IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Charles C. HORNBACK, Private (E-1), U.S. Marine Corps, Appellant	BRIEF ON BEHALF OF APPELLANT USCA Dkt. No. 13-0442/MC Crim.App. No. 201200241

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

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7292
F:(202) 685-7426
david.dziengowski@navy.mil
Bar no. 35719

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Issue Presented

WHETHER THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS ERRED IN FINDING NO MATERIAL PREJUDICE TO APPELLANT'S SUBSTANTIAL RIGHT TO A FAIR TRIAL AFTER IT ASSUMED, WITHOUT DECIDING, THAT TRIAL COUNSEL'S ACTIONS AMOUNTED TO MISCONDUCT, AND WHETHER THE MILITARY JUDGE'S CURATIVE INSTRUCTIONS SUFFICIENTLY ADDRESSED THE CUMULATIVE NATURE OF SUCH CONDUCT AS WELL AS ANY CORRESPONDING PREJUDICE IN LIGHT OF THE FACTORS IDENTIFIED IN UNITED STATES V. FLETCHER, 62 M.J. 175 (C.A.A.F. 2005).

Statement of Statutory Jurisdiction

Private (Pvt) Charles C. Hornback, U.S. Marine Corps, received an approved court-martial sentence that included a bad-conduct discharge. Accordingly, his case fell within the Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), jurisdiction of the U.S. Navy Marine-Corps Court of Criminal Appeals (NMCCA). He invokes this Court's jurisdiction under Article 67, UCMJ, 10 U.S.C. § 867 (2012).

Statement of the Case

On February 16, 2012, a special court-martial composed of officer members convicted Pvt Hornback, contrary to his pleas, of violating a lawful general order (use of spice), making a false official statement, and committing larceny, in violation of Articles 92, 107, and 121, UCMJ, 10 U.S.C. §§ 892, 907, and 921 (2006), respectively. (J.A. at 278-79.) Pvt Hornback was

originally charged with two orders violations, false official statement, provoking words, larceny, and communicating threats; however, after raising motions to dismiss under Rule for Courts-Martial (R.C.M.) 917, the military judge dismissed Specification 2 of Charge I (use of bath salts) and Charge III (provoking words). (J.A. at 6-17, 204-20.)

The panel sentenced Pvt Hornback to confinement for three months and a bad-conduct discharge. On June 4, 2012, the Convening Authority (CA) approved the adjudged sentence. (J.A. at 12.) Except for that portion of the sentence extending to the bad-conduct discharge, the CA ordered the sentence executed. (Id.) The lower court affirmed on February 21, 2013. (J.A. at 4.) On April 18, 2013, Appellant timely petitioned this Court for grant of review. This Court granted review on September 23, 2013.

Statement of Facts

The military judge grew tired of Trial Counsel's repeated, improper inquiries. He admonished her:

> *I'm tired of having the members being exposed to basically character evidence that's not admissible*. I mean, you can't -- I just want to reiterate to you, you can't present evidence that the accused is a druggy; therefore, he probably used drugs. You need to present evidence that he specifically used drugs on a certain day and time. And a specific drug. Not that he's a drug abuser generally and so you should convict him of using drugs. *You can't do that . . . You could do that at an ad board. You can't do that in federal court*.

(J.A. at 169 (emphasis added).)

During trial on the merits and during sentencing, Trial Counsel argued and made improper inquiries that triggered repeated objections, Article 39(a) sessions, rulings, and--as seen above--admonishment by the military judge. The summary below attempts to capture the extensive misconduct that supports this appeal.

A. Opening

Trial Counsel employed the tripartite theme of "[d]ecay, drugs, and dishonesty" during her opening statement.[1] (J.A. at 65.) Beginning with the "decay," Trial Counsel stated, "when [Appellant] arrived, he seemed like a good guy. He was friendly. He was motivated. He did a good job. He was dating his future wife, whom he married in May of 2010." (Id.) Pivoting, she stated, "in the beginning of 2011, he was moved out of the shop. That's when his demeanor started to change and the decay set in. He began acting differently around other people that he used to know." (Id.) That is also when, according to Trial Counsel, "[t]he accused appeared to be somewhat untruthful . . . ." (Id.)

As the Government witnesses took the stand, Trial Counsel's focus remained on Pvt Hornback's character.

[1] Trial Counsel reiterated this theme during her closing argument. (J.A. at 223.)

B. Lance Corporal Teets

Two witnesses testified to start the trial. Then the Government called Lance Corporal (LCpl) Teets.[2] (J.A. at 76.) He testified that he met Pvt Hornback while working in the S-8 shop. (J.A. at 77.) The S-8 shop is a place where Marines "wait[for] legal separation or medical separation[.]" (Id.) Trial Counsel asked LCpl Teets about his recreational activities with Pvt Hornback:

> Q. Did you ever discuss -- did he ever ask you -- *did he ever ask you to use drugs with him?*
>
> A. Not directly, but in a way where my statement was given to CID, I believe it was. It was an offer or invitation.
>
> Q. Can you explain what the circumstances were?
>
> A. Yes, ma'am.
>
> DC: I'm going to object to this line of testimony on speculation and improper lay opinion.

(J.A. at 79 (emphasis added).) Following that objection, the military judge called an Article 39(a) session. He asked Trial Counsel, "was that uncharged misconduct, 404(b), with reference to the spice[?] I mean, what was the purpose of asking that witness about all that first background? He didn't smoke spice with this witness, did he?" (J.A. at 80.) Trial Counsel

[2] Because of an administrative separation for marijuana use, LCpl Teets testified under a grant of immunity. (J.A. at 76-77.)

responded, "No. The accused made admissions. He has forgotten what he told me earlier and what he told CID." (Id.)

This exchange highlights the first time Defense Counsel or the military judge raised Military Rule of Evidence (M.R.E.) 404. It would not be the last. Trial Counsel next called Gunners Mate Third Class (GM3) Malaea Robidart.

C. Gunners Mate Third Class Robidart

GM3 Robidart worked as the non-commissioned officer-in-charge (NCOIC) of the ID Card Center. (J.A. at 89.) She knew Pvt Hornback from her time as his supervisor in the S-8 shop. (Id.) She also knew Pvt Hornback's wife. (J.A. at 90.) Trial counsel probed that relationship:

> Q. Did you ever speak to her about the marriage?
>
> A. Yes, ma'am.
>
> Q. *And did she tell you anything about why they were separated?*
>
> A. There was a lot of reasons, ma'am.
>
> DC: Objection. Relevance.

