IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

| | | |
|---|---|---|
| UNITED STATES,<br>Appellee<br><br>v.<br><br>James A. Hale III,<br>Staff Sergeant (E-6)<br>U.S. Marine Corps<br>Appellant | ) | ANSWER ON BEHALF OF APPELLEE<br><br>Case No. 201600015<br><br>Tried at Marine Corps Air Station Miramar, California; Marine Corps Recruit Depot San Diego, California; Joint Base Elmendorf-Richardson Anchorage, Alaska; and Camp Pendleton, California, on March 11, May 23, August 4, and October 29, 2014, and January 21, February 19, March 24-27, March 30-April 2, and October 5, 2015, by a general court-martial convened by Commanding General, Marine Corps Recruit Depot/Western Recruiting Region. |

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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## Errors Assigned

**I.**

**WHETHER THE MILITARY JUDGE ERRED IN ADMITTING EVIDENCE OBTAINED FROM THE SEARCH OF SSGT HALE'S GYM BAG AS WELL AS THE RESULTS OF THE URINALYSIS TEST THAT WAS CONDUCTED PURSUANT TO THE FRUITS OF THAT SEARCH.**

**II.**

**WHETHER THE GOVERNMENT'S ATTEMPT TO INTIMIDATE DETAILED DEFENSE COUNSEL AND ITS IMPROPER ARGUMENTS AT TRIAL AMOUNTED TO PROSECUTORIAL MISCONDUCT AND PREJUDICIAL SPILLOVER EFFECT DURING CLOSING ARGUMENTS.**

**III.**

**WHETHER APPELLANT RECEIVED INAFFECTIVE [sic] ASSISTANCE FROM HIS DEFENSE COUNSEL.**

**IV.**

**WHETHER APPELLANT'S SENTENCE TO TWENTY-SIX YEARS OF CONFINEMNET [sic] IS INAPPROPRIATELY SEVERE.**

**V.**

**ISSUES ASSERTED BY APPELLANT UNDER *UNITED STATES V. GROSTEFON*.**

## Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge and more than one year of confinement. Accordingly, this Court has jurisdiction pursuant to

Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

## Statement of the Case

A panel of officer and enlisted members sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of failing to obey a lawful general order, one specification of wrongful use of an Anabolic Steroid, two specifications of rape, one specification of aggravated assault, one specification of adultery, one specification of kidnapping, and one specification of indecent language, in violation of Articles 92, 112a, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, 920, 928, and 934 (2012).

The Members sentenced Appellant to twenty-six years of confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

## Statement of Facts

### A. Appellant kidnapped SK at gunpoint, forced her to perform oral sex on him, raped her, and told her, "Welcome to HIV world, whore."

Appellant was stationed at the Military Entrance Processing Station in Anchorage, Alaska (R. 666; Appellate Ex. LVI at 6), when he encountered SK, a long-time resident of the Abused Women's Aid in Crisis (AWAIC) housing shelter in Anchorage and its affiliated transitional housing, Harmony House. (R. 741, 885,

932, 940-41; Appellate Ex. LXIV.) SK was a mother of five, a crack-cocaine addict, and a prostitute who advertised her prostitution services online. (R. 933, 966; Appellate Ex. XLI at 44, 69.)

On August 19, 2013, Appellant contacted SK by text message. (R. 934; Prosecution (Pros.) Ex. 36 at 13.) He sought prostitution services and also requested that SK procure painkillers for him. (R. 934-35.)

On the afternoon of August 25, 2013, Appellant and SK met in person outside a Carr's supermarket. (R. 937.) After they met, at Appellant's request, SK procured for Appellant narcotic pills "from a girl [she] knew." (R. 941-42.) Satisfied with the pills, Appellant departed without any sexual activity. (R. 942-43.)

Later that evening, however, after she "eventually got high," SK contacted Appellant to "let him know that [she] was free." (R. 943, 991; Pros. Ex. 36 at 46.) Appellant "wanted more pills," but they agreed to meet and that prostitution services "would be—would play a part this time." (R. 943.)

Appellant again met SK near her residence, then drove her to Spenard, an Anchorage neighborhood known for drugs and prostitution, where SK made contact with her drug-dealer and procured more pills for Appellant. (R. 943-46.) Appellant was dissatisfied with the amount of pills and demanded that SK return them to her dealer. (R. 947, 949.) When SK was unable to, Appellant, still seated

in his truck, retrieved what SK described as a black gun from the center console of the truck. (R. 949; Appellate Ex. XLI at 49, 56.) Appellant pointed it at SK, and said, "Well, today is not your lucky day." (R. 949.)

Appellant drove farther into Spenard, to areas unfamiliar to SK, while his weapon remained pointed at SK. (R. 950-51, 996.) He demanded that SK give him her phone and identification. (R. 951.)

With his pistol still pointed at her, Appellant told SK to "suck his dick like [her] life depended on it." (R. 951.) She performed oral sex on him. (R. 952.) Then he put his gun on the truck dashboard, forced SK onto her back, and raped her. (R. 952-53.) After Appellant raped SK, he demanded she wait in the truck while a police car passed, then told her to exit the truck. (R. 953-54.) When she did, Appellant told her, "Welcome to the HIV world, whore," and drove away with her phone and identification. (R. 954-55; Appellate Ex. XLI at 47, 62.)

B. SK reported Appellant's rape to Anchorage police, who discovered evidence of his other crimes.

SK ran to a nearby house and asked to use the phone. (R. 955; Pros. Ex. 43-44.) After speaking with "Stephanie" at her shelter, SK declined to call the police. (R. 956.) The residents of the house paid for a taxi to take her back to Harmony House. (R. 956.) The next day, upon encouragement from her case manager and others, SK reported the rape to the Anchorage Police Department (APD) and received a sexual assault exam. (R. 957-60.)

1. Detective Sarber located the information that identified Appellant as SK's rapist.

Anchorage Police Detective (Det.) B█ Sarber, of the Special Victims Unit, was the primary investigator into SK's report. (R. 299-300; Appellate Ex. XLI at 38; Appellate Ex. XLIX at 7-9.) A nineteen-year law enforcement officer, Det. Sarber interviewed SK at the Sexual Assault Response Team Center on August 26, 2013. (R. 300; Appellate Ex. XLI at 39.) SK recounted her interactions with Appellant and described their text-message interactions. (Appellate Ex. XLI at 39-57, 61-68.) Using SK's phone records, Appellant's California driver's license, and the August 25, 2013, Carr's supermarket security video, Det. Sarber identified Appellant as SK's rapist. (R. 302; Pros. Ex. 7, 36; Appellate Ex. XLIX. at 13-15; Appellate Ex. LVI at 6; Appellate Ex. CXXIV at 13.)

2. Anchorage Police arrested Appellant at his gym, where he requested his gym bag be brought to the police station.

Detective Sarber provided APD patrol with a description of the truck in the Carr's security video and called APD dispatch upon receiving a report that Appellant was at a local gym. (R. 302; Pros. Ex. 27; Appellate Ex. LVI at 6.) Officer J█ Conley and two other officers arrested Appellant, placing Appellant in handcuffs and escorting him out of the gym. (R. 291-92, 303; Appellate Ex. XLIX at 15; Appellate Ex. LVI at 6.)

Upon Appellant's request, one of the arresting officers present retrieved Appellant's gym bag, a blue and red duffle bag, from his locker. (R. 293; Pros. Ex. 8; Appellate Ex. XLIX at 15.) Appellant's truck, which matched the truck in the Carr's security video, was towed for evidence. (Appellate Ex. XLIX at 15.) Appellant stated that the keys to the truck were in his gym bag and that he was carrying a Samsung cell phone. (*Id.*) Officer Conley drove Appellant to the Anchorage Police Department, while Appellant's gym bag remained in the trunk of Officer Conley's car. (R. 293.)

3. <u>After interviewing Appellant, Detective Sarber obtained a warrant to search for and seize Appellant's cell phone</u>.

Detective Sarber interviewed Appellant at the Anchorage police station. (Appellate Ex. XLIX at 15.) Appellant admitted that he arranged to meet SK for prostitution services, and stated that they may have exchanged "about five or six text messages" before meeting. (Appellate Ex. LVI at 6.) From Appellant's phone records, Det. Sarber knew that they had in fact exchanged "around 127 messages" between August 19 and August 25, 2013. (*Id.*; Pros. Ex. 36.)

Appellant denied raping SK, but stated that after they argued over her fee, he demanded she get out of his car, and he then drove away with her identification and phone, which he later threw out of the car window. (Appellate Ex. LVI at 7.)

Appellant also stated that he keeps "a loaded semi-auto .40 Beretta" pistol in his truck. (*Id.* at 7; Appellate Ex. XLIX at 15.)

After the interview, Det. Sarber applied for and obtained a warrant to search for and seize Appellant's cell phone, to search his truck, to photograph him, and obtain his DNA. (Appellate Ex. LXI at 8; Appellate Ex. XLIX at 15-19.) The issuing Magistrate found probable cause to believe that,

> on the premises known as APD at (city and state) Anchorage, AK, there is now being concealed property, namely: Samsung smart phone belonging to [Appellant] and set to phone number 760-819-1916, a full data dump of this phone to show text and call records between [Appellant] and SK.

(*Id*. at 17.)

4. <u>Before driving Appellant to his apartment, Detective Sarber looked through Appellant's gym bag</u>.

When Det. Sarber returned to the interview room with the search warrant, Appellant told him the cell phone he had used with SK was in his apartment. (R. 306, 317.) Detective Sarber agreed to drive Appellant to his apartment to retrieve the phone. (R. 306-07; Appellate Ex. LVI at 8.)

While still in the interview room, Det. Sarber looked through Appellant's gym bag "to make sure there weren't any guns or knives or any other types of sharp objects or implements in there he could use to injure me or somebody else." (R. 308-09; Appellate Ex. LVI at 8.) Because of Appellant's size, strength, and military training, officer safety was at the fore of Det. Sarber's mind. (R. 308-12; Pros. Ex. 6.) Had he not looked through the bag, he would have put it in his trunk,

though at some point he would have had to search the bag in order for Appellant to be "in the apartment with this bag." (R. 311-12.)

