 (C.A.A.F. 2013) (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)). The plain error doctrine is "to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Causey*, 37 M.J. 308, 311 (C.M.A. 1993) (citations and internal quotation marks omitted).

Here, we find plain or obvious error in some, but not all, of the challenged aspects of TC's argument, and that the error did not materially prejudice a substantial right of the appellant.

a. Calling the appellant a liar and inflammatory arguments

It is a basic rule of our profession that a "prosecutor [*12] should not make arguments

calculated to appeal to improper prejudices of the trier of fact. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty." ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-6.8(c) (4th ed. 2015) [hereinafter ABA].[33] Accordingly, the Court of Appeals for the Armed Forces (CAAF) has cautioned that "calling the accused a liar is a dangerous practice that should be avoided." *Fletcher*, 62 M.J. at 182(citation and internal quotation marks omitted). TC are expected to "comment on . . . conflicting testimony" in closing argument without using "language that [i]s more of a personal attack on the defendant than a commentary on the evidence." *Id.*, at 183. *See also United States v. Knickerbocker*, 25 C.M.A. 346, 2 M.J. 128, 129-30, 54 C.M.R. 1072 (C.M.A. 1977) (finding plain error in TC calling Knickerbocker's testimony "incredible," a "fairy tale," and expressing a personal opinion as to his guilt.)

However, TC are allowed to "'forcefully assert reasonable inferences from the evidence.'" *United States v. Coble*, No. 201600130, 2017 CCA LEXIS 113, at *10, unpublished op. (N-M. Ct. Crim. App. 23 Feb 2017) (quoting *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008)). There is an "exceedingly fine line which distinguishes permissible advocacy from improper excess" when it comes to [*13] commenting on the credibility of a defendant. *Fletcher*, 62 M.J. at

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[33] *See* Judge Advocate General Instruction 5803.1E, Rule 3.8(e)(6) (20 Jan. 2015) ("To the extent consistent with these Rules, the ABA standards may be used to guide trial counsel in the prosecution of criminal cases.") (citations omitted).

182-83 (finding TC's comments that Fletcher's testimony "was the first lie," that he "had 'zero credibility' and that his testimony was 'utterly unbelievable'" were "not so obviously improper as to merit relief in the absence of an objection from counsel"). Thus, "[u]se of the words 'liar' and 'lie' to characterize disputed testimony when the witness's credibility is clearly in issue is ordinarily not improper unless such use is excessive or is likely to be inflammatory." *United States v. Peterson*, 808 F.2d 969, 977 (2d Cir. 1987) (citing *United States v. Williams*, 529 F. Supp. 1085, 1106-07 (E.D.N.Y. 1981) ("'Lie' is an ugly word, but it is appropriate when it fairly describes the ugly conduct it denotes.").

Accordingly, one factor in considering whether the TC's forceful commentary on the appellant's credibility is improper is whether the appellant was charged with a false official statement.[34] Here, although the appellant pleaded guilty to a violation of Article 107, UCMJ, the members were not made aware of that fact until sentencing.

Another factor is whether the TC "explained why the jury should come to th[e] conclusion" that the appellant lacks credibility, *Cristini*, 526 F.3d at 902, or whether, instead, the TC's statements were "unsupported by any rational justification other than

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[34] *See, e.g. United States v. Doctor*, 7 C.M.A. 126, 21 C.M.R. 252, 259-60 (C.M.A. 1956) (finding no error where TC "called the accused a psychopathic liar and a schemer who would falsify to anyone" and referred to Doctor as a liar "some twenty times," because "[w]hen the making of a false official statement is the offense to be proven and there are facts to support the charge, trial counsel is within the limits of reasonable persuasion if he calls the defendant a liar").

an assumption [*14] that [the appellant] was guilty," and "not coupled with a more detailed analysis of the evidence adduced at trial[.]" *Hodge v. Hurley*, 426 F.3d 368, 378 (6th Cir. 2005). Such unsupported statements by the TC, devoid of any detailed analysis, are improper because they "convey an impression to the jury that they should simply trust the [government's] judgment" that the accused is guilty because the TC "knows something [the jury] do[es] not." *Id.*