(J.A. at 90-91 (emphasis added).) The military judge again called an Article 39(a) session and asked GM3 Robidart to leave the courtroom. (J.A. at 91.) At that point, Defense Counsel changed the basis of his objection to improper character evidence under M.R.E. 404. (Id.) Trial Counsel insisted that she was not trying "to go that route . . . ." (Id.) Instead,

she wanted to elicit from GM3 Robidart that when Pvt Hornback "was using *drugs* he was *treating her poorly*." (J.A. at 92 (emphasis added).) Defense counsel objected to that testimony on hearsay grounds, and the military judge sustained the objection. The members reentered the room.

Then Trial Counsel reengaged the witness:

> Q. Did you interact with [Pvt Hornback] frequently?
>
> A. I mean on a supervisor to, you know, that kind of basis, yes.
>
> Q. And while you worked with him in the S-8, *did he say anything about drug use?*
>
> A. I overheard a couple conversations but nothing that I could say for sure he said anything.
>
> Q. Did he -- did you -- *did he say anything that might make you believe he was speaking from personal experience with drugs?*
>
> MJ: Hang on. We're going to have a 39(a) session.

(J.A. at 96 (emphasis added).) The members once more left the courtroom and the military judge *sua sponte* raised M.R.E. 404. He stated:

> I am concerned that you are getting into what would be 404(b) evidence or other acts evidence. We've got to narrow this down. I don't know what time period we're talking about. The fact that he used drugs before, you know, if he was having conversations about using drugs outside the charged time period I don't want that going to the members. I mean you can make an objection to that.

(J.A. at 96.) The military judge then gave a specific instruction to Trial Counsel:

MJ: I don't want to hear any testimony about drug use -- the accused admitting to drug use -- unless it is the accused admitt[ing] to drug use during the charged period. Okay?

TC: Yes, sir.

MJ: All right. So first orient to the charged period. I don't want there to be the possibility that there was drug use before or after the charged period being admitted into evidence. That would be inadmissible. All right?

TC: Yes, sir.

(J.A. at 97.) Defense Counsel then stated his concern about the drug-use evidence:

DC: And, Your Honor, I would also ask that it be to the substances charged. I believe there may be an allegation of ecstasy.

MJ: Exactly. And yeah, I don't want just drug use, coke, cocaine, ecstasy, heroin, marijuana. I want the drug. I want it specified to the drug and during the time period if he has made an admission to that . . . [T]hat is impermissible evidence going to the members if it is outside that window or if it is a different type of drug. Okay?

(Id.) Trial Counsel acknowledged that she understood the instruction. (Id.) The military judge then gave her an opportunity to ask foundational questions outside the presence of the members. After subsequent objections on the bases of hearsay and speculation, (J.A. at 102), the military judge ruled:

Any statement his wife made to her is hearsay. It is not admissible. Any statements Teets made to her is

> hearsay regarding the accused drug use. That is not admissible.
>
> . . . .
>
> [I]f someone is charged with using marijuana, you can't come in here and start eliciting testimony or evidence that, you know, he's been around marijuana or he knows things about marijuana. I mean its [*sic*] impermissible character or other acts evidence. I don't think you've given notice of 404(b).

(J.A. at 103-04.) Trial Counsel acknowledged that she did not provide any M.R.E. 404(b) notice. (J.A. at 105.) She then highlighted that notice is required "upon request[.]" (Id.) The topic soon turned back to hearsay. Referring to the testimony of GM3 Robidart, the military judge stated:

> [i]t seems like a lot of this [evidence] is filtered through hearsay from other people. She -- even the testimony of him knowing about spice is something that she may have overheard in passing. It wasn't like a conversation she was having with the accused. . . .

(J.A. at 109.) After this discussion, the military judge ordered the members and witness back into the courtroom. (J.A. at 111.) The following examination immediately ensued:

> Q. GM3 Robidart, you testified that you knew the accused a little bit prior to him working for you. What was his demeanor like when he was actually working for you?
>
> A. Well, do you mean as far as how he acted while he was working for me?
>
> Q. *How did he act? What was his personality like?*
>
> A. To be honest, ma'am, very combative and he didn't --

MJ: Hang on.

DC: Objection, Your Honor.

MJ: Members. Head out.

(J.A. at 111 (emphasis added).) This instruction to the members was the third of its kind by the military judge. As soon as they retired from the courtroom, the military judge provided Trial Counsel with a precise litany of questions for the witness.[3] (Id.) The members returned to the courtroom. (J.A. at 112.) And Trial Counsel continued her examination of GM3 Robidart:

Q. So how well do you know him?

A. On a personal level, not very well. But, you know, as far as a work relationship I have that knowledge of him.

Q. And would you recognize any changes in him?

A. At work, yes ma'am.

Q. And did you recognize any physical changes in him during that time?

A. Yes, ma'am.

---

[3] The military judge directed:

> Here is how this should go. How often did you see the accused? Did you interact with him on a daily basis? Were you able to observe the way he acted at work? You don't have to get into the specifics. How well do you know him? How long did he work for you, etcetera, etcetera. Okay. Without her talking about the specifics. Okay. And then presumably, you have some questions about the change in that. . . .

(J.A. at 111.)

Q. And can you please tell the court what those were.

A. There were a couple days, ma'am, that he came in --

MJ: When?

A: It was towards my end of time there, sir. I am not exactly sure on dates. I left there I believe at the end of June so it was sometime in June.

MJ: Okay.

A. And there would just be days where he would come in and be very sporadic and -- I mean just more angry and that sort of thing. And didn't really -- I mean we had a lot of butting heads in the shop.

Q. *How is that different from how you knew him before?*

A. *Because before, ma'am, you know he was still that same way a little bit but not as bad.*

MJ: *Okay. Stop this.* Disregard all that testimony. Strike that from your memory as though you've never heard it.

(J.A. at 112-13 (emphasis added).) But Trial Counsel persisted:

Q: Did he just explain his use of any prescription drugs with you?

A: Yes, ma'am.

Q: And what did he say?

A. Just that he would overtake what he was supposed to be taking.

Q. *Did he explain why that was?*

A. *To get the high.*

DC: Objection, Your Honor.

MJ: Basis?

DC: 404.

(J.A. at 114 (emphasis added).) The military judge sustained the objection and for a second time instructed the members to cast the improper character evidence out of their minds. (Id.)

