15 January 2014

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 14-0005/AF
Staff Sergeant (E-5), DANIEL A. FREY, USAF, *Appellant.*	)	Crim. App. No. 37759

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE PRESENTED

WHETHER 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.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is accepted.

STATEMENT OF FACTS

Appellant, a 30-year old Staff Sergeant at the time of his crimes, was convicted after a fully litigated trial of aggravated sexual assault and rape of 10-year old RK, the daughter of Appellant's supervisor, MSgt KK. (JA at 16.)

Specifically, RK testified and the members found that sometime in the early morning hours of 1 January 2009, Appellant groped RK's breasts, touched the exterior of her vagina, and penetrated her vagina with his fingers while he was staying as a guest at the victim's home. (JA at 54, 60-76.) RK explained that early in the morning of 1 January, she woke up to find Appellant's hand on her stomach, underneath her shirt. (JA 67-68.) As RK lay on the couch, too afraid to say anything, Appellant moved his hand up to her chest and groped her breasts before sliding his hand into her pants, rubbing her vagina, and digitally penetrating her vagina with his finger. (JA 68-73.) He then groped RK's breasts a second time before moving his hand, once again, to RK's vagina. (JA at 69-73.) Although Appellant "didn't stop" touching RK, she eventually got up the courage to escape the situation and go upstairs. (JA at 74.)

Due to the abiding emotional impact of her sexual assault, RK testified remotely during findings, but did not testify at sentencing. During her testimony she became emotional multiple times, crying during her testimony when recounting the details of her sexual assault at Appellant's hands. (JA at 73-74, 76, 77.) RK also explained to the members how scared she was all during Appellant's sexual assault, and how even afterwards she was scared to tell her father about the incident. (JA at 73, 75-76.) Ultimately, she summoned the courage to prepare a

handwritten note to her father (which the government admitted as Prosecution Exhibit 5; JA at 81) saying: "Daddy, the guy that moved in downstairs was touching me in the wrong places." (JA at 81.)

Pertinent to the granted issue, trial counsel devoted a total of 4 lines of a 9-page, 173 line sentencing and rebuttal sentencing arguments (roughly 2.5 percent of the total argument) to the comments at issue in this case, namely: "Now, the Defense Counsel said, 'there's no evidence before you that he's ever done anything like this before.' And there is no evidence before you. But think what we know, common sense, ways of the world about child molesters." (JA 31-32.)

Before the Court, Appellant attempts to rely upon additional trial counsel arguments as fodder for their assignment of error (App. Br. at 2, 6), however, trial defense counsel ***never objected*** to the following argument by trial counsel taking Appellant to task for failing to accept responsibility for his crimes during his unsworn statement:

> 'What is the sentencing process trying to help here?' Are we trying to focus more on helping a child molester get out of jail, a child molester who refuses to admit and apologize for his actual crimes he was found guilty of, or are we trying to fairly and justly show that the Air Force will not tolerate child molesters, that we want to protect young girls form the same fate and that we are trying to protect and comfort

> [RK] for everything that he has put her through?

(JA at 21-22.)

Rather, trial defense counsel raised the issue of rehabilitative potential generally (JA at 22) and recidivism specifically in ***his*** sentencing argument, stating "***SSgt Frey isn't someone who preys on children . . . that one minute is not who SSgt Frey has ben his whole life***." (JA at 24 (emphasis added).) He also attempted to emphasize that Appellant had no predisposition for child molestation, referring to a defense character letter from Appellant's ex-fiancé (Defense Exhibit D; JA at 103-05), asserting: "Sergeant Frey never exhibited any alarming sexual interest or behaviors. She says he interacted normally with children in his family." (JA at 25.) He then issued a ***specific invitation*** to the members to make a sentencing determination based upon what trial defense counsel asserted was a low recidivism risk:

> We acknowledge what occurred on the night in question, but what we are looking at is ***do you believe that Sergeant Frey is going to do this again and therefore you need to place him in prison for 10 years to create a barrier between him and little girls***."[1]

[1] In addition to the references above, trial defense counsel continued to emphasize low recidivism risk as a theme throughout his sentencing argument, arguing that the lack of pretrial confinement indicated a lack of recidivism risk and augured in favor of limited confinement: "And you do have to weigh, okay, if he's been out there for 18 months and nothing like this has occurred again, is a lengthy prison sentence of 10 years really appropriate?" (JA at 27-28.)

