27 January 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	REPLY BRIEF ON BEHALF OF APPELLANT
v.	)	Crim. App. No. 37759
	)	USCA Dkt. No. 14-0005/AF
DANIEL A. FREY Staff Sergeant (E-5) United States Air Force, *Appellant.*	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

COMES NOW Appellant, by and through undersigned counsel, and pursuant to Rule 19(b)(3) of this Honorable Court's Rules of Practice and Procedure and this Honorable Court's Docketing Notice of 15 November 2013, and files this reply to the United States' final brief.

Additional Argument

Issue

THE AIR FORCE COURT ERRED IN FINDING TRIAL COUNSEL'S PRESENTENCING ARGUMENT WAS HARMLESS ERROR WHERE TRIAL COUNSEL INSINUATED THAT APPELLANT WILL COMMIT FUTURE ACTS OF CHILD MOLESTATION.

In rebuttal argument, trial counsel conceded there was no evidence of similar misconduct, but then stated: "But think what we know, common sense, ways of the world about child molesters." (J.A. 32). The improper argument materially prejudiced the Appellant, and the military judge further compounded the problem

by overruling the objection and giving a curative instruction that encouraged the panel members to consider the improper argument.

A. *Trial counsel's argument was improper – the government's proposition of potential for rehabilitation is without merit.*

During the sentencing argument, trial defense counsel pointed to the fact that Appellant would have to register as a sex offender and that he had not previously engaged in any similar misconduct (J.A. 29, 31-32). Both arguments were fair comments based on the actual evidence presented at trial. In their brief, the government argues that in response to trial defense counsel's argument, trial counsel made the above-referenced comments in order for the members to consider the Appellant's rehabilitative potential and the necessity for specific deterrence. Appellee's Final Brief at 11. The government cites *United States v. Williams* for the proposition that potential for rehabilitation is broad enough to include expert opinion on future dangerousness. *Id*. at 12. However, there was no expert testimony during the Appellant's trial; here, trial counsel only attempted to prey upon the fears of the panel members by making an argument that had no basis in fact: that all sex offenders will reoffend.

B. *Trial counsel's argument materially prejudiced the Appellant.*

This Court has adopted a three-part balancing test to determine the prejudice of trial counsel's improper argument: (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. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). This Court has previously held that "it is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." *Id*. The government urges this Court to forgo the first two prongs of that analysis and focus on the third prong. Appellee's Final Brief at 16. Specifically, the government cites *United States v. Halpin*, 71 M.J. 477 (C.A.A.F. 2013), where this Court found the Appellant failed to establish that the weight of the evidence did not clearly support the adjudged and approved sentence. There are notable distinctions between *Halpin* and this case that render *Halpin* inapplicable.

First, trial defense counsel failed to object to the improper argument and as a result, this Court reviewed *Halpin* under a plain error analysis. *Id*. at 479. Here, Appellant's counsel made a timely and appropriate objection to the improper argument. Second, in *Halpin* the appellant pled guilty in exchange for the convening authority's agreement to refer the case to a special court-martial. *Id*. at 478. The appellant in *Halpin*, a nineteen-year-old Airman First Class, had previously

received letters of counseling, letters of reprimand, and Article 15s and also continued a course of misconduct after his initial apprehension. *Id*. at 479-80. Here, Appellant, a Staff Sergeant with over ten years of active duty service had no prior instances of misconduct, excellent enlisted performance reports, and the conduct at the court-martial was an isolated incident. *Halpin* is not applicable to the facts in Appellant's case. In view of trial counsel's improper argument, we cannot be confident that Appellant was sentenced on the basis of the evidence alone, and as a result, was prejudiced by the improper argument.

C. *Trial counsel's reference to "common sense and ways of the world" had a singular purpose.*

The government suggests that the military judge's and trial counsel's reference to the members using their "common sense and knowledge of the ways of the world" was appropriate and consistent with precedent. Appellee's Final Brief at 19-20. The cases cited involve the evaluation of lay testimony, witness credibility, or evaluating potential defenses. *Id*. All of the references to "common sense and knowledge of the ways of the world" are non-binding dicta used by this Court to analyze how panel members might consider properly presented evidence and proper instructions given by the military judge. None of those circumstances outlined are applicable to this case. Here, trial counsel relied on an improper notion that was not presented in evidence. Trial counsel exhorted the panel members to use their

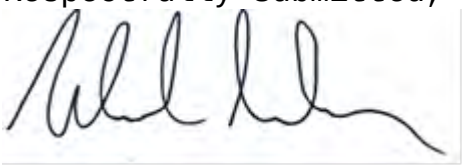
common sense and ways of the world in an improper manner – insinuating that we need to protect children from child molesters by inflaming the passions of the panel, invoking the need for the panel to protect future potential victims by adjudging lengthy confinement.

Further, the military judge instructed that, with respect to "any implication suggested by counsel," "it is up to you to determine whether or not that comports with your sense of the ways of the world." (J.A. 33). In other words, as noted above, if the panel believed trial counsel's assertion that all child molesters are serial offenders, then the panel was free to consider this when adjudging an appropriate sentence, even though they were using improper evidence.

When applying the *Fletcher* factors to this case, it becomes evident that the improper comments made by the prosecutor during the sentencing argument constituted severe misconduct, the curative measures by the military judge exasperated the misconduct, and minus the improper statement, the weight of the evidence does not support the sentence. As a result, this Court cannot be confident that the Appellant was properly sentenced on the weight of the evidence alone.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside the sentence.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on January 27, 2014.

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