He then called a fourth Article 39(a) session. (J.A. at 115.) The focus of that session centered on Trial Counsel's attempt to elicit testimony on the alleged wrongful use of Xanax. As before, the military judge defined evidentiary limits for Trial Counsel:

> That is clearly impermissible evidence. You can't say that he used drugs -- this drug to get high. He misused this prescription drug on this occasion in order to get high to prove that he therefore used drugs and other prescription drugs on a separate occasion to get high.

(J.A. at 116-17.) Additional instructions followed:

> MJ: *My concern here is that you are getting into all these potential bad acts that aren't specific to the charged offenses which would blow this case up.* I mean you just can't have that.
>
> TC: Sir, I need --
>
> MJ: You need direct evidence that a crime was committed. You can't put all this evidence out there that, yeah, this guy is kind of into drugs and he likes to -- he knows a lot about drugs and he knows a lot about drugs that can't be detected in your system. I mean you have to show evidence that he committed the specific crime on the specific date that you alleged . . . *Not that he's a bad guy*.

(J.A. at 118 (emphasis added).) The members reentered the courtroom. (J.A. at 120.) Trial Counsel concluded her examination and called her next witness. (J.A. at 126.)

D. Lieutenant Commander Terrien

LCDR Terrien served as the flight surgeon for VMFAT-101. (J.A. at 127.) After a number of background-type questions, Trial Counsel asked LCDR Terrien, "how do you know the accused?" (J.A. at 126-29.) But the military judge called an Article 39(a) session before LCDR Terrien could answer. (Id.) Because LCDR Terrien had treated Pvt Hornback, the military judge was concerned that Trial Counsel's questions could invade the psychotherapist-patient privilege guaranteed by M.R.E. 513. (J.A. at 129-31.) So he instructed Trial Counsel--"[d]o not get into any" psychotherapist-patient privilege. (J.A. at 134.) As he did with GM3 Robidart, he furnished Trial Counsel with specific questions to ask LCDR Terrien. (J.A at 133.) After the members returned, Trial Counsel asked LCDR Terrien whether he prescribed Pvt Hornback anti-anxiety medication "during June - July of 2011[.]" (J.A. at 137.) The flight surgeon acknowledged that he was prescribed Seroquel. (J.A. at 138.) The following examination ensued:

> Q. Can you please describe to the members what Seroquel is?
>
> A. Seroquel is a medication it is classified as an

> atypical neuroleptic which means it is a newer medicine that is used -- mainly it was developed for psychosis patients with schizophrenia to help them control hallucinations, delusions. It is also currently -- it is used for that. It is also used for bipolar conditions manic and depressive bipolar conditions.
>
> DC: Your Honor, I object.
>
> MJ: Sustained. Strick [*sic*] the last question and answer from your mind.

(J.A. at 138.)

The military judge called another Article 39(a) session. (J.A. at 139.) He stated, "I am concerned that the jury's been tainted by hearing evidence that he was taking schizophrenia medication." (Id.) He then inquired, "[Trial Counsel] what we talked about that you were just going to ask him about whether he provided Xanax. Did we discuss going into like what Seroquel is used to treat?" (J.A. at 140.) Trial Counsel answered in the negative. (Id.) After LCDR Terrien's examination concluded, the military judge gave a curative instruction to the members. (J.A. at 145.)

E. Lance Corporal Carrillo

LCpl Carrillo testified next. (Id.) The Government offered him to prove Charge III, provoking words.[4] Trial Counsel asked LCpl Carrillo about the events of July 20, 2011. (J.A. at

[4] LCpl Carrillo worked with Pvt Hornback and socialized with him after work. (J.A. at 146.)

147.) He testified that he received a phone call from Pvt Hornback that day:

> And I answered the phone and . . . the conversation went . . . listen here you asshole or mother fucker. If you ever talk to my wife again, I am going to come up to the squadron and break your fucken [*sic*] neck because you talked to her . . . .

(Id.) LCpl Carrillo then explained the conversation he had with Pvt Hornback's wife:

> I was speaking to his wife that day because I was getting my clearance taken care of. And I briefly spoke to her about my motorcycle getting stolen. *She asked me if I thought it was [Pvt Hornback]. Roger that.*

(Id. (emphasis added).) Trial Counsel asked why he took the alleged threat by Pvt Hornback seriously. (J.A. at 150.) At that point, LCpl Carrillo referred back to the conversation with Pvt Hornback's wife:

> So she said something along the lines of he is losing it. I don't feel like I know him anymore. He is a completely different person. And I feel like he [is] about to do something really stupid so you need to be careful. *She further asked me if I really thought he stole my bike. And I told her yes.*

(J.A. at 151 (emphasis added).) Defense Counsel objected on M.R.E. 404 grounds, and the military judge stated, "Members, I believe *that is the second time* it has been referenced something about the potential that the accused . . . had something to do with a stolen motorcycle." (J.A. at 151-52 (emphasis added).) He instructed the members to disregard that testimony. (J.A. at

152.) Once LCpl Carrillo finished testifying, the military judge called a recess for the day. (J.A. at 159.)

F. Gunnery Sergeant French

GySgt French was the first witness to testify for the Government on the second day of trial. (J.A. at 160.) His testimony formed the basis of another M.R.E. 404 objection. Specifically, Trial Counsel asked him about his "first reaction" to the alleged threat by Pvt Hornback. (J.A. at 161.) GySgt French answered:

> My first reaction was with a hundred-plus Marines and sailors working for me, I was, like, wait, what? And when I went into the OIC's office and discussed it with him, they had discussed other information concerning *further NJP's* [*sic*] and that the accused no longer had anything else to lose. *He was at the bottom of the rank structure.*

(Id. (emphasis added).) After an M.R.E. 404 objection, the military judge tried, once again, to cure the error. He instructed the members, "Don't consider any information regarding the accused's prior record." (Id.)

G. Corporal Morris

Cpl Morris testified next. (J.A. at 163.) He worked with Pvt Hornback and was also his roommate. (J.A. at 164.) As before, Trial Counsel launched into the following character-based inquiry:

Q. And what kind of a roommate was he for you?

A. He was a good roommate. It was good times.

Q. And did anything start changing later?

A. Towards the spring, I'd say, *there was just kind of a drastic change in the way he acted.*

Q. And how is that.

DC: Objection. 404 Character evidence.

(J.A. at 165 (emphasis added).) The military judge sustained the objection. (Id.) But Trial Counsel persisted:

Q. In specifics, how did things change as a landlord for you?

DC: Objection. 404 and then 401, relevance.