(JA at 25 (emphasis added).)

In was only in rebuttal that trial defense counsel objected exactly twice to trial counsel's rebuttal sentencing argument, and then only in reference to the permissible bounds of the members ability to utilize their "common sense and ways of the world" as they deliberated on sentence. (JA at 30 and 32.) The first objection pertained to "common sense and ways of the world" vis a vis the argument that sex offenders are not restricted to "the guy that jumps out of the bushes" (previously referenced by trial defense counsel at JA at 24). Trial counsel argued:

> ATC: Detective Maleshich minimized a lot, talking about 'you're not that guy,' 'you're not that guy in the bushes,' and so did the Defense. But we all know that most sexual assaults don't occur –
>
> DC: I'm going to object right now, Your Honor.
>
> MJ: Trial Counsel.
>
> ATC: I'm just making argument using common sense and ways of the world, Your Honor.
>
> MJ: Continue.
>
> ATC: We all know that most sexual assaults do not occur from the guy in the bushes; they occur from a family member or a friend. And that's what happened here.

(JA at 30-31.)

The second objection was in response to trial counsel's response to the defense's explicit argument that Appellant was a low recidivism risk: "Now, the Defense Counsel said, 'there's no evidence before you that he's ever done anything like this before.' And there is no evidence before you. But think what we know, common sense, ways of the world about child molesters." (JA 31-32.) Following the military judge's overruling of the objection, the trial counsel moved to his next point and did not address the issue again. (JA at 32.)

While the military judge did overrule the defense objection to trial counsel's "common sense and ways of the world" comments during his rebuttal sentencing argument (JA at 32), the military judge still provided specific, tailored "curative instructions" in response to the statements at issue in this case (JA at 33-34.) In particular, the military judge instructed the members that: (1) arguments of counsel are just argument, not evidence; and (2) reminded the members that there was no specific evidence that most sexual assaults are committed by family or friends:

> Court members, let me begin by reminding you . . . that when counsel make argument, that is not evidence. That is only the counsel's view of evidence. You are to rely on the evidence admitted in the court and your recollection of that evidence. It is appropriate for you to apply your common sense and knowledge of the ways of the world whether or not in your particular case that involves any implication suggested by counsel. Again, it is up to you to

> determine whether or not that comports with you sense of the ways of the world. ***A few statements Trial Counsel made in particular that most sexual assaults occur by family or friends is not before you in evidence, again, put that in context of whatever knowledge of the ways of the world you have. But that specific assertion of fact is not in evidence.***

(JA at 33-34 (emphasis added).) The military judge gave these instructions to the members first, before all other sentencing instructions. (JA at 34-47.)

Finally, while the trial counsel requested 10 years of confinement (JA at 22; 31, 32), and the defense counsel conceded that some confinement was appropriate (JA at 28), the members adjudged only 8 years confinement. (JA at 50.)

Additional facts necessary to the disposition of these issues are set forth in the argument below.

SUMMARY OF ARGUMENT

There was neither error nor prejudice in trial counsel's stray reference that members utilize their "common sense and knowledge of the ways of the world" in evaluating Appellant's rehabilitative potential in light of his serious child sex assault convictions. First, the defense "opened the door" to a discussion of rehabilitative potential and recidivism by inviting the members to adjudge a less severe sentence based upon what trial defense counsel depicted as Appellant's low recidivism risk. Second, trial counsel's response was limited

in nature and not the crux of the sentencing argument, occurring only in rebuttal, and comprising only 4 lines of a total of 173 lines of sentencing and rebuttal sentencing argument. Third, evaluated in context, this remark was insignificant because the vast majority of the government's sentencing argument was focused upon the permissible theme of punishment to remedy the horrendous victim impact upon an innocent 10-year old girl sexually assaulted in her own home by a family friend. Finally, an "error" resulting from this limited remark, buried in an otherwise wholly permissible government sentencing argument, was remedied by the military judge's tailored curative instructions, and rendered harmless by the severity of the charges and compelling victim impact which fully justify the sentence in this case.