In the bag, he saw drug tablets and a syringe and needles. (R. 309; Pros. Ex. 10-11; Appellate Ex. LVI at 8.) He took photographs of these items and returned them to the bag. (R. 310; Appellate Ex. LVI at 8.)

5. Data from Appellant's cellphone revealed his criminal interactions with another prostitute.

Detective Sarber included in this warrant application "a complete data dump" of the information on Appellant's phone "to corroborate his cell phone call and text records with [SK]." (Appellate Ex. XLIX at 15.) Data from Appellant's phone revealed a series of text messages in which he discussed prostitution services with a woman named MW. (Appellate Ex. IX at 36-44, 50-54.) Appellant also discussed procuring narcotics through MW. (*Id*. at 53.)

C. Investigation of Appellant revealed additional misconduct.

1. In 2003, Appellant sexually assaulted his first ex-wife, Air Force Technical Sergeant AR .

In February 2014, Det. Sarber and a Naval Criminal Investigative Service detective met with Appellant's ex-wife, Air Force Technical Sergeant (TSgt) AR. (R. 115-16.) She told them that, while they were married, Appellant had sexually assaulted her. (R. 115-16.)

After Appellant and AR wed in 2002, they lived as civilians in Fort Smith, Arkansas, with their daughter who was born August 25, 2002. (R. 108, 114, 1168,

1183, 1657.) One evening while AR lay on a futon next to their daughter in the apartment they shared with Appellant's brother, Appellant approached AR, grabbed her hair, and dragged her down the hallway. (R. 1168-69.) He pinned AR to the floor and forcibly sodomized her anally until he ejaculated, at which point feces and blood came out of AR's anus. (R. 1169-70.) As AR cleaned herself in the bathroom, Appellant told her that he had to show her that she could not resist him. (R. 1171.) AR moved out of their apartment the next day.[1] (R. 1171.)

2. <u>In Afghanistan in 2011, before they were married, Appellant impregnated his second ex-wife, B█ Severyn, who told investigators about Appellant's drug use</u>.

After he was arrested, Appellant's wife at the time, B█ Severyn, contacted his command.[2] (R. 46.) She provided additional information about Appellant, including about his use of prostitutes, steroids, and the narcotics Vicodin and Percocet. (R. 47-51, 725-31, 733.) Investigators also learned that Appellant and Ms. Severyn had met as Marine Staff Sergeants during workups prior to their 2011 deployment to Afghanistan. (R. 44, 716.) Their relationship turned romantic, then sexual, and Appellant impregnated Ms. Severyn while in Afghanistan. (R. 45,

[1] TSgt AR later had a second child with Appellant before they divorced. (R. 1654.) She described it in pretrial testimony: " . . . I'm an idiot. And like what so many people do in this situation, they go back. I did that, I went back, and I can't explain my reasoning. I think about it all the time." (R. 110.) She did not testify in front of the Members regarding her return, but in presentencing rebuttal, she testified to the birth of their second daughter in 2004. (R. 1657.)
[2] Appellant and Ms. Severyn divorced in February 2014. (R. 46.)

717.) Ms. Severyn gave birth to a baby boy on March 9, 2012, (Pros. Ex. 25), and she and Appellant later married on December 23, 2012. (R. 45, 714.)

D. After releasing his original lead Trial Defense Counsel, Major P, Appellant was represented by two counsel through a contentious trial.

On March 7, 2014, based in part on Appellant's conduct with SK, the United States preferred Charges alleging violations of Articles 81, 112a, 120, 122, 128, and 134, UCMJ. (Charge Sheet, May 8, 2014.) Two months later, the United States preferred Additional Charges alleging violations of Articles 80, 81, UCMJ, based on Appellant's conduct with MW, and Article 92, UCMJ, based on his sexual relationship in Afghanistan with Ms. Severyn. (*Id.*) The United States referred all Charges together on May 8, 2014. (*Id.*)

1. Appellant released Major P as counsel, and Captain C and Captain S represented Appellant through trial and clemency.

On May 23, 2014, Appellant was arraigned at Marine Corps Air Station Miramar, California. (R. 2, 12.) He was represented by Major (Maj) P and Captain (Capt) C, whose presence Appellant waived because she was on maternity leave in May 2014. (R. 3-4, 7.) Major P and Capt C each appeared on behalf of Appellant at the next session of trial, August 4, 2014, when Capt S also appeared as Individual Military Counsel.[3] (R. 17-18.)

[3] Captain S had not yet promoted from First Lieutenant at this appearance.

On October 14, 2014, Appellant submitted written notice of forum selection and mixed pleas, including Guilty pleas to the Specifications relating to drugs and MW. (Appellate Ex. XX.) On October 29, 2014, Appellant released Maj P. (R. 157-60; Appellate Ex. XXI at 12; Appellate Ex. XXXI.) Appellant then amended his pleas and entered pleas of Not Guilty to all Charges and Specifications. (R. 390.) Captain C and Capt S remained Appellant's counsel through trial, which commenced in March 2015, and the post-trial process. (R. 616, 1704; Appellate Ex. CXXXV; Clemency Pet., Aug. 3, 2015.)

2. Captain C and Captain S filed fifteen of Appellant's twenty-two pretrial motions after Major P was released, and succeeded in disposing of Charges related to MW.

Before releasing Maj P, Appellant filed seven Motions, including motions to preclude use of TSgt AR's allegations under Mil. R. Evid. 413 (Appellate Ex. XII), and for an R.C.M. 706 board. (Appellate Ex. XVI.)

After Appellant released Maj P, Capt C and Capt S filed sixteen Motions, including to fund the travel of the Defense Service Office Highly Qualified Expert (HQE) to the trial situs (Appellate Ex. XXVII); to compel funding for a second investigative visit by Trial Defense Counsel to Anchorage (Appellate Ex. XXIX); to suppress Appellant's cell phone data as the product of an unlawful search (Appellate Ex. XLIX); to suppress evidence from the search of Appellant's gym

bag and results of a derivative urinalysis test (Appellate Ex. LVI); and to suppress testimony from MW. (Appellate Ex. LXII.)

In response to Appellant's Motions, the United States withdrew the Charges and Specifications related to MW. (Appellate Ex. LXIII; Charge Sheet.) The Military Judge denied the motion to suppress the search of Appellant's gym bag and the derivative evidence therefrom. (Appellate Ex. LXXXII.)

3. At trial, Captain C and Captain S, assisted by their office's Highly Qualified Expert, raised scores of objections, *voir dired* the Military Judge, moved to dismiss mid-trial, and cross-examined SK for several hours.

K█ C█, the Defense HQE, assisted the Trial Defense Counsel from the gallery at trial in Alaska. (R. 177, 624, 626; Appellate Ex. XXVII.) Before opening statements, Capt C raised her concerns to the Military Judge regarding communications between SK and the prosecution's HQE, G█ M█. (R. 624.) Detective Sarber was the United States' first witness, and Capt C objected during his initial testimony eight times. (R. 650-64.)

After the first morning of testimony, Capt S elected to *voir dire* the Military Judge, inquiring about the Military Judge's understanding of judicial ethics canons, his approach to motions hearings, his perceptions of his "facial expressions" and "body language," and whether he was frustrated with Capt C. (R. 707-12.) After the *voir dire*, Capt S stated, "Sir, at this time, I do not believe the record indicates any ground for challenge of the military judge, sir." (R. 713.)

Before testimony began on the second day of trial, Capt C re-raised her concerns about Ms. M[redacted]'s text-message communications with SK. (R. 863.) Captain C discussed the text messages at length and concluded by moving to dismiss Charges related to SK. (R. 867.) Trial Counsel argued in response, after which Capt C was visibly weeping, and Capt S requested and received a recess. (R. 872, 1731; Appellate Ex. CXLV at 6.) The Military Judge denied Appellant's request to dismiss or abate proceedings. (R. 874.)

On the second day of trial, Capt C cross-examined SK for more than four hours, (R. 969-1057), focusing in part on her communications with Ms. M[redacted]. (R. 1025-29, 1052.)

4. The Defense focused on SK's untrustworthiness and mental illness, and attacked the biases of prosecution witnesses and participants.

Consistent with Appellant's version, the defense theory at trial was that SK fabricated her allegation. (R. 640-41, 1454-55, 1464-65.) The Defense characterized SK as a woman who "knows how to hustle" to survive on the streets, suffers from mental illness, and lies and manipulates. (R. 637-38, 1467-75.)

To support this theory, Trial Defense Counsel cross-examined SK about her history of mental illness, her history of drug use, and the expiration of her allowed time to reside at Harmony House. (R. 975-78, 1039.) Defense expert witness Dr. C[redacted] Graver, a clinical psychologist at Madigan Army Medical Center,

testified that SK's history of traumatic brain injury, mental illness, and post-traumatic stress disorder could impact her ability to accurately perceive and recall events. (R. 1248-57.) He also testified regarding SK's antisocial personality, a condition associated with deceitfulness and manipulation. (R. 1258-63.)

To attack SK's truthfulness, Appellant presented testimony from SK's ex-husband, former mother-in-law, and the father of one of her sons, each of whom testified to SK's lack of honesty. (R. 1315, 1318, 1321.)

To show witness bias, in addition to the communications between Ms. M[redacted] and SK, the Defense elicited evidence that TSgt AR was—contrary to her claim—aware of the present allegations against Appellant when she spoke with investigators. (R. 1228-29.)

5. Citing his instructions on spillover and that the arguments of Counsel were not evidence, the Military Judge overruled Appellant's objections to Trial Counsel's arguments and denied Appellant's mistrial motion.

The evening before findings arguments, the Military Judge gave instructions. (R. 1380-1405; Appellate Ex. CXXII.) He instructed the Members:

> You will soon hear an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments, like the questions, of counsel are not evidence. Argument is made by counsel in order to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you.

(R. 1381; Appellate Ex. CXXII at 1.) Regarding spillover, he instructed:

> Spillover—facts of one charged offense to prove another. An accused may be convicted based only on evidence before the Court and not on evidence of a general criminal disposition. Each offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense.