(Id.) Once again, the military judge instructed the members to "step out[.]" (Id.) During the subsequent Article 39(a) session, Trial Counsel characterized the evidence as "circumstantial" in nature. (J.A. at 166.)

MJ: Okay. What you can't do is get into a bunch of evidence that the accused is a druggy and, therefore, he probably used some drug at some point. That's not admissible evidence.

TC: Right, sir. And when people use drugs, there's other indications. It's not just actually the direct evidence of seeing somebody smoking it. . .

MJ: It would have to be circumstantially related to the time that you charged him with using a specific drug.

TC: And it is in that timeframe --

MJ: What do you believe he is going to say?

TC: I believe he's going to say that he started being late on his rent. He was no longer -- he was gone frequently and then would sleep all day.

MJ: Do you have an objection to that?

DC: Yes, sir. I think that's improper character evidence. . . .

(J.A. at 166.) Soon after, the military judge admonished Trial Counsel:

> . . . *I'm tired of having the members being exposed to basically character evidence that's not admissible*. I mean, you can't -- I just want to reiterate to you, you can't present evidence that the accused is a druggy; therefore, he probably used drugs. You need to present evidence that he specifically used drugs on a certain day and time.

(J.A. at 169 (emphasis added).) Trial Counsel acknowledged that she understood the military judge. (Id.) But the military judge provided additional instructions: "And a specific drug. Not that he's a drug abuser generally and so you should convict him of using drugs. You can't do that . . . *You could do that at an ad board. You can't do that in federal court*."[5] (Id.) After a brief examination of Cpl Morris outside the presence of members, the military judge again instructed Trial Counsel: "I don't want to hear any more about drugs being used in the house. . . . 'Drugs' is too general; okay? Use spice, Xanax, or bath salts[.]" (J.A. at 173.)

[5] The military judge also implored, "You need to corroborate these things and it needs to be specific. He used drugs on this date." (J.A. at 168.) Not long after providing that direction, the military judge reiterated, "You need to present evidence that he specifically used drugs on a certain day and time." (J.A. at 169.)

Towards the end of Cpl Morris's testimony and in the presence of the members, Trial Counsel discussed the issue of Basic Allowance for Housing (BAH). (J.A. at 188.)

> Q. Now, Corporal Morris, I would like to discuss the matter of your BAH. Can you please tell the members the reason why you were still receiving BAH with dependents after you should have notified the IPAC?[6]
>
> A. Yes, ma'am. We were on a lease together, wanted to finish up the lease, and then he stopped paying me for the other half of the rent.
>
> Q. Who's "he"?
>
> A. Private Hornback.

(J.A. at 188-89.) Defense Counsel initially objected to this testimony on M.R.E. 404 grounds, but then changed his objection to relevance. (J.A. at 189.) The military judge sustained the objection. (Id.)

H. Remaining Witnesses

Cpl Kelly testified next. (J.A. at 190.) Like the other witnesses, he, too, worked with Pvt Hornback. (J.A. at 191.) He also socialized with Pvt Hornback. (J.A. at 192.) Together, they "hung out" at Cpl Morris's apartment. (Id.) Trial counsel focused her inquiry on that topic:

> Q. Now, a few weeks after the accused left the apartment and vacated the apartment, did you find anything in his room?
>
> A. Yes, ma'am.

[6] Installation Personnel Administration Center. (J.A. at 27.)

Q. And what is it that you found a few weeks after he was kicked out?

MJ: Hold on. Do you have an objection?

DC: Never mind, Your Honor.

MJ: No objection?

DC: No objection.

MJ: Very well. Go ahead.

WIT: I found a glass bowl.

DC: Objection. Your Honor, 404.

(J.A. at 192-93.) The military judge sustained the objection. (J.A. at 193.) Apparently exasperated, the military judge then directed Trial Counsel to "[*j*]*ust lead*." (Id. (emphasis added).)

Trial Counsel thereafter elicited hearsay. On redirect, for example, Trial Counsel asked Cpl Kelly "why did the police show up at the house that night?" (J.A. at 194.)

A. They received a phone call stating domestic violence.

TC: From whom?

DC: Objection. Hearsay.

TC: Sir, he's opened the door to this line of questioning.

MJ: He certainly has opened the door to this line of questioning, but the objection is hearsay. How does the accused know this?

Q. How do you know a call was made?

A. When I was detained, the police officer said there was a domestic --

DC: Same objection.

MJ: Sustained.

(J.A. at 194-95.)

Two more witnesses testified for the Government's case-in-chief. The last witness, Chief Warrant Officer (CWO3) Scott D. Easton, U.S. Marine Corps, testified in his capacity as the personnel officer "at the IPAC for H&HS for MCAS Miramar." (J.A. at 196.) Once again, Trial Counsel elicited hearsay--this time while asking questions about BAH:

WIT: Ma'am, IPAC became aware as Sergeant Soriano was contacted by a member of [Pvt] Hornback's command, and he was concerned that Pvt Hornback was receiving entitlements that might not be accurate as he was married to a military --

DC: Objection. Hearsay.

MJ: Okay. The second part of that statement is hearsay.

(J.A. at 198.) The Government rested its case the morning after CWO3 Easton's testimony.[7] (J.A. at 204.) After Defense Counsel called its witness, the parties delivered their closing arguments.

[7] The Senior Member asked the military judge if the panel was "going to receive a copy before deliberation on the Marine Corps policy, specifics on the drug policy?" (J.A. at 200.) The military judge informed the members that they would "get all the documents that have been admitted into evidence at the appropriate time[.]" (Id.)

I. Closing Arguments and Instructions

At the outset of the Government's closing argument, Trial Counsel reiterated her tripartite theme of "drugs, decay, and dishonesty." (J.A. at 223.) Trial Counsel then argued "[*t*]*he accused is like a criminal infection that is a plague to the Marine Corps* -- " (Id. (emphasis added).) Defense Counsel immediately objected, and the military judge sustained the objection. (Id.) Trial Counsel then tried to raise the testimony of Cpl Morris, but the military judge stopped her, stating "I struck the testimony of Corporal Morris."[8] (J.A. at 231.)

Trial counsel resumed her closing argument. She argued, "the accused's life was decaying over the course of that year. *He became that criminal infection*[.]" (J.A. at 234 (emphasis added).) Defense Counsel again objected, and the military judge sustained the objection. (Id.)