ARGUMENT

EVALUATED IN CONTEXT, TRIAL COUNSEL'S SENTENCING ARGUMENT WAS NOT DESIGNED TO UNDULY INFLAME THE PASSIONS OR PREJUDICES OF THE COURT MEMBERS, AND APPELLANT SUFFERED NO PREJUDICE.

Standard of Review

The standard of review for allegations of improper argument in sentencing is *de novo*. United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011). Even when an appellate court concludes argument was improper, relief is only warranted where the court finds material prejudice to the substantial rights of the

accused to be sentenced based on the evidence alone. United States v. Fletcher, 62 M.J. 175, 184-85 (C.A.A.F. 2005).[2]

Law and Analysis

Appellant alleges that trial counsel's comment during rebuttal sentencing argument that "But just think what we know, common sense, ways of the world about child molesters," (JA at 31) was an improper invitation to the members to sentence Appellant more harshly for potential future misconduct. (App. Br. at 6-8.) Trial counsel's statement made no such explicit reference, and in considering the argument in context, no such implication is reasonably possible. Indeed, for the reasons set forth below, and especially in light of the military judge's specific post-argument curative instruction on the subject, it is clear that this four-line reference in a nine-page, 173 line sentencing argument (approximately 2.5 percent of the sentencing argument) even if erroneous, was harmless.

It is well settled that when reviewing an argument, the focus must be contextual. United States v. Baer, 53 M.J. 235,

[2] The government notes that Appellant now claims error based upon a non-objected to line of trial counsel's opening sentencing argument, namely: "that we want to protect young girls from the same fate . . ." (Ap. Br. at 2, 6; JA at 23.) However, failure to object to sentencing argument waives the issue for appeal. R.C.M. 1001(g). Nonetheless, this Honorable Court does permit review of such statements, but only for "plain error." United States v. Halpin, 71 M.J. 477, 479 (C.A.A.F. 2013). In evaluating plain error in the context of an alleged improper sentencing argument, it is Appellant's burden to prove that there was error, that it was plain, and that it materially prejudiced a substantial right. Id. Accordingly, this honorable Court should only review the un-objected to portions of trial counsel's sentencing argument for "plain error."

237 (C.A.A.F. 2000); Article 59(a), UCMJ. As stated in Baer, "the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation but the argument as 'viewed in context.'" Baer, 53 M.J. at 238 (citing United States v. Young, 470 U.S. 1, 16 (1985)). Indeed, as quoted by the Court in Baer, "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Id. (quoting Dunlop v. United States, 165 U.S. 486 (1897)). Sterile or anemic arguments are not required in order to stay within the bounds of fair comment; "blunt and emphatic language is essential to effective advocacy in most cases." United States v. Turner, 17 M.J. 997, 999 (A.C.M.R. 1984), *pet. denied*, 19 M.J. 17 (C.M.A. 1984).

Evaluated in context, trial counsel's argument did nothing more than raise the concept of the necessity of *specific deterrence* as relevant to Appellant's rehabilitative potential, and thus, a correspondingly appropriate sentence in light of rehabilitative potential, or lack thereof. Moreover trial counsel did so only ***in direct response*** to trial defense counsel's invitation to the members to adjudge a lenient

sentence due to his purportedly "low" recidivism risk. (JA at 27-28.) Specific deterrence is undoubtedly a legitimate and well recognized principle of sentencing in the military justice system.[3] As a corollary, recidivism, *vis-a-vis* rehabilitative potential, is relevant evidence at a court-marital in determining how much specific deterrence is necessary, and hence, a legitimate basis for argument. *See* United States v. Williams, 41 M.J. 134, 137-39 (C.M.A. 1994) (forensic psychiatrist testified regarding predictability of recidivism rates and violence upheld because the term "potential for rehabilitation" is broad enough to include expert opinion on future dangerousness); *accord* United States v. George, 52 M.J. 259, 261 (C.A.A.F. 2001).