In a closing argument that covered over 31 pages of transcribed text, the TC used the words "liar" and "lying" to describe the appellant, or stated the appellant told a "lie" or "lies", on 11 pages, some 25 times in total.[35] The TC also repeatedly referred to the appellant's NCIS statement as "fanciful,"[36] a "fake fantasy world,"[37] and "imaginary world."[38] At times, the TC's derogatory references regarding the appellant's veracity were supplemented with a "more detailed analysis of the evidence":[39]

> You remember [Petty Officer K's] statement in court. He said he specifically told [the appellant] not to pursue her. . . . Does it seem reasonable that [Petty Officer K] whose [sic] closer friends with [Petty Officer H], and that he's at his house would have this, this

[35] Record at 656-78, 712-19.
[36] *Id.* at 657, 665.
[37] *Id.* at 673.
[38] *Id.*
[39] *Hodge*, 426 F.3d at 378.

> new 19-year-old kid come over and say hey you, [*15] why don't you go in and mess up the relationship? Yeah, go do it you might get lucky. Does that make sense? It shouldn't because it's not true. He's lying[.]").[40]

However, often times, the opposite was true, and TC's derogatory comments were not tethered to a government theory of the case or supported by any "rational justification":

> Again, remember what reasonable doubt is. . . . It's not a 19-year-old Seamen apprentice who's a "Don Juan" type, who's able to coast [sic] consent out of passed out women lying in vomit-stained sheets. . . . So when he's telling you the story of his consent; it's *obviously and demonstrably a lie*.[41]
>
> . . . .
>
> Let's assume that world exists just for a second. I know it's an ingenious idea, but let's assume that's true, that [Ms. AB] actually said yes to the question of "Hey, do you want to have sex?". . . It is still a crime. Let me say that one more time, even if you buy *every lying*

[40] Record at 661.
[41] *Id.* at 665 (emphasis added).

> *word* out of his mouth. He is still a criminal.[42]

We conclude, therefore, that the sheer number of disparaging comments, often accompanied by no detailed analysis, violated the guidance of our superior court in *Fletcher* and *Knickerbocker* and constituted plain error. "[T]he [TC] should have [*16] avoided characterizing [the appellant] as a liar and confined h[is] comments instead to the plausibility of [the appellant's] story[.]" *Fletcher*, 62 M.J. at 183.

b. Invented admissions

A prosecutor "may strike hard blows" against a defendant, but is "not at liberty to strike foul ones." *Berger*, 295 U.S. at 88 (finding prosecutorial misconduct in part because the prosecutor "misstat[ed] the facts in his cross-examination of witnesses" by "putting into the mouths of such witnesses things which they had not said," and "assuming prejudicial facts not in evidence"). Accordingly, "[i]t is a fundamental tenet of the law that attorney[s] may not make material misstatements of fact in summation."[43] *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994) (citation omitted). Our court found error where a trial counsel,

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[42] *Id.* at 668 (emphasis added).

[43] *See also* ABA, at 3-6.8(a) ("In closing argument to a jury . . . the prosecutor may argue all reasonable inferences from the evidence in the record, unless the prosecutor knows an inference to be false. . . . The prosecutor should not knowingly misstate the evidence in the record, or argue inferences that the prosecutor knows have no good-faith support in the record.").

"either by design or through inexperience," mischaracterized a statement of regret by an appellant to an NCIS agent "as a crescendo to his argument, arguing the words in a manner that" inappropriately characterized them as "an admission to the underlying misconduct." *United States v. Fletcher*, No. NMCCA 201000421, 2011 CCA LEXIS 149, at *18-19, unpublished op. (N-M. Ct. Crim. App. 25 Aug 2011), *aff'd*, 71 M.J. 107 (C.A.A.F. 2012) (summary disposition).

"[W]hile counsel has the freedom at trial to argue reasonable inferences from the evidence, counsel cannot misstate evidence . . . ." *United States v. Carter*, 236 F.3d 777, 784-85 (6th Cir. 2001) (finding plain error where the [*17] prosecutor asserted a witness had been told the opposite of what she had testified to hearing) (citations omitted). Here, during the government's closing argument, the TC misstated portions of the appellant's responses from the NCIS interrogation: "[w]ell, *I thought* maybe she'll think I was [Petty Officer H]"—and, "*I thought she thought*—I assumed she thought I was [Petty Officer H]. It was a dark room and maybe she *would* get confused."[44] The TC further argued:

> *[H]e admits, and in fact, he says that he was counting on* the fact that *I hope that she will confuse me* with [Petty Officer H]. Maybe she'll think I'm [Petty Officer H]. He's counting on it, and that's evidence that she was impaired that he

[44] Record at 663 (emphasis added).