Trial Counsel then invoked the supposed desires of Pvt Hornback's command:

> *And the command has taken . . . action* in the form of these charges before you. The government is confident that you will find him guilty beyond a reasonable doubt.

[8] The record reveals that the military judge ultimately allowed Cpl Morris' testimony after the Government granted him immunity. (J.A. at 183-87.)

(J.A. at 234.) At this point, the military judge stopped Trial Counsel and instructed the members that "the convening authority is not expecting a certain result in this case."[9] (Id.) He then issued a *sua sponte* instruction on character evidence:

> Additionally, throughout the course of this trial and even during the closing argument, I sustained several objections to character evidence. You may not consider any evidence that was the subject of a sustained objection for any purpose, and you may not consider -- those objections related to character evidence, you may not conclude based on any of that evidence or arguments of counsel that the accused is a bad person or has general criminal tendencies and that he, therefore, committed the offenses charged. You need to base your determination on the admitted evidence in this case and determine if the offenses were committed beyond a reasonable doubt at the specific times and in the specific manners in which they were alleged.
>
> Can all the members follow that instruction?
>
> Affirmative response from all members.

(J.A. at 234-35.)

During rebuttal argument, Trial Counsel personally vouched for evidence and injected her personal views. (J.A. at 241-45.) Some examples include, "Members, you saw the dependency application itself, the NAVMC 10922. *This is probably the most*

[9] As to this issue, the military judge did not request or make any findings of fact. (J.A. at 234.) Instead, he simply proffered, "no one is presuming any certain outcome in this case." (Id.) But Trial Counsel again referred to Pvt Hornback's command during sentencing argument--"[a]nd lastly, *the commander's* main goal is to preserve good order and discipline." (J.A. at 282 (emphasis added).) Defense Counsel did not object to that remark.

simple DOD form that I have ever seen."; "Now, members, the next main issue the defense spoke to you about, *the next main excuse, I should say*, is that Kelly and Morris planted those camera cards"; and "Now, the spice. For some reason, the defense wants to discredit Lance Corporal Powers and Carney . . . *I'm not really sure why*." (J.A. at 241-45.)

Trial Counsel also attempted to rebut Defense Counsel's contention that the Government witnesses were not truthful. She baldly insisted:

> They did not collaborate on this story. They were not fabricating the story. They swore that they were telling the truth on the stand today or yesterday.

(J.A. at 243-44.)

J. Sentencing Argument

After securing convictions for wrongful use of spice, false official statement, and larceny, Trial Counsel's abuses continued into the sentencing phase of the case. During the Government's sentencing argument, for example, Trial Counsel attempted to argue evidence of a crime for which Pvt Hornback was not convicted:

> TC: Members, *we* are here now because you have convicted this Marine of smoking Spice and also of stealing from the U.S. Government. Now, the Spice conviction you found to be true beyond a reasonable doubt, and with that, came the testimonies of two individuals who both heard him say he was using Spice at work. What was he doing at work? He was F-18 mechanic --

DC: Your Honor, I'm going to object.

MJ: Sustained. You have to argue about the crime that he was convicted of. He was convicted of smoking Spice that they observed him smoking.

TC: Yes, sir.

MJ: *You can't speculate as to other bad acts that he might have done.* I want you to stay away from other bad acts or evidence of a general criminal disposition and focus on the offenses of which the accused was convicted.

(J.A. at 280-81 (emphasis added).) The military judge did not instruct the members to disregard that argument.

Facts not included herein are contained in the argument section below. All relevant facts are reproduced in Tables I and II of this Brief's Appendix.

Summary of Argument

Pvt Charles C. Hornback, U.S. Marine Corps, did not receive a fair trial. Trial Counsel repeatedly injected improper character evidence during the Government's opening statement, case-in-chief, closing argument, and sentencing argument. Trial Counsel also raised the specter of unlawful command influence, and even personally vouched for the credibility of the Government's evidence and witnesses. This persistent and pronounced misconduct permeated the entire court-martial and prejudiced Pvt Hornback's substantial right to a fair trial. Given the pervasive nature of the misconduct, the lower court erred when it found that the military judge's instructions cured

the error. The instructions--to include the one given during Trial Counsel's closing argument--were insufficient. United States v. Crutchfield, 26 F.3d 1098 (11th Cir. 1994), illustrates this point. There, like here, improper argument and inquiries spanned an entire trial, requiring reversal despite attempted curative instructions by the judge. Finally, the lower court further erred when it assumed without deciding whether prosecutorial misconduct occurred. That is a threshold determination under United States v. Fletcher, 62 M.J. 175 (C.A.A.F. 2005), and it cannot be avoided.

To correct these substantial errors, and to afford Pvt Hornback the fair trial he deserves, this Court should set aside the findings and sentence and authorize a rehearing.

Argument

APPELLANT DID NOT RECEIVE A FAIR TRIAL DUE TO PERSISTENT AND PRONOUNCED PROSECUTORIAL MISCONDUCT THAT PERMEATED HIS ENTIRE COURT-MARTIAL. GIVEN ITS PERVASIVE NATURE, THE MILITARY JUDGE'S INSTRUCTIONS WERE INSUFFICIENT TO CURE THE MISCONDUCT. THE LOWER COURT ERRED WHEN IT FOUND OTHERWISE, JUST AS IT ERRED WHEN IT ASSUMED WITHOUT DECIDING THAT PROSECUTORIAL MISCONUDCT OCCURRED. THIS COURT SHOULD SET ASIDE THE FINDINGS AND SENTENCE AND AUTHORIZE A REHEARING.

A trial counsel commits misconduct when she "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal

offense." United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting Berger v. United States, 295 U.S. 78, 84 (1935)). As stated by this Court, "[t]he cornerstone for any discussion of prosecutorial misconduct is . . . Berger v. United States." Fletcher, 62 M.J. at 179. There, the Supreme Court opined:

> [Trial Counsel's] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He 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.