(R. 1398; Appellate Ex. CXXII at 16.)

a. <u>The Military Judge overruled Appellant's objections to Trial Counsel's argument on findings</u>.

In his closing argument, Trial Counsel argued, in part:

> Now, you may not think that the use of steroids is that dramatic, is that appalling; it should be. You do know that it is punishable under the Uniform Code of Military Justice, and you do know there is extensive evidence that supports a conviction on that charge.
>
> But think back to my earlier theme. I know there may have been many that you have heard. But my concern—the government's belief, that man seated over there is someone who lives above the law. And this is one nugget of proof, that he does believe that he is above the law. He is above the laws and values that govern and guide us all, whether it be in society or whether we are in the United States Marine Corps.

(R. 1421-22; Appellate Ex. CXXIV at 2.) Trial Counsel's argument was slightly less than two hours. (R. 1412, 1449.)

Afterwards, outside the presence of the Members, Capt S objected, generally, to "the first 40 to 45 minutes" of Trial Counsel's argument as "appealing to the passions of the members." (R. 1449.) He also objected to improper spillover argument, to suggestions that the Members disregard the Military Judge's instructions, to improper burden shifting, to improper comment on Appellant's

silence, to improper suggestion of unethical diagnosis by Dr. Graver, and to improper suggestion that the Members disregard the credibility instruction and instead presume that witnesses are telling the truth. (R. 1450-53.)

The Military Judge overruled each objection. (R. 1452-53.) He noted that his instructions already "specifically addressed" the matters of appealing to the passions of the Member and spillover. (R. 1452.) He also noted that he had already instructed the Members that "argument of counsel are just that: Argument; it is not evidence." (R. 1452.)

b. The Military Judge overruled Appellant's objections to rebuttal argument and denied his motion for a mistrial.

After Capt C argued on findings, (R. 1453-81), Trial Counsel argued in rebuttal. (R. 1482-92.) He addressed the Defense's argument that Ms. M[redacted] had influenced SK:

> What you got presented to you from the defense is that now the highly qualified expert for the government, G[redacted] M[redacted], has now done something wrong. She has now provided emotional support for someone who has never had success with law enforcement, who has lived that hard life we've talked about. And because she maintains contact with that person, because she is someone that helped get her here months later, after that man raped her in the cab of a truck, it is now insidious.
>
> Members, that's a front [sic]. The entire process, it's in a front [sic]. Every one of us that are standing right here, that somehow someway an agent of the government is providing something that's not appropriate, that's disgusting. I sit back and listen to that, again, I think back to my original points to you. The government just can't win because everybody says we're wrong. As you heard the vouching

> from Captain [C], liar, liar; S.K. lies; Detective Sarber is biased. [TSgt AR], why did she have another kid? Clearly she's lying. Clearly she has a dog in the fight.

(R. 1483.)

He later addressed the Defense's attempt to impeach TSgt AR, specifically regarding her recollection of where Appellant's brother and his girlfriend were when Appellant raped her:

> But on the stand this past Thursday when asked the same question, she thought that they were in the bedroom. We got her, game over. Members, don't believe anything that [TSgt AR] said. His bedroom is not in the apartment. She doesn't remember where they are. It was ten years ago. Were they in an apartment? Possible. Were they not? That's also possible; many things are possible. But I went through all of this discussion with you before.
>
> But to go ahead and discredit [TSgt AR] because of that minor inconsistency, that's absurd. Much like we talked about with S.K., we remember the big things. We remember those things that are seared into our memories, seared into our souls. Being anally raped as a new mother, barely reaching 20-years-old by your husband, is a memory that doesn't go away. Whether or not that man's brother and his girlfriend were in the apartment while they are college students, working as well, who cares? They didn't come help because they weren't there; or if they were, they didn't hear it.

(R. 1484-85.) During rebuttal argument, the Military Judge overruled Capt C's objections to burden shifting. (R. 1485, 1490.) Trial Counsel then ended his rebuttal by responding to the Defense's case that SK was not trustworthy:

> That man didn't choose her because she was just another girl to hook up with; he didn't choose her for that primal need to have sex; he chose her because she was a prostitute. He chose her because of who she was, someone who through his eyes was not enough for society.

Someone in society would not believe when she came forward to tell a horrific rape, a rape at gunpoint.

DC (Capt [C]): Objection, sir; facts not in evidence.

MJ: It's argument.

You may proceed.

TC (LtCol [T]): He did not choose her because she was articulate and strong; he chose her because he thought she wasn't. He didn't choose her because she didn't use or sell drugs; he chose her because that's what she did. He didn't choose her because she was surrounded by loved ones, friends, and family to support her in a time of crisis; he chose her because she wasn't.

. . .

In the little girls' dream, they first dream of ice cream, they first dream of dolls, and fairies, and horses. As those girls grow, so do their dreams. What will I become? What will I be? Will I be a wife? Will I be a mother? Will I travel and see the world? Will I be a doctor, maybe even the president?

Little girls—

DC (Capt [C]): Objection, sir; inappropriate argument—or improper argument.

MJ: Overruled.

TC (LtCol [T]): Little girls and the bigger girls they become though, do not dream of being a prostitute. They don't dream of sweet talking strangers. They don't dream of negotiating money for sex or using crack cocaine; that life is undreamable. What is left of that little girl that became a bigger girl with no dreams? You saw her on Wednesday. She walked into this courtroom.

[TSgt AR] likely had dreams; and it sure didn't include being anally raped by her husband as a new mother and new wife, barely 20-years old. It's one courtroom, members, for everyone, no matter where a victim lives, no matter what drugs that victim uses, no matter what life they follow, even if they are a prostitute.

(R. 1491-92).

Captain S re-raised objections to the rebuttal argument— what he characterized as Trial Counsel's argument that "The government can't win. That everything we do, we can't win. The government just can't win"—as unfairly portraying the United States as a loser if Appellant is found not guilty. (R. 1494.) He objected to improper characterization of the "defense's argument as 'absurd'; that our version of events was absurd, that our argument or perhaps counsel themselves were disgusting." (R. 1494.) He also objected to improper appeals to the Members' passions through references to how "no little girl wants to grow up to be a prostitute." (R. 1494-95.) As a remedy, Capt S requested "an additional instruction." (R. 1495; Appellate Ex. CXXVI.)

The Military Judge denied the request for the additional instruction, but agreed to repeat his written instructions to "not let your emotions overcome your rational thought process. You must reach your decision based on the facts proven to you and on the law given to you, not on sympathy, prejudice, or personal preference to ensure that all parties receive a fair trial." (R. 1495-96.) He declined to remedy what he found to be Trial Counsel's "fleeting" comment disparaging the Defense theory. (R. 1495.)

While the Members were deliberating, Capt S asked for a mistrial "based on our previous argument," which the Military Judge denied. (R. 1498, 1500.)

E. The Members convicted Appellant and awarded a sentence that included twenty-six years of confinement.

The Members convicted Appellant of wrongful use of an Anabolic Steroid, two Specifications of rape of SK, aggravated assault upon SK, adultery, kidnapping SK, communicating a threat to SK, and violating a lawful order by engaging in intercourse with Ms. Severyn in Afghanistan.[4] (R. 1506.) The Military Judge merged the rape and adultery specifications for sentencing, and Appellant faced a maximum of confinement for life without the possibility of parole, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. (R. 1509, 1666; Appellate Ex. CXXX at 1.)

After the United States presented no evidence in aggravation, Appellant presented extenuation and mitigation evidence in multiple forms. (R. 1520-1652; Defense (Def.) Ex. J - P.) This included testimony from Ms. Severyn; Appellant's friends, both military and civilian; members of Appellant's family, including his brother and parents; Appellant's psychologist, Dr. G█ Williams; and Appellant's ex-girlfriend, Gunnery Sergeant V█ Landeros, U.S. Marine Corps Reserve. Appellant also presented expert testimony from Dr. E█ Ferma, regarding Appellant's rehabilitative potential, and an unsworn statement from Appellant.

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[4] The Members acquitted Appellant of Pandering and of soliciting SK to wrongfully possess Oxycontin and Vicodin, both in violation of Article 134, UCMJ. (R. 1506.)

Over objections,[5] (R. 1653-55), the United States introduced evidence in rebuttal to counter the portrayal of Appellant as a good father: testimony and text messages showing he had custody of his daughters the weekend of his eldest daughter's eleventh birthday, August 25, 2013, when he was coordinating his meeting with SK. (R. 1657-61; Pros. Ex. 35; Pros. Ex. 36 at 36-43; Pros. Ex. 47.)

In his sentencing argument, Trial Counsel requested a sentence that included "confinement from 40 to 45 years." (R. 1674.) The Members sentenced Appellant to, *inter alia*, twenty-six years of confinement. (R. 1702.)

F. The Convening Authority ordered a post-trial hearing in response to Appellant's clemency submissions that alleged prosecutorial misconduct and unlawful command influence.

1. In clemency matters, Trial Defense Counsel complained about Trial Counsel's out-of-court statements to them.

After adjournment on April 2, 2015, but before the Military Judge authenticated the Record of Trial on June 26, 2015, Trial Defense Counsel drafted a Motion for Appropriate Relief, alleging unlawful command influence and prosecutorial misconduct by Trial Counsel, and requesting that he be disqualified from the case and that the Charges be dismissed with prejudice. (Appellate Ex. CXL.) Captain C and Capt S signed this Motion as being served on opposing

[5] Trial Defense Counsel objected no fewer than 105 times at trial, including at least eighty-six objections by Capt C. (R. 650, 652, 655, 658, 659, 662-64, 667, 739, 746, 754, 757, 778, 841, 843, 844, 846-48, 947-48, 953-54, 960, 962-63, 965-67, 1098, 1162, 1166-80, 1188, 120, 1345-47, 1485, 1490-91, 1526, 1661-64.)

counsel on May 1, 2015, but chose not to file the Motion. (R. 1737, 1742, 1757.)