Here, trial counsel was attempting no more than advising the members they should consider the general nature of Appellant's molestation offense, if they chose to do so, in evaluating the likelihood of Appellant's crimes effecting his future rehabilitative potential and necessity for specific deterrence. It is also crucial to note that he did so relying upon it as a ***secondary argument***, focusing primarily on the necessity of harsh punishment for Appellant in reliance upon the legitimate sentencing principles of ***retribution*** (harsh

[3] Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges Benchbook*, paras. 2-5-21 (1 January 2010). The government notes that this 2010 version of the "Benchbook" was the version in effect at the time of Appellant's trial.

punishment for severe victim impact on RK); and ***specific deterrence*** (severity of crime and desirability of lengthy confinement to specifically deter Appellant).

The government acknowledges that a prosecutor is limited to the evidence of record and "such fair inferences as may be drawn therefrom." United States v. White, 36 M.J. 306, 308 (C.M.A. 1993) (quoting United States v. Nelson, 1 M.J. 235, 239–40 (C.M.A. 1975)). In this case, Appellant and his counsel squarely placed before the members the issue of recidivism and future dangerousness in the form of asserting that less confinement was appropriate in light of Appellant's supposed "low" recidivism risk (JA at 25, 27-28) as well as arguing about the lifelong impact of the sex offender registry upon Appellant as a function of his convictions. (JA at 28, 48.) Certainly, if the members were permitted to consider this information for whatever mitigating impact it may have on the adjudication of an appropriate sentence, such evidence was also sufficient to raise an inference, which the members could evaluate using their "common sense and knowledge of the ways of the world" of what impact, if any, the nature of Appellant's crimes (whose severity is also evidenced by the sex offender registry requirements) would have on his rehabilitative potential.

Nonetheless, the primary focus over the course of the government's 9-page, 173 line sentencing and rebuttal sentencing

arguments was not recidivism, but punishment for the sexual victimization of one 10-year-old-girl: RK. "[T]his sentencing case is about protection. It is about the protection of our Air Force standards that we do hold so high. It is about the protection of young girls everywhere, ***most of all it is about the protection of [RK].***" (JA at 17 (emphasis added).) Continuing on this line, for three full pages of his five page opening sentencing argument, trial counsel urged the members to impose a 10-year sentence based almost exclusively upon the potential for lifelong psychological impacts on RK alone:

> [RK] has been given a life sentence. She has been given a life sentence by Sergeant Frey with the acts he committed against her. Think of what she will go throughout the course of her life.
>
> . . .
>
> Her first consensual sexual experience, will this event be there? When she gets married, when she has children, what kind of mom will she be to her children? Will she be anxious that the same fate that she suffered will happen to them? What has this done to her trust in the military? . . . What will this do to her faith? Every single New Year's Eve from now until the day she dies, will this event play over again in her mind?

(JA at 18-19.)

It was the trial defense counsel who *invited* argument about Appellant's recidivism risk, "opening the door" by suggesting that he posed no future danger, asserting, "He didn't jump out of the bushes and snatch somebody and take them back and rape

them. He wasn't someone who was on the playground trying to lure a child back to his home, things you might see on television. That's not him." (JA at 24.) Trial defense counsel then, much like appellate defense counsel now, then attempted to set up a "***strawman***" for the members, alleging that "the government talked a lot about you have to protect little girls everywhere from Sergeant Frey . . .." (JA at 24, *see also* JA at 27.) ***The government did no such thing.*** As detailed above, verbatim, trial counsel's opening sentencing argument focused almost exclusively on the individual victim impact upon RK. (JA at 17-19.)

It was the over-reaching comment by trial defense counsel that opened the door on rebuttal sentencing argument, where again, the government did no more than invite the members to make reasonable inferences from the evidence before them and at no time "waved the bloody shirt" of potential future victims to come. Even so, the government's comments regarding potential recidivism by Appellant were limited to four lines of the four page rebuttal argument. Furthermore, its positioning within the argument also provides contextual evidence of its minimal impact and import upon trial counsel's sentencing argument. It was in the middle of the rebuttal argument, surrounded by a much longer appeal that a sexual offender who violates the trust and confidence earned as a close friend of the family is more

treacherous than a madman who leaps out of the bushes. (JA at 31.) After trial defense counsel objected, trial counsel simply noted that he was "just arguing the ways of the world, Your Honor" and then moved on to a discussion of the importance of a dishonorable discharge ***without any further comment*** on the "ways of the world of child molesters." (JA at 32.) Finally, trial counsel concluded where he started, making clear to all what the theory and justification for the government's sentencing recommendation was, namely, individual victim impact: "Members, in giving a strong sentence you let everyone know that this kind of behavior, one time, 10 times, will not be tolerated by the military and you let [RK] know how we feel about what has happened to her." (Id.)