Berger, 295 U.S. at 88. Prosecutorial misconduct comes in various forms, to include repeated injection of improper character evidence during trial. See United States v. Crutchfield, 26 F.3d 1098, 1102 (11th Cir. 1994) (reversing and remanding "where the record reflect[ed] numerous instances in which the prosecutor simply ignored the court's rulings on relevancy and improper evidence objections."). When the misconduct is "not slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential[,]" Fletcher, 62 M.J. at 185 (quoting Berger,

295 U.S. at 89) (internal quotations omitted), this Court should set aside the findings and sentence. Id.

In analyzing prosecutorial misconduct, arguments and inquiries that elicited objections from Appellant are reviewed "for prejudicial error." Fletcher, 62 M.J. at 179 (citing Article 59, UCMJ, 10 U.S.C. § 859 (2000)). As for any misconduct that failed to elicit an objection, this Court reviews for plain error.[10] Id. (citing United States v. Rodriguez, 60 M.J. 87, 88 (C.A.A.F. 2004) ("Plain error occurs when there is (1) error, (2) the error is obvious, and (3) the error results in material prejudice to a substantial right.")).

A. Trial Counsel made improper inquiries and argument throughout the court-martial, repeatedly disobeying the military judge's rulings. She committed prosecutorial misconduct.

On fifteen separate occasions, Trial Counsel elicited improper character evidence from witnesses during Pvt Hornback's court-martial.[11] (J.A. at 65, 79, 90-91, 96, 111, 113, 114, 147,

[10] The record reveals three instances where Defense Counsel failed to object to improper argument: (1) Trial Counsel's opening statement raising the issue of truthfulness and decay (J.A. at 65); (2) the reference to unlawful command influence during rebuttal argument, (J.A. at 234), though there, the military judge stopped Trial Counsel before any objection could be lodged; and (3) the reference to the "commander's main goal" during sentencing argument (J.A. at 282).

[11] Military Rule of Evidence 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order

151, 161, 165, 192-93, 223, 234, 280-81.) On at least ten separate occasions, the military judge instructed her to stop.[12] (J.A. at 96, 104, 111, 113, 116-17, 118, 166, 169, 173, 281.) She did not. If "there is no excuse for offending twice, after the court has ruled upon the matter," Beck v. United States, 33 F.2d 107, 114 (8th Cir. 1929), it follows, a fortiori, that there is no excuse for offending fifteen times after the military judge has ruled ten times on the matter. As the United States Navy Board of Review once opined, "A studied effort to arouse passion and prejudice is characterized by *repeated and persistent* asking of *improper questions* to which the objections of the defense have been sustained." United States v. Stockdale, 13 C.M.R. 540, 543 (N.B.R. 1953) (emphasis added) (citing Beck, 33 F.2d at 114). That is what happened here.

> to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided, that upon request by the accused, the prosecution shall provide reasonable notice in advance of trial, or during trial if the military judge excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Mil. R. Evid. 404(b); (J.A. at 38-39.)

[12] These instructions by the military judge occurred during the Government's case-in-chief and during sentencing argument. The number of instructions (ten) excludes other occasions when the military judge instructed Trial Counsel by sustaining Defense Counsel's objections on character, hearsay, or relevancy grounds.

Despite repeated, sustained objections to the Government's misuse of character evidence, Trial Counsel persisted in arousing passion and prejudice through her improper inquiries and argument. Trial Counsel's character-centric approach was consistent with the preview she gave the members during her opening statement. There, Trial Counsel said, "[t]his case is about decay, drugs, and dishonesty." (J.A. at 65.) She then hammered away at that theme when it came time for closing: "This case is about drugs, decay, and dishonesty. Napoleon Bonaparte said, "The infectiousness of a crime is like that of the plague. The accused is like a criminal infection that is a plague to the Marine Corps[.]" (J.A. at 223.)

Trial Counsel also elicited improper hearsay (J.A. at 194-95, 198), brazenly raised unlawful command influence, (J.A. at 234, 282), and personally vouched for the credibility of the Government's evidence and witnesses during the court-martial proceeding.[13] (J.A. at 242-43.) These examples only exacerbated the persistent and pronounced misconduct. The lower court countenanced this misconduct when it (1) assumed without deciding that prosecutorial misconduct occurred and (2) affirmed

[13] Remarkably, the lower court found "no plain or obvious error" in Trial Counsel: (1) inquiring about Pvt Hornback's role regarding a stolen motorcycle, (J.A. at 147); (2) referring to Pvt Hornback's command taking "action" against him "in the form of these charges . . ." (J.A. at 234); and (3) two instances of vouching for evidence and testimony (J.A at 242-43). Hornback, 2013 CCA LEXIS 114, at *5-6 n.5; (J.A. at 2.)

Pvt Hornback's conviction. This Court should not do the same. Consistent with Fletcher, 62 M.J. at 185, this Court should set aside the findings and sentence and authorize a rehearing.

Before moving on, one final point should be noted. Trial Counsel elicited the improper character evidence from the Government's own witnesses--on direct examination. As "[e]very lawyer is responsible . . . for his or her own witnesses," Rosanna Cavallaro, Police and Thieves, 96 Mich. L. Rev. 1435, 1452 n.82 (1998), Trial Counsel presumably knew the answers to the questions she asked. That, after all, is a fundamental part of trial preparation. See Thomas A. Mauet, Trial Techniques 114-15 (6th ed. 2002) ("[M]eet with witnesses to determine what their testimony will be, and . . . prepare them for testifying."). The identification of "potential problems" of expected testimony is another fundamental part of trial preparation. See, Mauet, supra, at 115. Presuming that a United States prosecutor follows these basic approaches to trial preparation, even arguably-vanilla prompts from Trial Counsel should be viewed as misconduct here, so long as they elicited improper character evidence from the Government's own witnesses.

B. Assuming without deciding prosecutorial misconduct is error under Fletcher. As a practical matter, it is unworkable. As a legal matter, it frustrates appellate review.

In Fletcher, this Court first *decided* whether four categories of prosecutorial misconduct occurred before it then

decided whether the appellant was prejudiced. 62 M.J. at 179-84. But the lower court here took a different approach. It *assumed but did not decide* whether trial counsel committed misconduct. Hornback, 2013 CCA LEXIS 114, at *6; (J.A. at 2-3.) As a practical matter, the lower court's decision to obviate the threshold issue of prosecutorial misconduct is unworkable and should be rejected. For example, one cannot examine--with any particular granularity--the severity of an error without first deciding that it even exists. And it follows that, if one cannot examine the severity of an error, then one cannot examine whether instructions by the military judge were sufficiently curative to preserve a fair trial--despite the error. But service courts are required to do just that; under Fletcher's first and second factors for prejudice, service courts must test for severity of misconduct and curative remedies, if any. 62 M.J. 184-85. The lower court's approach is simply unworkable.