Instead, Capt S submitted an affidavit to the Military Judge, writing:

> 5. Prior to the Article 39(a) motions hearing on 21 January 2015, LtCol [T] came into [Capt C's] office to speak about a discovery request that I had filed. LtCol [T] stated to me that if I was his peer, he would have told me to "fuck off."
>
> . . .
>
> 7. After the conclusion of an Article 39(a) session on 19 February 2015. Captain [C] and I discussed the fact that LtCol [T] had told her that if she were her husband he would "punch her in the face." I do not specifically recall hearing this statement, but I very clearly recall discussing it with [Capt C].
>
> 8. . . . Upon returning to the defense working spaces, [Capt C] relayed to myself and Ms. K███ C████, that while discussing evidence and potential objections, LtCol [T] told her "be careful, you are coming back to the Government soon" or words to that effect.
>
> 9. . . . [B]oth I and Ms. C████ encouraged [Capt C] to raise the issue on the record; however, at the time, as lead counsel, [Capt C] made the decision not to raise the issue on the record.

(Appellate Ex. CXLVI at 1-2) Captain C and Capt S attached Capt S's affidavit to Appellant's clemency matters. (Clemency Pet., Enclosure (5), Aug. 3, 2015.)

In response, the Staff Judge Advocate recommended that the Convening Authority order a post-trial Article 39(a) hearing. (Staff Judge Advocate Recommendation Addendum, Aug. 14, 2015.) The Convening Authority ordered a hearing under R.C.M. 1102, to inquire into "[p]rosecutorial misconduct and unlawful command influence raised" in Capt S's affidavit. (Order Directing Post-Trial 39(a), Sep. 24, 2015.)

2. Captain C testified to the context of Trial Counsel's out-of-court statements to her and their limited effect upon her performance.

The post-trial hearing convened on October 5, 2015. (R. 1707.) Appellant presented testimony from Capt C, who had known Trial Counsel, LtCol T, "for several years" and knew his sense of humor. (R. 1807.) Captain C testified to her encounters with him, including his statement about coming "back to the Government":

> Q. And how did it come to the point where the conversation turned to the comment which I'm about to ask you about?
>
> A. I don't exactly remember. I do remember that him and I were talking about—he—he had previously told me prior to this, on a number of occasions, that when he was talking to me, he felt like I was skeptical of him or that he felt, I don't know if the word is "awkward"—I don't know if he used that word-because of my attitude towards him.
>
> And he had explained to me that there was two reasons, I think, for—there could be two reasons for my—that attitude that I carried as a defense counsel: One being that I had had previous bad experiences with the prosecutor; or, two, that I have just a general distrust of the government and the commands trying to be out to get my Marines, basically.
>
> And he told me that—and he told me that, and we started talking about how I was going to—or I was slated to move from the Defense Services Organization to the Trial Services Organization after my tour in defense was completed and—yeah.
>
> Q. What did he say?
>
> A. Well, he was talking a lot about me switching sides, basically, and that I was going to come back to the government at some

> point and, you know, "Remember, you're coming back to the government some time."

(R. 1793.) Captain C felt "annoyed" and like she "was being scrutinized" based on this interaction. (R. 1793-94.)

Captain C testified that she laughed when Trial Counsel told Capt S to "fuck off," (R. 1788); that she knew Trial Counsel was joking when he made a comment about punching her in the face, (R. 1803-04); and that she recalled having once told Trial Counsel that a particular email he sent her "was bullshit," (R. 1805).

Captain C also testified to her discussion with Trial Counsel about the potential of calling Ms. M as a witness on a motion:

> Q. Okay. Other than the comments and what may be considered improper argument, was there any misconduct on the part of LtCol [T]?
>
> A. There— the only—
>
> Q. In your mind?
>
> A. The only other comment that I think that may have affected me, sir, and I don't think that it's misconduct, is [LtCol T]—I had brought in—I had brought up the text messages between G M and the complainant in the case prior to raising the motion itself to [LtColT], and I think we had a discussion about putting Ms. M on—yes, we did, sir.
>
> We had filed a witness request and put Ms. M on the list, and he had talked to me about, you know, "Well, you know, we don't want to get in the practice of putting HQE's on the stand; and if you put—if you think it's appropriate for Ms. M to go on the stand, then, you know, it might be appropriate for Ms. C to also go on the stand."

(R. 1814-15.) In hindsight, she "probably should have put Ms. M[redacted] on the stand during—or prior to [ ] making that motion [to dismiss] on the second day of trial," which, along with "object[ing] more during closing," would be the only thing she would have done differently. (R. 1815.)

Captain C testified that she made the decision not to raise on the Record any out-of-court interaction with Trial Counsel. (R. 1797.) Ms. C[redacted] corroborated this testimony. (R. 1763-64.) Captain C also did not think that either her interactions with Trial Counsel, or her husband's position in the same region as Trial Counsel, was significant enough to inform Appellant about it. (R. 1786, 1797-98.)

When asked about the collective effect that her interactions with Trial Counsel had upon her representation, Capt C testified, "I am of the position that I represented my client to the best of my ability." (R. 1796.)

The Military Judge declined to make findings and conclusions of law. (R. 1715-18; Second Addendum to the Staff Judge Advocate's Recommendation.) The Convening Authority approved the sentence as adjudged. (Convening Authority Action (C.A.A.) at 3, Jan. 4, 2016.)

## Argument

I.

NO WARRANT WAS REQUIRED FOR DETECTIVE SARBER TO SEARCH APPELLANT'S GYM BAG, AS THE SEARCH WAS INCIDENT TO A LAWFUL APPREHENSION AND WAS A REASONABLE INTRUSION TO PROTECT OFFICER SAFETY.

A. The standard of review is abuse of discretion.

This Court reviews the denial of a motion to suppress for an abuse of discretion. *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007) (citing *United States v. Khamsouk*, 57 M.J. 282, 286 (C.A.A.F. 2002)). This standard is "a strict one, calling for more than a mere difference of opinion." *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (citing *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010)). An abuse of discretion occurs when a military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).

Under this standard, findings of fact are affirmed absent clear error; conclusions of law are reviewed *de novo*. *United States v. Flores*, 64 M.J. 451, 454 (C.A.A.F. 2007) (citing *Khamsouk*, 57 M.J. at 286). This Court views the evidence in the light most favorable to the prevailing party. *Id.* (citing *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

B. "Reasonableness" is the touchstone of all Fourth Amendment inquiries. The warrant requirement is subject to certain exceptions, including searches incident to a lawful arrest and reasonable intrusions to protect officer safety.

"The Fourth Amendment provides in relevant part that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (internal quotation marks omitted). The Fourth Amendment, however, "does not protect against all searches." *United States v. Michael*, 66 M.J. 78, 80 (C.A.A.F. 2008). "Rather, it proscribes only unreasonable searches. 'The ultimate standard set forth in the Fourth Amendment is reasonableness.'" *Id*. (quoting *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973)).

1. The United States is entitled to conduct a full, reasonable search incident to a lawful arrest.

a. A search incident to lawful arrest is not only an exception to the Fourth Amendment's warrant requirement, but is also reasonable under that Amendment.

"The prevailing rule under the Fourth Amendment that searches and seizures may not be made without a warrant is subject to various exceptions." *United States v. Edwards*, 415 U.S. 800, 802 (1974). Warrantless searches incident to a lawful arrest are justified intrusions under the Fourth Amendment. *United States v. Robinson,* 414 U.S. 218, 235 (1973); *see* also Mil. R. Evid. 314(g). In *Robinson*, the Supreme Court held that the United States may conduct "a full search" incident to a lawful arrest, as such a search "is not only an exception to the warrant

requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Robinson*, 414 U.S. at 235; s*ee also United States v. Curtis,* 44 M.J. 106, 143 (C.A.A.F. 1996).

A lawful arrest entitles an officer to search the suspect for weapons that may harm the arresting officer, and "to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Chimel v. California,* 395 U.S. 752, 763 (1969) ("[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested")[6]; *Cupp v. Murphy,* 412 U.S. 291 (1973) ("[I]t is reasonable . . . to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence he may have in his possession.") .

In summary, these cases speak "not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness." *Robinson,* 414 U.S. at 226.

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[6] *Chimel* was limited significantly in *Arizona v. Gant,* 556 U.S. 332 (2009), where the Court held that the search of an arrestee's vehicle was unreasonable "after the arrestee has been secured and cannot access the interior of the vehicle," and where there was no reason "to believe that evidence of the offense of arrest might be found in the vehicle." 556 U.S. at 335. Nevertheless, the Court reaffirmed in *Gant* the principle that "a search incident to arrest may only include 'the arrestee's person and the area within his immediate control—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.'" *Id.* at 339 (quoting *Chimel,* 395 U.S. at 763).

b. The reasonableness of a search incident to lawful arrest depends on the scope, manner, and place of the intrusion and the justification for initiating it.

Authority to search incident to a lawful arrest is broad, but not unlimited; courts analyze the reasonableness of such a search "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Virginia v. Moore,* 553 U.S. 164, 171 (2008) (quoting *Wyoming v. Houghton,* 526 U.S. 295, 300 (1999)); *see also Robinson,* 414 U.S. at 441-42 (Powell, J., concurring) ("The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.").

Courts evaluate the totality of the circumstances and "must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish,* 441 U.S. 520, 559 (1979); *Houghton,* 526 U.S. at 300. There are "temporal and spatial limitations on a search incident to a lawful arrest," but "even a substantial delay will not invalidate a search." *Curtis*, 44 M.J. at 143 (C.A.A.F. 1996) (citing *Edwards*, 415 U.S. at 807).

The Supreme Court in *Edwards*, holding that a seizure of a suspect's clothes was reasonable despite not occurring until the morning after arrest, established that

> once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other. This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the "property room" of the jail, and at a later time searched and taken for use at the subsequent criminal trial. The result is the same where the property is not physically taken from the defendant until sometime after his incarceration.

415 U.S. at 807-08; *see also Abel v. United States*, 362 U.S. 217, 239 (1960) (holding that a search that did not occur until the accused was at the police station was reasonable "especially as the search of property carried by an accused to the place of detention has additional justifications").