> knew she was in [sic] impaired, and it[']s evidence in [and] of itself.[45]

The appellant objected, after TC's closing argument, that these attributions exposed the members to "improper argument" about "uncharged misconduct."[46] The appellee urges us to find that the appellant later "waive[d]" this issue by "withdr[awing] the request [for a curative instruction] in order to tactically avoid having the [m]ilitary [j]udge" issue an alternative instruction to the members which would "reemphasize the purposes for which the [m]embers *could* consider [the a]ppellant's [*18] explanation[.]"[47] "'A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)). Consequently, we may "consider waiver only if an accused affirmatively, knowingly, and voluntarily relinquishes the issue at trial." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). Finally, "'[t]he determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case . . . .'" *Elespuru*, 73 M.J. at 328 (quoting *Johnson*, 304 U.S. at 464). We do not agree that the appellant did this with respect to the "improper argument" aspect of his objection, as the

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[45] *Id.* at 675 (emphasis added).
[46] *Id.* at 680.
[47] Appellee's Brief of 3 Feb 2016 at 32, 33 (italics in original).

appellant renewed his objection after the military judge offered an alternative instruction.[48]

During his NCIS interrogation, the appellant discussed what may have gone into Ms. AB's decision to have sex with him based on his retrospective thoughts, including the information he learned after the encounter during the six months before he spoke with NCIS:

> NCIS Agent: Okay. So, what in the world would give you that impression that she would have you go in there and have sex with her?
>
> Appellant: The reason—well, my reasoning behind this is I assumed she thought I was [Petty [*19] Officer H].
>
> . . . .
>
> NCIS Agent: What possessed you to go into that room?

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[48] Record at 689-90 ("[Civilan Defense Counsel]: So our position is this is a situation created by the government in this particular case, and the curative instruction that we gave you is the only way out of it without a mistrial." "MJ: Very well . . . I think that the uncharged paragraphs that I have already in the instructions . . . to the elements of the offenses and . . . particularly with . . . respect to the accused's knowledge and [Ms. AB's] capability of consenting are sufficiently clear, *but your objection is certainly noted for the record.*"). (Emphasis added).

Appellant: Stupidity I guess. I assumed I could make it up and get lucky once.

NCIS Agent: Okay. Well, what it looks to me is you thought you could go in there and she would think you were [Petty Officer H]?

Appellant: No.

NCIS Agent: What makes you think it was [Petty Officer H], because you just told me you had no idea that they had a prior relationship?

Appellant: I didn't, but afterwards I found out.[49]

Despite the TC's claims, the appellant specifically told NCIS that at the time that he entered the bedroom, he did not intend for Ms. AB to confuse him for Petty Officer H:

NCIS Agent: . . . . I 100 percent think you know—I know that you know what you were doing. You know that she would not know it was you and you know that you could take advantage of the situation because she was drunk. I know those things.

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[49] PE 4; AE XXXIX at 15-16.

> Appellant: That's not what I was trying to do.[50]

Taken in the context of the entire interrogation, the appellant's statement that he "assumed she thought I was [Petty Officer H]," reflects the appellant's explanation—several months after the encounter—regarding why he *now believes* Ms. AB agreed to have had sex with him, [*20] not what his motivations might have been on the night in question.[51]

The appellee argues that TC's statements were still "reasonable inferences from evidence in the record . . . including that the [a]ppellant believed [Ms. AB] might confuse him with [Petty Officer H.]"[52] Indeed, other parts of TC's argument forcefully and persuasively made this point without misstating the evidence of record:

What's the real reason he went in that room? We don't have to speculate. He told us. "*My reason behind this is I assumed she thought I was* [*Petty Officer H*]." *What does this show*? This shows that he knew she was unconscious in there, and if she became conscious, she would be so confused in the dark, so incompetent, so incapable of consenting, that her confusion will allow him to have sex. He's admitting to it. *Those are his words*. That's why he's going in there because she's so incompetent, so incapacitated, and so [a]sleep or unconscious she would think I was

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[50] PE 4; AE XXXIX at 27.
[51] PE 4; AE XXXIX at 15.
[52] Appellee's Brief at 38.