Next, the lower court's approach frustrates appellate review by this Court. When misconduct is only assumed, this Court cannot determine how much weight, if any, the lower court placed on particular instances of it. And that impairs this Court's ability to review severity. Severity, after all, is one key that turns the case. It impacts the need for instruction(s), and it must be analyzed against the strength--or weakness--of the Government's case. The lower court strolls

through this analysis, but it does so with its eyes wide shut, having only *assumed* the misconduct occurred.

If anything, by assuming without deciding, the lower court broadcasts its lack of concern for the issue. In the context of prosecutorial misconduct, that lack of concern sends an unfortunate message to prosecutors that these trial tactics will be tolerated. For these reasons and more, this Court should set aside the findings and sentence.

C. Appellant remains prejudiced because the pervasive misconduct of Trial Counsel was not cured by the military judge's instructions to the members. Crutchfield is illustrative here.

When testing for prejudice, this Court examines three factors: (1) the severity of the misconduct; (2) curative measures taken; and (3) the strength of the Government's case. Fletcher, 62 M.J. at 184. Because each factor here demonstrates prejudice, this Court should do what the lower Court did not: set aside Pvt Hornback's conviction.

1. This misconduct was severe.

In Fletcher, this Court noted five factors to determine the severity of prosecutorial misconduct:

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

Fletcher, 62 M.J. at 184 (citing United States v. Modica, 663 F.2d 1173, 1181 (2d Cir. 1981)). Here, each factor points to a finding that Trial Counsel's misconduct was severe.

The raw numbers are alarming. Trial Counsel elicited improper character evidence *fifteen times* during the court-martial, each time in the presence of the members.[14] On two occasions, Trial Counsel unfairly argued the notion that Pvt Hornback's command desired a particular result. She also elicited improper hearsay and vouched for the credibility of the Government's evidence and witnesses. All told, these examples highlight at least twenty separate instances of misconduct. Far from "isolated incidents of poor judgment", the misconduct here was "pervasive and severe." See Fletcher, 62 M.J. at 185. The raw numbers alone demonstrate acute severity.

But the second factor is also alarming in that Trial Counsel's misconduct permeated the entire court-martial. Misconduct occurred in the Government's opening statement, case-in-chief, closing arguments, and sentencing argument, spanning

[14] Rather than confront this salient fact, the lower court bases its decision, in part, on the fact that the members never heard some of the proffered testimony. See Hornback, 2013 CCA LEXIS 114, at *7; (J.A. at 3.) The members did hear, of course, the examples of prosecutorial misconduct cited herein.

421 pages of the 557-page record of trial.[15] (J.A. at 65-282.) That covers nearly seventy-five percent of Pvt Hornback's trial, further demonstrating acute severity.

As for the third and fourth factors, trial on the merits lasted two and one-half days and the members deliberated for less than four hours. Just as in Fletcher, these factors demonstrate that the conduct was severe, pervasive, and impactful. 62 M.J. at 185 (noting the appellant's court-martial "lasted less than three days and the members deliberated for less than four hours."). It is perplexing then, that the lower court *assumes*, but does not decide, that prosecutorial misconduct occurred. See Hornback, 2013 CCA LEXIS 114, at *6; (J.A. at 2-3.) Surely this approach is incorrect.

Finally, regarding the fifth Fletcher factor, Trial Counsel repeatedly disobeyed (at worst) or simply failed (at best) to follow the military judge's instructions regarding improper character evidence. The military judge instructed, cautioned, and even admonished Trial Counsel for her repeated, improper inquiries and argument--all to no avail. After his sternest admonishment--"*You could do that at an ad board. You can't do that in federal court*[,]" (J.A. at 169), Trial Counsel still injected improper character evidence during the Government's

[15] Of note, 111 pages of the 557-page record cover matters preceding opening statements of counsel.

case-in-chief, closing, and sentencing argument.[16] Much like in Crutchfield, where "the prosecutor simply ignored the court's rulings on relevancy and improper character evidence objections[,]" 26 F.3d at 1102, here, Trial Counsel ignored the military judge's rulings. The result is an unfair arousal of passion and prejudice in the minds of the members. See Stockdale, 13 C.M.R. at 543. Accordingly, this fifth factor--like the other four--demonstrates severe misconduct that warrants setting aside the findings and sentence.

2. Curative measures were insufficient.

The military judge attempted, on more than one occasion, to cure the highly prejudicial impact of Trial Counsel's repeated, improper inquiries and argument. He called Article 39(a) sessions to instruct Trial Counsel on the proper way to proceed (most of which Trial Counsel did not heed). He issued instructions to the members to attempt to cast the prejudice from their minds. And he directly addressed the impropriety of character evidence after Trial Counsel unfairly cited the objectives of Pvt Hornback's command during her closing argument.

[16] As discussed, infra, if Trial Counsel--a representative of the United States Government--failed to listen to the military judge's instructions, there is no reason to assume that the members did.

But the military judge did not re-instruct the members when the misconduct continued into rebuttal and sentencing argument. There, trial Counsel vouched for Government evidence, (J.A. at 241-45), put the weight of the United States behind two Marines' testimony to rebut a defense theory, (J.A. at 243-44), and suggested that Pvt Hornback smoked spice on the job. (J.A. at 281.)

Given the strength of the first Fletcher factor, discussed supra, the military judge's attempted remedial measures were insufficient. In unique cases like this one, this Court should not rely on the presumption that members follow a military judge's instructions, especially if Trial Counsel could not.

In Crutchfield, the U.S. Court of Appeals for the Eleventh Circuit reversed a conviction where the prosecutor engaged in "[s]everal lines of questioning" that "constituted improper character evidence[.]" 26 F.3d at 1100. There, like here, the prosecutor "continued on several occasions to make the same types of inquiries" despite contrary rulings by the trial judge. Id. at 1103. And there, like here, the prosecutor made those inquires throughout the trial proceedings. Id. at 1100-03. Noting the trial judge's futile efforts to stem the resultant prejudice, the Eleventh Circuit opined, "When improper inquiries and innuendos *permeate* a trial to such a degree as occurred in this case, we do not believe that instructions from the bench

are sufficient to offset the prejudicial effect suffered by the accused." Id. at 1103 (emphasis added). The Eleventh Circuit additionally reasoned, "[A] jury cannot always be trusted to follow instructions to disregard improper statements." Id. (citing United States v. McLain, 823 F.2d 1457, 1462 n.8 (11th Cir. 1987)).