Here, Det. Sarber searched Appellant's gym bag in the police station interview room the same afternoon Appellant was arrested. Under *Robinson* and *Chimel*, Det. Sarber was permitted to search Appellant for any weapons or evidence. He conducted his search far sooner than the search in *Edwards*, which was not conducted until the morning after arrest. *See Edwards*, 415 U.S. at 802; *see also Curtis*, 44 M.J. at 143. His minimal intrusion into the bag Appellant had specifically asked to take to the police station—and which he was about to receive before leaving—was therefore reasonable under the Fourth Amendment. *See Abel*, 362 U.S. at 239.

c. Because Mil. R. Evid. 314 permits admission of evidence obtained from searches incident to a lawful arrest, evidence derived from Detective Sarber's search of Appellant's gym bag was admissible.

Mil. R. Evid. 314 governs searches not requiring probable cause. Mil. R. Evid. 314(g)(1) unambiguously states that "a person who has been lawfully apprehended may be searched." Separately, Mil. R. Evid. 314(g)(2) provides that, "A search may be conducted for weapons or destructible evidence, in the area within the immediate control of a person who has been apprehended."

Under Mil. R. Evid. 314(g)(2), military courts have permitted warrantless searches of an accused's clothes incident to a lawful apprehension, *Curtis*, 44 M.J. at 143; an accused's pockets and person following apprehension by an officer of the day for disrespect toward a commissioned officer, *United States v. Marine*, 51 M.J. 425 (C.A.A.F. 1999); and an accused's wallet after apprehension at a military police office, *United States v. Wallace*, 34 M.J. 353 (C. M.A. 1992). The Rule likewise permits admission of evidence derived from Det. Sarber's search of Appellant's gym bag.

2. Under *Terry*, Detective Sarber's search for weapons was reasonable to protect his safety and the safety of others.

The Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 21 (1968), established that a warrantless pat-down search for weapons was reasonable when an officer possesses "specific and articulable facts which, taken together with the rational

inferences from those facts, reasonably warrant the intrusion" into the suspect's protected interests. *Terry*, 392 U.S. at 21. The Court established an "objective standard" for testing reasonableness: "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 21-22, 27; *see also Adams v. Williams*. 407 U.S. 143, 146 (1972) ("The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . .").

In *Michigan v. Long*, 463 U.S. 1032, 1050 (1983), the Court clarified and expanded upon *Terry*. In *Long*, the Court held in the context of an automobile stop that, "If, while conducting a legitimate *Terry* search of the interior of the automobile, the officer should, as here, discover contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances." *Long*, 463 U.S. at 1050 (citations omitted); *see also Minnesota v. Dickerson*, 508 U.S. 366, 374 (1993) ("[P]olice officers, at least under certain circumstances, may seize contraband detected during the lawful execution of a Terry search.").

Here, Det. Sarber had specific and articulable facts that reasonably justified his concern for his own safety and the safety of others in the police station: Appellant's reported conducted with SK, size, strength, military training, ownership and possession of firearms, and deceit regarding communications with

SK. (R. 308-12; Pros. Ex. 6; Appellate Ex. LVI at 6.) Considering also his pending vehicle trip, a reasonably prudent man in Det. Sarber's position would be warranted in the belief that his safety was in danger. *See Terry*, 392 U.S. at 27.

Appellant's argument that Det. Sarber did not consider Appellant to be "under arrest" when he "was done serving the search warrant on his person," is irrelevant to the officer safety analysis under *Terry*. (R. 318; Appellant's Br. at 16.) "If a suspect is 'dangerous,' he is no less dangerous simply because he is not arrested." *Long*, 463 U.S. at 1050. Because Det. Sarber discovered evidence of contraband only after a limited intrusion based on specific and articulable facts, to protect his safety and the safety of others, the Fourth Amendment did not require suppression. *See id.*; *Dickerson*, 508 U.S. at 374; *Terry*, 392 U.S. at 27.

II.

APPELLANT FORFEITED OBJECTION TO TRIAL COUNSEL'S OUT-OF-COURT COMMENTS, WHICH HAD NEITHER AN INTIMIDATING PURPOSE NOR ANY EFFECT UPON TRIAL DEFENSE COUNSEL'S VIGOROUS DEFENSE AGAINST OVERWHELMING EVIDENCE. TRIAL COUNSEL'S ARGUMENT FAIRLY COMMENTED ON THE EVIDENCE AS WELL AS PROSECUTION AND DEFENSE THEORIES, AND APPELLANT FAILS TO SHOW THAT THE MEMBERS DISREGARDED THE SPILLOVER INSTRUCTION. EVEN ASSUMING *ARGUENDO* PROSECUTORIAL MISCONDUCT, APPELLANT FAILS TO ESTABLISH MATERIAL PREJUDICE IN LIGHT OF THE MILITARY JUDGE'S CURATIVE INSTRUCTION.

A. Appellant forfeited any objection to Trial Counsel's out-of-court statements.

Whether prosecutorial misconduct occurred and, if so, whether that misconduct amounted to prejudicial error are legal questions this Court reviews *de novo*. *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006); *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997). However, when an appellant fails to object at trial, allegations of prosecutorial misconduct are reviewed for plain error. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). The appellant must therefore prove that "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id*. 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. Fisher*, 21 M.J. 327, 328-29 (C.M.A.

1986). Here, because Appellant did not object at trial to any out-of-court statements by LtCol T—Trial Counsel—this Court reviews for plain error.

B. Appellant merits no relief from Trial Counsel's out-of-court statements when he fails to establish any plain-error prong.

"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 (1935)). The Supreme Court has explained that prosecutorial misconduct occurs when "a prosecuting attorney oversteps the bounds of propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal case." *Berger*, 295 U.S. at 85.

> [A prosecutor] may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from *improper methods calculated* to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Id*. at 88 (emphasis added)

1. Appellant fails to establish error, let alone plain or obvious error, when none of Trial Counsel's statements to Captain C or her husband violated any professional norm or standard.

a. Trial Counsel's out-of-court statements were, at most, off-color jokes or professional guidance—not error.

Appellant's effort on appeal to characterize LtCol T's out-of-court statements as misconduct conflict with the gloss Capt C gives those statements.

Having known LtCol T for several years, she "laughed" when he told Capt S, "If you were one of my peers, I would have told you to 'fuck off.'" (R. 1788.) She knew LtCol was joking about punching her. (R. 1803-04.) Their ribaldry went both directions: she told him without repercussion that his email was "bullshit." (R. 1805.) In this light, LtCol T statement to Capt C's husband about holding this trial "against him" was manifestly an innocuous jest.

So too with his advisory to Capt C that she would be "coming back to the government soon." (R. 1793.) She understood that this conversation centered on her "attitude towards the government," based on her demonstrated skepticism of LtCol T. The statement was far from threatening: it was constructive professional advice, which made Capt C feel nothing more than "annoyed." (R. 1793.) Thus, in context, none of LtCol T's out-of-court statements violated a professional norm or standard.

b. Any error in Trial Counsel's out-of-court statements was not plain or obvious.

A trial counsel is plainly prohibited from interfering with an accused's right to counsel or dissuading a witness from testifying. *See Edmond*, 63 M.J. at 348; *Meek*, 44 M.J. at 5-8.

Here, LtCol T's out-of-court statements violated no such well-established norm. And Appellant identifies no case law finding any error in statements of the type that LtCol T made—either individually or cumulatively. (Appellant's Br. at

26-30.) Although not dispositive of the second plain error prong, the absence of any controlling authority strongly suggests that Appellant cannot carry his burden to show LtCol T's statements were "plain or obvious" error. *See United States v. Akbar*, 74 M.J. 364, 399 (C.A.A.F. 2015) (citing *United States v. Tarleton*, 47 M.J. 170, 172 (C.A.A.F. 1997) ("the absence of controlling precedent favorable to appellant demonstrates that the error, if any, was not plain error")).

2. Even if Trial Counsel's out-of-court statements violated a professional norm or standard, the error had no impact on the fairness of Appellant's trial.

Prosecutorial misconduct is reviewed for prejudice. *Meek*, 44 M.J. at 6; *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) (noting that the "touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial").

In *Meek*, the Court of Appeals for the Armed Forces reviewed a trial counsel's misconduct—in the form of attempting to unlawfully dissuade a witness from testifying and besmirching civilian defense counsel in front of the appellant—for prejudice. *Meek*, 44 M.J. at 5-8. The *Meek* court found no prejudice where the witness in question did, in fact, testify favorably for the appellant and the civilian defense counsel represented appellant through the trial. *Id*.

Appellant here focuses his prejudice argument on Capt C, alleging that "LtCol T's intimidation tactics worked and Capt C did not represent [Appellant]

effectively." (Appellant's Br. at 30.) But courts evaluate the combined efforts of the defense as a team rather than evaluating the individual shortcomings of any single counsel. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004) (citing *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001)).

Appellant's claim of prejudice in the form of "intimidating the defense" is squarely belied by the Record. *See United States v. Parker*, 75 M.J. 603, 614 (N-M. Ct. Crim. App. 2016) ("As is said, 'the proof is in the pudding . . . .'"). Here, the Defense team filed twenty-three pretrial motions, successfully disposing of an entire set of Charges and evidence related to MW. During this heated trial, they objected more than 100 times, moved mid-trial to dismiss Charges related to SK based on prosecutorial misconduct by Ms. M[redacted], *voir dired* the Military Judge on his understanding of ethics canons, requested and received a recess to regain composure, and moved for a mistrial after arguments. The Defense Counsel's stout performance was proof that LtCol T had no intimidating effect. *See id.*

Nor is any prejudice evident from Defense Counsel's trial decisions—either in declining to elicit Ms. M[redacted]'s testimony or declining to pursue LtCol T's removal. (Appellant's Br. at 29-30.) Appellant suggests benefits of each action, but provides no evidence of what Ms. M[redacted] would have testified to or how that testimony mattered. He likewise does not indicate any basis upon which LtCol T would have been removed. *See, e.g.*, *United States v. Bradley*, No. 200501089,

2008 CCA LEXIS 398, at *23-24 (N-M. Ct. Crim. App. Nov. 25, 2008) (finding that prosecutors who knew of appellant's immunized statements should have been removed under *Kastigar v. United States*, 406 U.S. 441 (1972)).