[Petty Officer H]. That should be startling to you. And that reveals who he is.[53]

However, the TC's attribution to the appellant of *statements* he never made—purportedly *admitting* that "he was *counting* on" and "*hop[ing]* that [Ms. AB] will confuse me" with Petty Officer H—are [*21] fundamentally different than simply arguing an inference of the appellant's intent from his actual statements to NCIS.[54] Such claims inappropriately mischaracterize the appellant's statement to NCIS and take them out of the context in which they were made. We, therefore, conclude that the TC's erroneous claim, whether "by design or through inexperience," was plainly improper argument.

c. Accusing the trial defense counsel of not believing the appellant

Consistent with TC's aforementioned duty not to divert members from deciding cases based on the evidence, it is "plainly improper" argument to "encourage[]the members to decide the case based on the personal qualities of counsel rather than the facts." *Fletcher*, 62 M.J. at 182 (identifying plainly improper argument where, among other improper actions trial counsel "suggest[ed] that Fletcher's

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[53] Record at 664 (emphasis added).

[54] *Id.* at 675 (emphasis added). *See United States v. Dimberio*, 56 M.J. 20, 30 (C.A.A.F. 2001) (Sullivan, J., concurring in the result) ("Direct evidence of th[e] state of mind [of a witness] in the form of an admission by [the witness] was certainly stronger than the circumstantial showing of this same state of mind . . . .").

defense was invented by his counsel," and "called the defense case "that thing they tried to perpetrate on you").

Here, TC flatly stated that during his rebuttal argument, "[t]he defense doesn't believe their own client."[55] The appellee argues that the civilian defense counsel invited this response in his closing argument, when he claimed that the government did not believe their own witnesses.[56] [*22] Specifically, the defense counsel argued, "[the government] called witnesses to prove that their own witness, the victim in this case . . . is a liar"[57] and "they br[ought] in another witness to impeach their star witness[.]"[58]

However, the TC's actual statement is not at all responsive to the civilian defense counsel's arguments. An appropriate, "invited response" would be to comment on the consistencies in Ms. AB's statements and how, and to what extent, her version of events was corroborated by other witnesses—thereby rebutting the civilian defense counsel's argument that the government does not believe the victim—not to attack the civilian defense counsel,

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[55] Record at 713.
[56] *See United States v. Boyer*, No. NMCCA 201100523, 2012 CCA LEXIS 906, at *10-11, *22, unpublished op. (N-M Ct. Crim. App. 27 Dec 2012)(noting that "[w]hen determining whether prosecutorial comment was improper," under "'the 'invited response' or 'invited reply' doctrine, the prosecution is not prohibited from offering a comment that provides a fair response to claims made by the defense[,]'" quoting *Carter*, 61 M.J. at 33, and proceeding to consider remarks of the trial counsel "[d]isparag[ing] the opposing counsel").
[57] Record at 700.
[58] *Id.* at 707.

claiming that he does not believe his client, either. Moreover, the TC does not provide any rationale or reason why the defense "doesn't believe their own client." Rather, it is merely a bald assertion that would naturally cause the members to infer that civilian defense counsel was, by encouraging them to accept the appellant's narrative of events, knowingly lying to the members. Consequently, we conclude that such an assertion was plainly improper.

d. Improperly placing the prestige of the government behind the credibility of Ms. AB's [*23] statements

It is a universal rule of professional conduct that TC shall not offer closing arguments premised on "counsel's personal opinion," and TC "should not imply special or secret knowledge of the truth or of witness credibility,"[59] because "when the prosecutor conveys to the jurors his personal view that a witness spoke the truth, it may be difficult for them to ignore [that witness'] views[.]" *Fletcher*, 62 M.J. at 180-81 (citation and internal quotation marks omitted). "'[P]lac[ing] the prestige of the government behind a witness through personal assurances of the witness'[] veracity'" constitutes "improper vouching." *Id.* (quoting *United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)).