Assuming, *arguendo*, this Court finds trial counsel's argument was improper, Appellant's argument still fails because he has failed to show material prejudice to a substantial right. In Fletcher, the Court listed several factors used to assess "the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." Fletcher, at 184. Those factors are: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction, or in this case, sentence. Id. In assessing these factors this honorable Court recently opined in United States v.

Halpin that factor three alone, the weight of the evidence supporting the conviction (or in this case, sentencing), can eliminate any prejudice from an improper sentencing argument. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013): "we find that the third *Fletcher* factor weighs so heavily in favor of the Government that we are confident Appellant was sentenced on the basis of the evidence alone." Id.

Such was certainly the case here. Here, similar to Halpin, the underlying facts of Appellant's offenses were egregious. In Halpin, the appellant engaged in reckless endangerment of his wife in response to her suicide attempt. Halpin, 71 M.J. at 479. Here, the facts are arguably even more disturbing as Appellant, a 30-year old non-commissioned officer, was convicted of sexually assaulting the 10-year old daughter of a supervisor who had opened his home to Appellant. Trial counsel seized upon these egregious facts at sentencing, and premised the necessity for a 10-year sentence and dishonorable discharge almost exclusively upon the individual victim impact upon RK, and secondarily, on the intolerable impact on good order and military discipline stemming from child molestation offenses, generally.

Nonetheless, Appellant sees the case differently, and boldly asserts that "the government did not present a significant case in aggravation" because the only additional

evidence the government put in at sentencing (beyond the compelling findings evidence) was Appellant's personal data sheet; a picture of the victim with her mother and Appellant's EPRs. (App. Br. 9.) This is Appellant's desperate attempt to conceal from the Court what it already knows, that in determining a sentence at trial, the members are permitted to consider all findings and sentencing evidence. R.C.M. 1001(f)(2).

Furthermore it was Appellant's case which, in the parlance of the Court in Halpin, "consisted of unremarkable character letters from Appellant's [family]." Halpin, 71 M.J. at 480. This 30-year old staff sergeant with over 10 years of service could only muster 5 character letters total from a former pastor, his former fiancé, and family members; not one of which came from a military member. (JA at 104-10). Such a paltry showing was insufficient to merit any relief in Halpin (Id. at 80) and it should likewise counsel against any relief here. Evaluating all of the evidence, as the members were permitted to do at trial, and as this Court is permitted to do in assessing prejudice, this Court can be supremely confident that Appellant was sentenced based upon the strength of this compelling evidence alone. Id.(citing United States v. Erickson, 65 M.J. 221, 224 (C.A.A.F. 2007) (quoting Fletcher, 62 M.J. at 184)).

Beyond the overwhelming strength of the government's case, and in moving to factor two of the Fletcher test, the military judge (although overruling the objection) took immediate action to ensure there was no confusion with the members from trial counsel's argument by issuing a "curative instruction" which highlighted the fact that there was no evidence of future crimes before them and that they should not consider any such facts not in evidence in arriving at a sentence:

> Court members, let me begin by reminding you of the instruction I gave you during findings which apply equally here, that when counsel make argument, that is not evidence . . . You are to rely on the evidence admitted in the court and your recollection of that evidence. . . . ***A few statements Trial Counsel made in particular that most sexual assaults occur by family or friends is not before you in evidence, again, put that in context of whatever knowledge of the ways of the world you have. But that specific assertion of fact is not evidence.***

(JA at 33-34.) This explicit instruction, followed by trial counsel's specific acknowledgement that there was "no evidence before you that he's ever done anything like this before" (JA at 31), made it clear exactly what trial counsel was and was not asserting evidence of. The military judge then reiterated clearly to the members that "you are to rely on the evidence admitted in the court and your recollection of that evidence" in arriving at a sentence in this case. (JA at 33.) Such a specific proviso fully ensures Appellant's "substantial right"

to have his sentence adjudged based upon the member's reliance on the evidence alone.