Finally, Appellant fails to argue how the trial would have been different if prosecuted by any other trial counsel. Appellant has therefore failed to show any material prejudice to a substantial right.

C. Trial Counsel's argument properly commented on the evidence. Any potential spillover or impact from his rebuttal was so fleeting as to have no prejudicial effect, especially given the Military Judge's instructions and overwhelming weight of the evidence.

When objection is made at trial, this Court reviews an allegation of improper argument for prejudicial error under Article 59, UCMJ, 10 U.S.C. § 859 (2012). *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005); *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) ("The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused.").

1. Improper argument, under *Baer*, depends on a contextual reading of whether comments violate norms or standards.

As with prosecutorial actions, misconduct in the form of improper argument must violate "some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *Meek*, 44 M.J.

at 5. Comments made in argument are reviewed in context rather than in isolation. *Baer*, 53 M.J. at 238 (quotations omitted).

a. A trial counsel may argue forcefully, but should not make disparaging comments about a defense counsel or an accused.

"Prosecutors can argue the record, highlight any inconsistencies or inadequacies of the defense, and forcefully assert reasonable inferences from the evidence." *Cristini v. McKee*, 526 F.3d 888, 901 (6th Cir. 2008); *see also United States v. Newman*, No. 933289, 1993 U.S. App. LEXIS 32082, at *29 (6th Cir. Dec. 7, 1993) (no prosecutorial misconduct where prosecutor repeatedly called defense's submitted evidence "phony" and "bogus" because there was evidence in record to indicate the evidence may have been fabricated).

"The prosecutor should support . . . the dignity of the trial courtroom . . . by manifesting a professional attitude toward . . . opposing counsel [and] defendants . . . ." ABA Criminal Justice Standards for the Prosecution Function 3-6.2(a) (4th ed. 2015); *see also Fletcher*, 62 M.J. at 181. There is, however, an "exceedingly fine line which distinguishes permissible advocacy from improper excess" which "is to be drawn within the concrete terrain of specific cases." *See United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973); *see also Viereck v. United States*, 318 U.S. 236, 253 (1943) (Black, J., dissenting) ("A prosecutor must draw a careful line. On the one hand, he should be fair; he should not seek to arouse passion or

engender prejudice. On the other hand, earnestness or even a stirring eloquence cannot convict him of hitting foul blows.”).

b. A trial counsel is permitted to comment on evidence and logical inferences drawn therefrom, but may not encourage a panel to convict based on general criminal disposition.

Arguments on findings “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.” R.C.M. 919. “An accused may not be convicted of a crime based on a general criminal disposition.” *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citing *United States v. Hogan,* 20 M.J. 71, 73 (C.M.A. 1985); Mil. R. Evid. 404(a), (b) (generally prohibiting the use of evidence of character or past crimes to prove an accused acted in conformity therewith)). Argument referring to an accused’s “general criminal disposition” therefore is improper as it is “not a ‘reasonable inference[] fairly derived’ from the evidence.” *Id*. at 152-53 (citing *Baer*, 53 M.J. at 237).

2. Trial Counsel’s reference to Appellant’s being “above the law(s)” was, in context, merely an exhortation against jury nullification, from which no possible prejudice arose.

In findings argument, Trial Counsel stated that Appellant’s use “is one nugget of proof, that he does believe that he is above the law. He is above the laws and values that govern and guide us all, whether it be in society or whether we are in the United States Marine Corps.” (R. 1421-22.) In context, this comment was

not a reference to any "general criminal disposition," but instead a pre-emptive argument against jury nullification—his comment began, "Now, you may not think that the use of steroids is that dramatic, is that appalling; it should be." (R. 1421.)

Even if this Court were to read this argument as a reference to Appellant's criminal disposition, the argument must still be tested for prejudice by examining, "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *United States v. Frey*, 73 M.J. 245, 249 (C.A.A.F. 2014) (citing *Fletcher*, 62 M.J. at 184).

First, the severity of the misconduct was low, particularly relative to its potential to impact the Members. The argument arose approximately six pages into his thirty-four page argument on findings, and Trial Counsel did not refer to any other offense. (R. 1415-48.) Although the statement was made while the accompanying PowerPoint slide listed each of the offenses, Appellant's Steroid use was unrelated to any offense he committed upon SK. (R. 1421-22; Appellate Ex. CXXIV at 2.) As the Military Judges' Benchbook notes, the primary danger of spillover exists when *similar* offenses are charged:

> When unrelated but similar offenses are tried at the same time, there is a possibility that the court members may use evidence relating to one offense to convict of another offense. Another danger is that the members could conclude that the accused has a propensity to commit crime.

Dep't of Army, Pam. 27-9, para. 7-17 (Sep. 10, 2014) (citing *Hogan*, 20 M.J. 71).

Second, the Military Judge took no curative measures , but only because he found none necessary to cure any potential harm: in overruling Appellant's objection and denying any requested relief, the Military Judge noted that he had already instructed the Members that Appellant "may not be convicted on evidence of a criminal disposition." (R. 1398, 1452.) He also provided the Members a written copy of the instructions. (Appellate Ex. CXXII at 16.) And the Members' findings reflect their scrupulous adherence to those instructions: they acquitted Appellant of two offenses related to SK, including one alleging that Appellant solicited SK to wrongfully possess Oxycontin and Vicodin. (R. 1506.)

Third, the evidence supporting both Appellant's use of Steroids and his kidnap, assault, and rape of SK was overwhelming. Regarding steroids, Appellant failed a urinalysis and had discussed his use with his ex-wife. Regarding SK, Appellant admitted to soliciting her for prostitution, meeting her, being in his truck with her at the time and location she alleged, all of which were corroborated by the security video and phone records. Appellant's firearm was found in hi truck, and a series of witnesses corroborated SK's frantic reactions to the kidnap and rape, which were also backed by DNA evidence.

In light of these factors, each of which weighs in favor of the United States, this Court can be "confident in the [M]embers' ability to adhere to the [M]ilitary [J]udge's instructions[,] to put counsel's arguments in their proper context," and

"equally confident that the [M]embers convicted [Appellant] on the basis of the evidence alone." *See United States v. Branen*, No. 201400412, 2015 CCA LEXIS 457, at *12 (N-M. Ct. Crim. App. Oct. 27, 2015).

3. <u>In rebuttal, Trial Counsel's single uses of "absurd" and "disgusting" and his comments about "little girls' dreams" directly and permissibly rebutted Defense arguments about witness biases and motives. The Military Judge's immediate instruction cured any possible error</u>.

In rebuttal argument, Trial Counsel characterized the notion that TSgt AR should not be believed as "absurd." (R. 1484-85.) The comment responded to Trial Defense Counsel's suggestion that TSgt AR had, in February 2014, concocted a 2003 rape allegation as part of her collusion with Ms. Severyn against Appellant. (R. 1476-77.) Trial Counsel's use of the word did not violate any standards; he instead "forcefully assert[ed]" the implausible and unreasonable nature of any adverse inference Appellant asked the Members to draw from the timing of TSgt AR's allegation. *See Cristini*, 526 F.3d at 901; ABA Standard 3-6.8.

So too with Trial Counsel's use of "disgusting" to rebut Appellant's suggestion that that Ms. M[redacted] had provided improper emotional support to SK. (R. 1463, 1483.) Trial Counsel again, for a single time across more than forty-five pages and two hours of argument and rebuttal, "forcefully assert[ed]" the fallacy of

Appellant's argument that a United States' representative improperly influenced SK's testimony. *See Cristini*, 526 F.3d at 901; ABA Standard 3-6.8.

Similarly, Trial Counsel's invoked the innocence of youth to explain why SK may have "walked into this courtroom" appearing disoriented or without the bearing of the other trial participants. This argument directly responded to Appellant's lengthy attack on SK's credibility, which targeted everything from her criminal past, to her history of mental disease, to her "inability to take this process seriously." (R. 1469.) Trial Counsel eloquently explained SK's station in life, and drew the reasonable inference that Appellant targeted SK because of her relatively low standing. *See Cristini*, 526 F.3d at 901; ABA Standard 3-6.8.

Although the Military Judge found none of the above comments amounted to error, to ensure that no possible prejudice arose from the argument, he reiterated to the Members that arguments of counsel were not evidence, and that "you must not let your emotions overcome your rational thought process." (R. 1496.) Appellant points to no evidence that the Members ignored or were unable to follow this curative instruction. As with the Trial Counsel's other statements, Appellant fails to demonstrate any possible prejudice, particularly in light of the immediate curative measures the Military Judge took. *See Frey*, 73 M.J. at 249; *Fletcher*, 62 M.J. at 184.

III.

APPELLANT WAS ZEALOUSLY AND CAPABLY REPRESENTED BY HIS TRIAL DEFENSE TEAM. APPELLANT FAILS TO SHOW THAT CAPTAIN C HAD ANY ACTUAL CONFLICT OF INTEREST, AND COUNSEL'S TRIAL DECISIONS WERE SOUND UNDER THE CIRCUMSTANCES. EVEN IF THIS COURT FOUND A DEFICIENCY IN COUNSEL'S PERFORMANCE, APPELLANT FAILS TO ESTABLISH HOW ANY OTHER ACTION WOULD HAVE AFFECTED THE TRIAL OUTCOME.

A. Claims of ineffective assistance of counsel are reviewed *de novo*.

An accused is entitled to effective representation by counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish ineffective assistance of counsel, "an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687). Questions of counsel's deficient performance and resulting prejudice are reviewed *de novo*. *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008).

Appellant has the burden of demonstrating both prongs of the *Strickland* test, including the burden of establishing the truth of factual matters underlying his claim of ineffective assistance. *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991); *Denedo v. United States*, 66 M.J. 114, 129 (C.A.A.F. 2008), *aff'd*, 556 U.S. 904 (2009). Because counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable

professional judgment, to show ineffective assistance an appellant must surmount a very high hurdle. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997); *United States v. Scott,* 24 M.J. 186, 192 (C.M.A. 1987).