In *Fletcher*, the CAAF identified "the use of personal pronouns in connection with assertions that a witness was correct or to be believed[,]" as an example of improper vouching, and found plain error

[59] ABA at 3-6.8(b).

in the TC's comments that "*we know*" that drug test results were "consistent with recreational use", that it was "very apparent" the government's expert witness was "the best possible person in the whole country to come speak to us about this[,]" and, that the government's evidence was "unassailable, fabulous, and clear." *Id.* at 179-80. The *Fletcher* court highlighted these examples out of "more than [*24] two dozen instances in which the TC offered her personal commentary on the truth or falsity of the testimony and evidence." *Id.* at 181.

However, closing arguments "may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case." RULES FOR COURTS-MARTIAL (R.C.M.) 919(b) (2012 ed.). Thus, it is not improper vouching for TC to "argu[e]," while "marshall[ing] evidence," that a witness "testified truthfully," particularly after the defense "'vigorously attack[s]'" this witness' "testimony during cross-examination." *United States v. Chisum*, 75 M.J. 943, 953 (A.F. Ct. Crim. App. 2016).

Here, the TC commented that Ms. AB's testimony was "consistent the entire time."[60] The TC also asked the members:

What other evidence do we have that we can be firmly convinced beyond a reasonable doubt that [Ms. AB] was asleep when this happened? Well, her testimony. Her testimony was, "I woke up. I went to bed and the next thing I know I feel pressure, and

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[60] Record at 666.

then I realize that it's this 'new guy' on top of me." And she woke up to Seaman Apprentice Andrews on top of her. That's her testimony. It's credible. It's uncontroverted, and you can believe it, and you can convict on that alone.[61]

We find that this is not impermissible vouching. The TC did not use any personal [*25] pronouns indicating personal opinion. Nor did the TC give the impression that this statement was based on evidence outside the record. After the civilian defense counsel vigorously attacked the credibility of Ms. AB on cross-examination, it was not improper argument for the TC to direct the members' attention to Ms. AB's testimony and argue that she was truthful. Even assuming *arguendo* that these comments by TC constituted impermissible vouching, these relatively isolated instances do not rise to the level of plain error.[62]

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[61] *Id.* at 672. The "you can convict on that alone" comment could also be viewed as a misstatement of the law defining sexual assault, given that Ms. AB did not know whether the appellant had actually penetrated her vulva with his penis. However, we decline to find this to be a plainly improper legal argument, given that it was at most an isolated misstatement of the law, and the military judge properly instructed the members as to the element of penetration, and the need to follow her instructions regardless of what counsel say. *Id.* at 640, 656. Moreover, the appellant admitted to "having sex in the missionary position" with Ms. AB, so there was no prejudice. PE 5 at 1.

[62] *See United States v. Solomon*, No. NMCCA 201100582, 2012 CCA LEXIS 291, at *17, unpublished op. (N-M. Ct. Crim. App. 31 Jul 2012), *rev'd on other grounds*, 72 M.J. 176 (C.A.A.F. 2013) (declining to find plain error in references by the TC "to

e. Misstating the law

Another type of improper prosecutorial argument is "erroneous exposition of the law." *United States v. Abernathy*, 24 C.M.R. 765, 774-75 (A.F.B.R. 1957) (ordering a rehearing in part because trial counsel committed plain error in erroneously arguing "that the accused could also be convicted" of "robbery solely by reason of his participation in [a] black-market venture" because the "facts were analogous to those in a felony murder situation"); *United States v. Rodrigues*, No. 97-10113, 1998 U.S. App. LEXIS 36919, at *26, *31 (9th Cir. Mar. 15, 1999)(reversing Rodrigues's conviction for bribery in part because of the prosecutor's "misstatement of the law" of bribery in claiming that Rodrigues only had to 'receive[] benefits with criminal intent'" to be guilty).