Still, Appellant seizes upon the military judge's and trial counsel's use of the time honored admonition that members should utilize their "***common sense and knowledge of ways of the world***" in evaluating evidence as a hallmark of impropriety (App. Br. at 7-8). It is anything but. Consistent precedent by this Court, dating back 54 years to United States v. Oakley, makes clear that the members' ability to utilize their "common sense and knowledge of ways of the world" extends not only to evaluating an accused's unsworn statement,[4] but evaluations of witnesses and evidence as well. United States v. Oakley, 29 C.M.R. 3, 7 (C.M.A. 1960) ("Had we not impliedly recognized the right of court members in that case to reject the testimony of the accuseds' witnesses and rely upon the common experience of mankind, we would have been required to dismiss the charge on sufficiency of evidence"). *See also*, United States v. Riviera, 54 M.J. 489, 491 (C.A.A.F. 2001) (affirming the use of "common sense and knowledge of ways of the world" in evaluating a parental discipline defense in a child abuse case: "This conclusion does not rest on specialized medical knowledge, but rather on the everyday 'common sense and [their] knowledge of human nature and of the ways of the world' expected of triers of

[4] D.A. Pam. 27-9, *Military Judges Benchbook*, paras. 2-5-12, 2-5-23.

fact"); United States v. Wilson, 40 C.M.R. 112, 117 (C.M.A. 1969) (quoting Oakley and applying "common sense and knowledge of ways of the world" to evaluation of lay witness testimony); United States v. Acosta-Zapata, 65 M.J. 811, 818 (A. Ct. Crim. App. 2007) (members were properly instructed to use "common sense and knowledge of ways of the world" in witness credibility determinations); United States v. Green, 52 M.J. 803, 805 (N.M. Ct. Crim. App. 2000) (holding that CCAs are permitted to exercise "common sense and knowledge of ways of the world" in evaluating the evidence while conducting "legal sufficiency" reviews on appeal). Here the military judge instructed the members that arguments by counsel are not evidence, and his instruction that the members utilize their "common sense and knowledge of ways of the world" in evaluating all the evidence was fully within the law and authorized the members to use their common sense to evaluate Appellant's character, his crimes, his rehabilitative potential, and the necessity for lengthy confinement for specific deterrence or general deterrence.

Finally, Appellant's argument that the 8-year sentence imposed represents a "lack of independent functioning" by the members at sentencing is absurd. (App. Br. at 9.) The government requested 10 years confinement (JA at 22; 31; 32); trial defense counsel conceded that some confinement was warranted (JA at 28); and then the members, supposedly under the

impermissible sway of trial counsel and with visions of recidivism dancing in their heads, then proceeded to adjudge markedly ***less confinement*** than that requested by trial counsel: eight years, vice 10. (JA at 50.) This does not represent a panel "inflamed" with improper considerations, it reflects the independent judgment of a panel instructed to consider only the evidence in this case in adjudging an appropriate sentence.

Moreover, Appellant's own citation to United States v. Schroder (App. Br. at 9) is instructive here as the Court in Schroder affirmed a 10-year sentence for Appellant's rape of his daughter notwithstanding trial counsel's erroneous arguments to impose a sentence in response to the victim impact for both charged and uncharged misconduct. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007). By contrast, here trial counsel's comments sought to punish the crime and vindicate the victim impact suffered by RK alone. Appellant thus fails even when evaluated by his own select arguments.

Accordingly, given the severity of the misconduct in this case involving the molestation of a 10-year old girl by a "family friend" invited into the victim's home; the absence of an acceptance of full responsibility by Appellant during sentencing; the minor role played by the four lines of argument to which Appellant took exception; and the sufficiency of the military judge's "curative instructions" to the members; any

error in trial counsel's argument was harmless and Appellant's richly deserved sentence should be affirmed.

CONCLUSION

Wherefore the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case, and in so doing, issue an opinion which explicitly holds that there is no error in trial counsel's argument that lengthy confinement is warranted as specific deterrence of an accused in a child molestation case.

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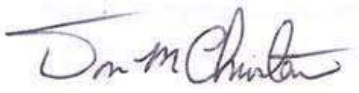

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division via electronic mail on 15 January 2014.

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