B. Appellant fails to carry his burden to overcome the strong presumption of his Trial Defense Counsel's competence.

"With respect to the first prong, whether counsel's performance was deficient, courts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *United States v. Rose*, 71 M.J. 138, 143 (C.A.A.F. 2012) (quoting *Strickland*, 466 U.S. at 689). The test for whether this presumption of competence has been overcome examines whether appellant's allegations are true; whether there is a reasonable explanation for counsel's actions; and whether defense counsel's level of advocacy "fell measurably below the performance . . . [ordinarily expected] of fallible lawyers." *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *Polk*, 32 M.J. at 153. "Even under *de novo* review, the standard judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

To exceed this deferential standard, the counsel's performance must amount to "incompetence 'under prevailing professional norms.'" *Harrington*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 690). An appellant must show that counsel's performance was deficient such that the counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. *Denedo*, 66 M.J. at 127.

1. Captain C had no actual conflict of interest in representing Appellant.

A military accused is "entitled to have conflict-free counsel." *United States v. Murphy*, 50 M.J. 4, 10 (C.A.A.F. 1998) (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978)). A military attorney has an ethical duty to identify conflicts of interest and to take appropriate steps to decline or terminate representation when required by applicable rules. *United States v. Humpherys*, 57 M.J. 83, 88 n.4 (C.A.A.F. 2002). Within the Department of the Navy, a conflict of interest exists when, e.g., "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the covered attorney." Judge Advocate General Instruction 5803.1E, R. 1.7.a.(2) (Jan. 20, 2015).

"A defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). The burden of proof is on the defense. *United States v. Calhoun*, 49 M.J. 485, 489 (1998) (citing *Strickland*, 466 U.S. at 687).

Here, Capt C expressly disclaimed any "material limit" on her representation due to a personal interest in either her husband's profession or her interactions with LtCol T. (R. 1786, 1797-98.) Appellant identifies no "actual conflict" that impacted Capt C.

2. <u>In declining to call Ms. M███ as a witness, Trial Defense Counsel made an appropriate tactical decision</u>.

"Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *United States v. Datavs*, 71 M.J., 420, 424 (C.A.A.F. 2012) (citing *Gooch*, 69 M.J. at 362-63 (holding that it was not deficient performance to decide not to have the military judge dismiss a specification and risk a mistrial where counsel had strategic reasons for keeping the assembled panel); *United States v. Stephenson*, 33 M.J. 79, 80 (C.M.A. 1991) (concluding that it was not deficient performance to decline to call character witness at sentencing hearing to avoid harmful rebuttal evidence)).

At trial, after moving to dismiss the Charges related to SK, Capt C cross-examined SK at length, with multiple lines of impeachment, including about her communications with Ms. M███. (R. 1025-29, 1052.) There is no indication in the Record that Ms. M███ would have added any more or different testimony to this effort. To the contrary, given that the defense theory at trial was that Ms. M███ was *too* sympathetic to SK, it is far more likely that her testimony would have been unfriendly to Appellant. As such, Trial Defense Counsel did not perform deficiently by declining to seek any minimal speculative benefit from Ms. M███'s testimony. *See Datavs*, 71 M.J. at 424.

3. Appellant fails to show how Trial Defense Counsel were deficient in declining either to further *voir dire* the Military Judge or to request his recusal.

A military accused is entitled to an impartial military judge. *See United States v. Rivers*, 49 M.J. 434, 444 (C.A.A.F. 1998). A military judge is obligated to "disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a). Any party is permitted to question and move a military judge for recusal. R.C.M. 902(d); *see also* 28 USC § 455 (2012).

Here, the Record betrays no bias on the part of the Military Judge—a conclusion supported largely by Trial Defense Counsel's questioning and explicit statement that the record established no basis for a challenge. (R. 713.) Appellant thus waived any challenge to the Military Judge. *See* R.C.M. 905(e). Since the time that waiver was entered, Appellant's post-trial allegation that his Trial Defense Counsel were deficient in failing to *further* question the Military Judge, and seek his recusal, has gained no additional support in the Record.

C. Appellant fails to show prejudice when he cannot identify how any different decision or action by Counsel would have affected the outcome.

1. It is settled law that errors involving non-structural errors must be tested for prejudice.

Structural errors are those "errors in the trial mechanism so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of

guilt or innocence.'" *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). A trial error "is treated as inherently prejudicial, without the need for a further showing of prejudice, only if it amounts to a 'structural defect[] in the constitution of the trial.'" *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (quoting *Meek*, 44 M.J. at 6).

But the list of possible structural errors requiring reversal is confined to a "very limited class of cases." *Neder v. United States*, 527 U.S. 1, 8, (1999); *see Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (citing *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction)).

Mere ineffective assistance errors are not included in that class, and this Court has also expressly refused to find—contrary to Appellant's request here—that ineffective assistance due to potential conflicts of interest constitute *per se* structural error. *United States v. Lee*, 70 M.J. 535, 540 (N-M. Ct. Crim. App. 2011).

2. <u>Appellant fails to meet his burden to show any prejudice resulted from his Trial Defense Team's performance</u>.

To show prejudice under *Strickland*, an appellant has the burden to demonstrate "a reasonable probability that, but for counsel's [deficient performance,] the result of the proceeding would have been different. . . . [T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *Datavs*, 71 M.J. at 424 (C.A.A.F. 2012) (quoting *Strickland*, 466 U.S. at 694-95).

Because a claim of ineffective assistance "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," courts apply *Strickland* with "scrupulous care." *Harrington*, 562 U.S. at 105. Appellate courts "make every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time." *Akbar*, 74 M.J. at 379 (citing *Strickland* 466 U.S. at 489); *see also United States v. Ingham*, 42 M.J. 218, 229 (C.A.A.F. 1995) ("The test of counsel's performance is not that he lost; and it is not that some number of options were not pursued or could have been pursed differently.").

Here, as discussed in Part II.B.2, *supra*, Trial Defense Counsel were dogged and resolute in the face of overwhelming evidence against Appellant. To support his ineffective-assistance allegation, Appellant's complaints of *prejudice* simply

regurgitate his complaints of *deficiency*: his Counsel failed to call Ms. M[redacted] as a witness and to inform the trial court about LtCol T's out-of-court comments. (Appellant's Br. at 44.) Appellant theorizes that Ms. M[redacted]'s testimony was essential to attacking SK's credibility, but this argument ignores that Capt C did cross-examine SK about her communications with Ms. M[redacted]. (R. 1025-29, 1052.) To this day, Appellant still has not identified what if any testimony from Ms. M[redacted] would have further undermined SK's credibility.

And while Appellant posits that raising LtCol T's out-of-court comments "would have resulted in the Government assigning a new prosecutor to the case," he cites no legal support for that idea and then does not identify how "the result of his proceeding would have been different." *See Strickland*, 466 U.S. at 694. Consequently, this Court should reject Appellant's attempt to show prejudice through mere "speculative or conclusory observations," *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997), as no factfinder would have reached any different conclusion if the defense called these witnesses. *See Datavs*, 71 M.J. at 424-25.

IV.

A SENTENCE OF TWENTY-SIX YEARS OF CONFINEMENT IS APPROPRIATE FOR A MARINE WHO CULMINATED A SERIES OF UNLAWFUL ACTS BY KIDNAPPING, ASSAULTING, AND RAPING A WOMAN AT GUNPOINT BEFORE CALLOUSLY THREATENING HER, IN CIRCUMSTANCES THAT OVERWHELMED ANY ATTEMPT TO MITIGATE THE CRIMES.

A. Sentence appropriateness is reviewed *de novo*.

This Court reviews the appropriateness of a sentence *de novo*. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006); *United States v. Baier*, 60 M.J. 382, 382-84 (C.A.A.F. 2005).

B. This Court's review ensures Appellant receives the punishment he deserves, in the interest of justice.

A court-martial is free to impose any sentence it considers fair and just within the limits of punishment prescribed by the Code or the President. *United States v. Dedert*, 54 M.J. 904, 909 (N-M. Ct. Crim. App. 2001); *see also United States v. Turner*, 14 C.M.A. 435, 437 (C.M.A. 1964). This Court may only affirm so much of the sentence as it finds correct in law and fact based on the entirety of the Record. Article 66(c), 10 U.S.C. § 866(c) (2012); *Baier*, 60 M.J. at 383-84. This sentence-appropriateness review involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988).

This Court gives "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quotation omitted); *Dedert*, 54 M.J. at 909 (citation omitted). Although this Court has significant discretion in reviewing the appropriateness and severity of the adjudged sentence, this Court may not engage in clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999) (citing *Healy*, 26 M.J. at 395-96).

C. Under the facts of this case alone, Appellant's sentence was appropriate ad his case merits no comparison to other cases.

1. Appellant's sentence was appropriate for kidnapping, assaulting and raping SK at gunpoint, particularly given his history of sexual violence.

Appellant was convicted of, *inter alia*, kidnapping, aggravated assault, and rape, all by gunpoint. (R. 1506.) With his additional convictions of wrongfully using Steroids, violating a lawful general order, and communicating a threat, and faced a maximum punishment of, inter alia, confinement for life without the possibility of parole. (R. 1509, 1666; Appellate Ex. CXXX at 1.) Because his adjudged and approved sentence of twenty-six years of confinement is significantly less than the maximum, the question becomes whether the sentence is appropriate under individualized consideration of Appellant, his character, and the nature and seriousness of his offenses. *See Snelling*, 14 M.J. at 267.

In assessing the length of appropriate length of confinement, the Members were required to consider the nature of Appellant's attack on SK, which evinced a uniquely predatory strain of violence. The breadth of his crimes, and the length of time they spanned, indicated the extent of his departure from lawful society. And although Appellant attempted to mitigate his crimes through evidence of his being a dedicated father, that showing was thoroughly undermined by the evidence that Appellant's brutal assault and rape of SK occurred on the same day of his eldest daughter's eleventh birthday—hours after he had completed his custodial weekend.