Here, TC argued that the members [*26] should find that Ms. AB was not competent to consent to sex with the appellant by drawing analogies to the levels of impairment which would preclude someone from enlisting or accepting a commission in the Navy or having nose surgery:

Now, in the terms of competency, let me frame it, so there is no mistake that we've proven this beyond a reasonable doubt. Think of a different context. Let's assume for an instant that somebody sharing these kinds of incompetency traits walks into a Navy recruiting office and we don't know what happens in there. But within a few minutes, somebody having these levels of incompetency runs out of there

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[the] believability of his witnesses on four occasions in the course of a lengthy closing statement").

or just stumbles and cries and shakes and says, "I didn't want to enlist." Or "I didn't want to commission." And the Navy recruiter says, "Nope, nope, she actually did." Or going into a hospital with that level of intoxication[,] that level of low competency[,] walks into a hospital and that person has an otherwise fine nose and says that I want a neuroplasty. I want nose surgery. And on the operating board says, "What's happening to me?" and leaves and the surgeon is saying, "No, no, they really, really, wanted it." Would that make any sense? Would those people [*27] get in trouble?[63]

Analogies of this type are fraught with peril. In *United States v. Newlan*, No. 201400409, 2016 CCA LEXIS 540, at *5, unpublished op. (N-M Ct. Crim. App. 13 Sep 2016), we set aside Newlan's conviction for sexual assault of a woman allegedly "incapable of consenting due to alcohol impairment" in violation of Article 120(b), UCMJ, because the military judge defined "impaired" based on its Article 111, UCMJ, drunken operation of a motor vehicle, definition. We concluded that the military judged erred because as "a term of art applicable only to" Article 111, UCMJ, the use of its definition by the military judge *and trial counsel* "amplified the risk that members would confuse the distinction between *any impairment* and impairment which was sufficient to render [an alleged victim] incapable of consenting." *Id.* at *21, 28 (emphasis added).

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[63] Record at 670-71.

While TC are able to use "matters of common public knowledge based on ordinary human experience" as examples in closing argument,[64] we find the TC's importation of the civil law concept of contractual capacity as analogous to the impairment required for a conviction under Article 120(b), UCMJ to be confusing, irrelevant, misleading, and plainly improper.

2. Prejudice to the appellant

Even though we "conclude that prosecutorial [*28] misconduct occurred," we are mindful that relief in the form of a rehearing "is merited only if that misconduct 'actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice).'" *Pabelona*, 76 M.J. at 12 (quoting *Fletcher*, 62 M.J. at 178). In assessing prejudice, we consider the cumulative impact of individual instances of prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial. *Fletcher*, 62 M.J. at 184. To determine whether the trial counsel's comments, taken as a whole, were "so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone," we consider: (1) the severity of the misconduct, (2) any curative measures taken, and (3) the strength of the Government's case. *Id.* It is possible for the third factor to "so overwhelmingly favor[] the government" so as to "establish [a] lack of prejudice" from improper argument, "in and of itself." *Pabelona*, 76 M.J. at 12.

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[64] ABA at 3-6.9.

a. Severity of misconduct

> Indicators of severity include (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument, (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) [*29] the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge.

Fletcher, 62 M.J. at 184 (citation omitted). We find that on balance, the misconduct was severe and permeated the initial findings' argument, but not the rebuttal. The trial on the merits lasted only three days and the members deliberated for only three hours before convicting the appellant. Although the members acquitted the appellant of two sexual assault specifications, those specifications were simply charged as alternate theories of proof arising from the same sexual encounter with Ms. AB. As a result, the appellant received no significant consideration from the panel in the form of an acquittal.

b. Curative measures taken

This factor is evenly balanced. Although the military judge did not take any specific curative measures in response to TC's plainly improper arguments, she did properly instruct the members on

the definition of "incapable of consenting,"[65] that "argument by counsel is not evidence and counsel are not witnesses,"[66] and to apply the law as she instructed. The military judge reiterated, "if there's a discrepancy between my instructions and what [*30] counsel have argued to you or how they have referred to those instructions, you must follow my instructions."[67] Moreover, it is "the duty of . . . [defense counsel] to ferret out improper argument, object thereto, and seek corrective action[.]" *United States v. Toro*, 37 M.J. 313, 318 (C.M.A. 1993) (citation and internal quotation marks omitted) (alteration in original). The appellant's civilian defense counsel did not object during TC's arguments and then only objected to one of TC's improper comments after the fact.[68] Finally, members are presumed to have complied with instructions absent evidence to the contrary, *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990), even in cases featuring improper prosecutorial argument.[69]

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[65] Record at 641.

[66] *Id.* at 719.

[67] *Id.* In fact, the civilian defense counsel even pointed out the TC's erroneous analogies to enlisting in the military or getting plastic surgery: "[T]hey had the audacity to ask you to adopt the standard, which by the way, is clearly not the law that if somebody walks into a Navy recruiting office, you know, a drunk person can't consent to signing a contract[;] are you kidding me[?] . . . It's clearly not the law[.]" *Id.* at 709.

[68] *See supra* note 48.

[69] *See United States v. Tanksley*, 7 M.J. 573, 579 (A.C.M.R. 1979), *aff'd*, 10 M.J. 180 (C.M.A. 1980) (finding impermissible argument "adequately offset by the trial judge's instructions on findings to the effect that counsel's arguments are not evidence and the court members are not to give them any further

c. Strength of the government's case

The government's case was strong relative to the defense case. Even though Ms. AB's testimony regarding how much alcohol she consumed varied from her NCIS statement, everyone else at the party who testified described Ms. AB as being extremely intoxicated shortly before the appellant had sex with her—she was drunkenly stumbling, falling asleep on a couch, and unable to have a normal conversation with other partygoers. They noted the appellant was in the same room and would have been able to see this behavior of Ms. [*31] AB.

The appellant's own statements to NCIS further establish that Ms. AB had expressed absolutely no interest in him—sexual or otherwise—at any time before he entered the bedroom; that he believed Ms. AB to be drunk when she stumbled to the bedroom, shortly before he had sex with her; and that he saw Ms. AB vomit in the bed, but still decided to have sex with her.

Thus, while acknowledging that TC's misconduct was severe, and assuming *arguendo* that the curative measures taken by the military judge were inadequate, we are "confident that the members convicted the appellant" of having sex with Ms. AB, while he knew or reasonably should have known that she was incapable of consenting, "on the basis of the evidence alone." *Sewell*, 76 M.J. at 14-15 (citation and internal quotation marks omitted).

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credence or attach to them any more importance than the court members' own recollections of the evidence compel").

C. Exclusion of evidence of the appellant's intoxication

The appellant next contends that the military judge' exclusion of evidence related to the appellant's level of intoxication deprived him of "'a meaningful opportunity to present a complete defense.'"[70] In denying the defense's request to introduce the evidence, the military judge provided:

I will allow you to ask [RW] whether or not the [appellant] [*32] was consuming alcohol because I can foresee a myriad of relevant things that will come up that involve what people were doing? What people were observing? Where they were? And it has already come out. What I will not allow is any more detailed testimony as far as level of intoxication, and all the intoxication aspects that we are delving into regarding the alleged victim because the government is right at a certain point, it is not relevant and it is just creating the appearance that that is a defense when voluntary intoxication is not a defense.[71]

Consequently, the military judge only permitted trial defense counsel to ask RW whether the appellant consumed alcohol and who provided it to him.[72]

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[70] Appellant's Brief at 39 (quoting *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016)) (additional citations omitted).
[71] Record at 353-54.
[72] *Id.* at 356. ("I will permit the defense one question of (sic) if the accused consumed any alcohol, and one question as to the source of the alcohol, and then that would be it with this witness[.]").

"'Whether rooted directly in the Due Process Clause . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'" *United States v. Bess*, 75 M.J. 70, 74 (C.A.A.F. 2016) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986)). "'A defendant's Sixth Amendment right to confront the witnesses against him is violated where it is found that a trial judge has limited cross-examination in a manner that precludes an entire line of relevant inquiry.'" *Id.* at 75 (quoting *United States v. Israel*, 60 M.J. 485, 488 (C.A.A.F. 2005)).

"Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than [*33] it would be without the evidence; and (b) the fact is of consequence in determining the action." MILITARY RULE OF EVIDENCE 401, SUPPLEMENT TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012 ed.). We review a military judge's decision to admit or exclude evidence for an abuse of discretion.[73] *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Donaldson*, 58 M.J. 477, 482

[73] Appellee argues that since the appellant did not object at trial on the specific ground he argues on appeal, we should review for plain error. Appellee's Brief at 51. We disagree. Trial defense counsel argued at trial that the appellant's level of intoxication was relevant to show whether or not the appellant was able to perceive Ms. AB kissing Petty Officer H and "a lot of other things also." Record at 352. As a result, we conclude trial defense counsel preserved this issue for appeal.