Appellant does not argue that the Members fail to give individualized consideration—and any such argument would fail when Trial Counsel argued for a sentence of forty to forty-five years of confinement (R. 1674), but the Members awarded barely half of that. (R. 1702.) Under all of the applicable sentencing principles (R. 1666; Appellate Ex. CXXX at 1; *see* R.C.M. 1001(g)), Appellant's sentence to confinement for twenty-six years "is appropriate in all respects for these offenses and this offender." *See United States v. Kirt*, 52 M.J. 699, 707-708 (N-M. Ct. Crim. App. 2000) (citing *Healy*, 26 M.J. 394; *Snelling*, 14 M.J. at 268).

2. <u>Appellant's veiled sentence disparity argument fails because he fails to identify any "closely related" case</u>.

Sentence appropriateness generally should be determined without reference or comparison to sentences in other cases. *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985). And this Court is not required to engage in comparison of

specific cases "'except in those rare instances in which sentence appropriateness can be fairly determined *only* by reference to disparate sentences adjudged in closely related cases.'" *Lacy*, 50 M.J. at 288 (emphasis added) (quoting *Ballard*, 20 M.J. at 283).

Appellant cites no mitigating or extenuating factors rendering his sentence inappropriate, and alleges no sentence *disparity* error, but compares his case with four others. (Appellant's Br. at 46-50 (citing *United States v. Suazolopez*, No. 201300463, 2014 CCA LEXIS 916 (N-M Ct. Crim. App. Dec. 23, 2014); *United States v. Mora*, No. 201200335, 2013 CCA LEXIS 265 (N-M. Ct. Crim. App. Mar. 28, 2013); *United States v. Stevenson*, No. 200301272, 2009 CCA LEXIS 445 (N-M. Ct. Crim. App. Dec 10, 2009); and *United States v. Gregory*, No. 200900282, 2009 CCA LEXIS 683 (N-M. Ct. Crim. App. Nov. 17, 2009).)

When arguing a claim of severe sentence disparity, Appellant bears the burden of showing that the cases are closely related and that the sentences are highly disparate. *Lacy*, 50 M.J. at 288. If that showing is made, the burden shifts to the Government to show a rational basis for the disparity. *Id*. "Closely related" cases are those that "involve offenses that are similar in both nature and seriousness or which arise from a common scheme or design." *United States v. Kelly*, 40 M.J. 558, 570 (N.M.C.M.R. 1994); *see also Lacy*, 50 M.J. at 288 (noting that examples of closely related cases include co-actors in a common crime,

servicemembers involved in a common or parallel scheme, or "some other direct nexus between the servicemembers whose sentences are sought to be compared").

Here, no "common or parallel scheme" links Appellant's crimes to any others, nor does Appellant attempt to find one. *See Lacy*, 50 M.J. at 288. And Appellant's crimes diverged in both "nature and seriousness" from his cited cases. *See Kelly*, 40 M.J. at 570. None of the other appellants kidnapped and assaulted his victim at gunpoint or communicated post-rape threats. These facts, along with Appellant's other crimes, both distinguish his case and "explain and justify" his sentence. *See United States v. Rostmeyer*, No. 201500095, 2015 CCA LEXIS 532, at *18 (N-M. Ct. Crim. App. Nov. 30, 2015).

3. Appellant's request for relief on his sentence amounts to a request for clemency.

Appellant's attempt to seek relief from his sentence to confinement merely amounts to another request for clemency. Appellant asked the Convening Authority for clemency under R.C.M. 1105. (Clemency Pet.) The Convening Authority declined to grant relief and ordered the sentence approved as adjudged. (C.A.A. at 3.)

This Court should not be moved to grant Appellant relief based on either the matters he submitted in clemency or comparison to other assault cases. It is clear from the nature and seriousness of Appellant's actions, and the entire Record of Trial, that the Members correctly determined Appellant's conduct was so egregious

and remorseless as to warrant a sentence to twenty-six years of confinement. This approved sentence is necessary to punish Appellant for his actions and to protect those who might come in contact with him.

V.

APPELLANT'S COMPLAINTS ABOUT MAJOR P ARE UNSUPPORTED BY AN AFFIDAVIT OR ANY OTHER RECORD EVIDENCE, AND APPELLANT FAILS TO DEMONSTRATE ANY PREJUDICE FROM MAJOR P'S PERFORMANCE. IT WAS NOT ERROR TO DENY A SECOND INVESTIGATIVE VISIT BY HIS COUNSEL, AND APPELLANT FAILS TO IDENTIFY ANY PREJUDICE FROM THAT DENIAL. THE MILITARY JUDGE PROPERLY ADMITTED SENTENCING EVIDENCE THAT DIRECTLY REBUTTED APPELLANT'S PRESENTATION OF HIMSELF AS A DEVOTED FATHER.[7]

A. Appellant's ineffective assistance of counsel claim fails when he offers nothing beyond bare allegations and speculation about Major P.

1. The Record shows no deficiency in Major P's performance and Appellant declined to submit an affidavit to support his claims.

The standard of review for ineffective assistance of counsel claims is *de novo*, as discussed in Part III.A., *supra*.

An appellant who raises ineffective assistance of counsel assertions at this Court must do more than levy "bare allegations and speculation concerning his trial defense counsel's claimed errors and omissions." *United States v. Wilt*, 201300274, 2015 CCA LEXIS 57, at *24 (N-M. Ct. Crim. App. Feb. 19, 2015);

[7] Responding to errors raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

*see also United States v. Henry*, No. 200800028, 2008 CCA LEXIS 617, at *10 (N-M. Ct. Crim. App. Aug. 19, 2008); *United States v. Griffin*, No. 200201471, 2007 CCA LEXIS 565, at *15 (N-M. Ct. Crim. App. Dec. 20, 2007), *rev. denied*, 66 M.J. 498, 2008 CAAF LEXIS 806 (C.A.A.F. 2008). His claims must be supported by a post-trial affidavit or *some* other credible evidence. *See id.*; *cf. Ginn*, 47 M.J. at 248.

Appellant's claim that Maj P conducted a deficient investigation is unsupported by either an affidavit or any Record evidence. This Court should reject these bare allegations raised only through Appellant's pleading. *See id.*

2. Appellant's speculations fail to demonstrate prejudice.

Even if this Court were to accept the truth of Appellant's assertions, he released Maj P as counsel well before trial. (R. 157-60; Appellate Ex. XXI at 12; Appellate Ex. XXXI; Appellant's Br. at 51.) Appellant fails to identify how Maj P's performance several months *before* trial impacted the events *at* trial, let alone how any alternative action by Maj P would have led to a different result. *See Datavs*, 71 M.J. at 424.

B. Appellant's fails to identify what Trial Defense Counsel would have discovered on a second pretrial site visit and how that visit would have impacted his trial.

An accused is entitled to necessary investigative resources, and a military judge's decision to deny those resources is reviewed for an abuse of discretion. *Cf.*

*United States v. Gray*, 51 M.J. 1, 30 (C.A.A.F. 1999); *see also United States v. Riesbeck*, No. 1374, 2014 CCA LEXIS 946, at *4-5 (C.G. Ct. Crim. App. Aug. 5, 2014), *rev'd on other grounds*, 74 M.J. 176 (C.A.A.F. 2014). Necessity requires more than the mere possibility of assistance—an accused must show that denial of resources would result in "a fundamentally unfair trial." *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005).

Here, two of Appellant's Trial Defense Counsel, along with a clerk, made a seven-day investigative visit to Anchorage in June 2014. (Appellate Ex. XXIX at 4; Appellate Ex. LII at 2.) The Military Judge denied Appellant's request for a second, seven-day investigative visit to Anchorage because Appellant failed to provide any evidence that the trip was "necessary." (Appellate Ex. LII at 4-5.) Appellant fails to identify any erroneous factual finding in the Military Judge's Ruling or how his conclusion was "outside the range of choices reasonably arising from the applicable facts and the law." *See Miller*, 66 M.J. at 307.

Assuming *arguendo* that the Military Judge abused his discretion in denying the visit, Appellant fails to establish any prejudice from the ruling. *See United States v. McAllister*, 55 M.J. 270, 276 (C.A.A.F. 2001). He levies only a general assertion that "his defense team was not properly prepared," (Appellant's Br. at 52), but even at this late stage identifies no evidence that a second investigative visit would have disclosed, nor how it would have impacted his defense.

C. The Military Judge was within his discretion to admit Appellant's text messages as rebuttal evidence on sentencing.

A military judge's decisions to admit or exclude evidence are reviewed for abuse of discretion. *United States v. Eslinger*, 70 M.J. 193, 197-98 (C.A.A.F. 2011) (citing *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010)). "To find an abuse of discretion requires more than a mere difference of opinion—the challenged ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000) (internal quotation marks omitted).

Here, Appellant's lengthy sentencing case sought to mitigate his offenses by characterizing him as a dedicated father. The brief rebuttal evidence—a short series of text messages presented through one witness—showed that Appellant arranged to meet with SK while he had custody of his daughters, and that he raped and assaulted SK on his eldest daughter's birthday. (R. 1657-61; Pros. Ex. 35; Pros. Ex. 36 at 36-43; Pros. Ex. 47.) The Military Judge was within his discretion in finding that the text messages were relevant as a direct response to Appellant's sentencing case, and that their probative value was not substantially outweighed by the danger of unfair prejudice. *See* Mil. R. Evid. 403.

## Conclusion

WHEREFORE, the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.

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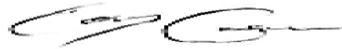

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**Certificate of Filing and Service**

I certify that the original and required number of copies of the foregoing[8] were to the Court on October 11, 2016. I also certify that a copy of the foregoing was delivered to Mr. Gary MYERS and Lieutenant Christopher C. McMAHON, JAGC, USN, and electronically filed in CMTIS on October 11, 2016.

[8] Rule 15.1(h) of this Court's Rules of Practice and Procedure limits principal briefs to "the greater of 50 pages or 20,000 words." This Answer is over fifty pages, but contains only 15,099 words.

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