(C.A.A.F. 2003). "'The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (quoting *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)) (internal quotation marks omitted).

The appellant argues that evidence of the appellant's level of intoxication was relevant to show that he did not "have the situational awareness" necessary to carry out the criminal scheme assigned to him by the government—"that he knew [Ms. AB] was intoxicated, anticipated she would confuse him with [Petty Officer H], and took advantage of that situation to have sexual intercourse with her against her will."[74] The appellant's argument is misplaced and fails to recognize the required *mens rea* for offenses under Article 120(b)(3), UCMJ.

[*34] As a threshold matter, we note that "[v]oluntary intoxication, whether caused by alcohol or drugs, is not a defense." R.C.M. 916(l)(2).

> However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent,

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[74] Appellant's Brief at 43 (citation omitted).

> willfulness, or premeditated design to kill is an element of the offense.

Id.

Sexual assault under Article 120(b)(3), UCMJ, however, "require[s] only general intent, not specific intent." *United States v. Clugston*, No. 201500326, 2017 CCA LEXIS 43, at *24, unpublished op. (N-M. Ct. Crim. App. 31 Jan 2017). "The general intent requirement is satisfied by proof that a defendant committed a volitional act that he or she knew or reasonably should have known was wrongful." *United States v. McInnis*, 976 F.2d 1226, 1234 (9th Cir. 1992) (citation omitted). Because sexual assault under Article 120(b)(3) does not require proof of actual knowledge or specific intent, "appellant's voluntary intoxication is not legally relevant to whether he committed the offense."[75] *United States v. Lovett*, No. 20140580, 2016 CCA LEXIS 276, at *2 n.2, unpublished op. (A. Ct. Crim. App. 29 Apr 2016) (affirming sexual assault conviction under Article 120(b)(3), UCMJ, which contains the same *mens rea* requirement as Article 120(b)(3)).

Simply put, whether or not the appellant had the "situational awareness" to "know" Ms. AB was [*35] intoxicated, or to anticipate she might confuse him with someone else, is not conclusive. Article 120(b)(3) requires only that appellant reasonably should have known Ms. AB was

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[75] We note that the appellant was also charged in the alternative with, and acquitted of, sexual assault under Articles 120(b)(1) and 120(b)(2), both of which are also general intent crimes.

incapable of consenting due to impairment by alcohol. Therefore, any evidence tending to show the appellant's actual, subjective lack of knowledge concerning Ms. AB's level of impairment and his actual, subjective intent in entering the bedroom are not facts of consequence. Accordingly, the military judge did not abuse her discretion when she found testimony about the appellant's level of alcohol consumption was not relevant.

Regardless, even assuming the military judge abused her discretion, we find any such error to be harmless. "A constitutional error is harmless when it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Mitchell v. Esparza*, 540 U.S. 12, 17-18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (citations and internal quotation marks omitted). We review this question of law *de novo*. *United States v. Tearman*, 72 M.J. 54, 62 (C.A.A.F. 2013). Thus, the question before us is whether we can conclude beyond a reasonable doubt that the members would have reached the same verdict had the appellant been permitted to introduce evidence of his level of alcohol consumption.

Here the appellant [*36] admitted to NCIS: (1) that he had no significant interaction with Ms. AB throughout the day; (2) that he thought Ms. AB was drunk when she went into the bedroom; (3) that she was asleep in the bed when he laid down next to her; and (4) that she vomited on the bed after he asked her if she wanted to have sex. Additionally, multiple witnesses testified that Ms. AB was intoxicated and had difficulty walking and carrying on a conversation. More than simply persuading us that the conviction is

legally and factually sufficient, as we noted *supra*, these facts leave us convinced beyond a reasonable doubt that any error committed by the military judge in excluding evidence of the appellant's level of alcohol consumption was harmless and did not contribute to the guilty verdict.

II. CONCLUSION

The findings and sentence, as approved by the CA, are affirmed.

Chief Judge GLASER-ALLEN and Senior Judge CAMPBELL concur.