This reasoning is persuasive. For example, "empirical research demonstrates that jurors are deeply affected by prejudicial comments and . . . *the impact is much greater in weak cases than in strong ones*." Abraham P. Ordover, Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a), 38 Emory L.J. 135, 175 (1989) (emphasis added).[17]

Crutchfield is persuasive here. Not only is the type of misconduct similar (repeated injection of improper character evidence, among other evidence, despite contrary rulings by the trial judge), the length of the misconduct is similar. What is more, Crutchfield logically relates to factor two identified by this Court in Fletcher. There, this Court examined the curative efforts of the military judge in light of the severity of the

[17] Notably, military courts have never characterized the presumption that members follow a military judge's instructions as irrebutable. Cf. United States v. Washington, 57 M.J. 394, 403 (C.A.A.F. 2002) (Baker, J., concurring) ("Juries are presumed to follow instructions, *until demonstrated otherwise*.") (citing United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991)) (emphasis added).

misconduct. Fletcher, 62 M.J. at 185. Even though the misconduct only occurred during the findings argument, this Court still set aside the findings and sentence. Id. at 185-86. Here, the misconduct exceeded what happened in Fletcher. So Crutchfield becomes illustrative. It counsels in favor of reversal, and rightfully so. One cannot assume that a members panel, observing a trained United States prosecutor consistently disregard a military judge's instructions, will not do the same.

3. "This evidence is so weak."[18]

The final Fletcher factor focuses on the strength of the Government's case. 63 M.J. at 185. Because it is more likely that prosecutorial misconduct improperly contributes to a conviction in a weak case, courts are understandably reluctant to reverse when the Government's case is strong. Contrast United States v. Morgan, 113 F.3d 85, 91 (7th Cir. 1997) (finding prosecutorial misconduct harmless where circumstantial evidence of the defendant's guilt was "compelling") with United States v. Ayala-Garcia, 574 F.3d 5, 21-23 (1st Cir. 2009) (finding prosecutorial misconduct and remanding for "a new trial" where "[w]itness credibility was central" to the case).

Here, on at least three occasions, the military judge commented on the weakness of the Government's case. Regarding

[18] The military judge made this statement during an Article 39(a) session. (J.A. at 106.) Though directed at a single offense, the statement epitomizes the Government's entire case.

the evidence of the Article 92 violations, he opined during an Article 39(a) session, "[t]his evidence is so weak." (J.A. at 106.) He further remarked, "[w]ell, this evidence is so remote and just is not good evidence." (Id.) The military judge made a third remark when addressing the evidence on wrongful use of Xanax, "I will tell you this is not a strong case." (J.A. at 108.)

Ultimately, the members were forced to rely on the credibility of lay witnesses to convict Pvt Hornback on the wrongful use of Spice. Neither spice itself nor its paraphernalia were offered as evidence by the Government at trial. This fact is troublesome, especially where much of the improper character evidence touched on drug use. (J.A. at 166 ("[Y]ou can't . . . get into a bunch of evidence that the accused is a druggy and, therefore, he probably used some drug at some point.").)

As for the false official statement and larceny offenses, witness credibility also served as a key component to the Government's case. To be sure, the Government provided Prosecution Exhibits 1 through 3--forms such as DD Form 4/3 and NAVMC 10922--but even documentary evidence was not insulated from Trial Counsel's misguided sights. (See J.A. at 242 (commenting during closing argument that "[t]his is probably the most simple DOD form that I have ever seen. . . .").) In short,

the Government's case was relatively weak. This factor, much like the others, counsels in favor of reversal.[19]

Collectively, the three Fletcher factors show that Trial Counsel's conduct materially prejudiced Pvt Hornback's substantial right to a fair trial. Accordingly, this Court should reverse the lower court and set aside the findings and sentence.

Conclusion

Trial Counsel's persistent and pronounced prosecutorial misconduct permeated the entire court-martial and materially prejudiced Pvt Hornback's substantial right to a fair trial. Despite repeated proscriptive rulings by the military judge, Trial Counsel continued to make improper argument and out-of-bounds inquiries of witnesses. Whereas the Government's case was weak and the misconduct of Trial Counsel was severe, the military judge's instructions did not cure the resultant prejudice. In a unique case like this one, where the misconduct spans the entire trial, this Court cannot rely on the presumption that the members followed the military judge's instructions. The only meaningful relief for Pvt Hornback is a retrial free from prosecutorial misconduct.

[19] That the members returned a split verdict, acquitting Pvt Hornback of some offenses and not others, further highlights the overall weakness of the Government's case. (J.A. at 278-79.) But for the persistent and pronounced misconduct, that partial acquittal could have been a total one.

For all these reasons, this Court should set aside the findings and sentence and authorize a rehearing.

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7292
F:(202) 685-7426
david.dziengowski@navy.mil
Bar No. 35719

Appendix

Table I

Examples of Prosecutorial Misconduct	Record Citations
Government Opening Statement	
➢ "decay, drugs, and dishonesty" ➢ "his demeanor started to change and the decay set in. He began acting differently" ➢ "[t]he accused appeared to be somewhat untruthful"	J.A. at 65.
Government Case-in-Chief	
➢ "did he ever ask you to use drugs with him?"	J.A. at 79.
➢ "Did you ever speak to hear about the marriage?" ➢ "And did she tell you anything about why they were separated?"	J.A. at 90.
➢ "And while you worked with him in the S-8, did he say anything about drug use?" ➢ "Did he . . . say anything that might make you believe he was speaking from personal experience with drugs?"	J.A. at 96.
➢ Q. "GM3 Robidart, you testified that you knew the accused a little bit prior to him working for you. What was his demeanor like when he was actually working for you?" ➢ A. "Well, do you mean as far as how he acted while he was working for me?" ➢ Q. "How did he act? What was his personality like?" ➢ A. "To be honest, ma'am, very combative"	J.A. at 111.
➢ Q. "How is that different from how you knew him before?" ➢ A. "Because before, ma'am, you know he was still that same way a little bit but not as bad."	J.A. at 113.
➢ Q. "Did he just explain his use of any prescription drugs with you?" ➢ A. "Yes, ma'am." ➢ Q. "And what did he say?" ➢ A. "Just that he would overtake what he was supposed to be taking." ➢ Q. "Did he explain why that was?" ➢ A. "To get the high."	J.A. at 114.

➢ Q. "Can you please describe to the members what Seroquel is?" ➢ A. "Seroquel is a medication it is classified as an atypical neuroleptic which means it is a newer medicine that is used -- mainly it was developed for psychosis patients with schizophrenia to help them control hallucinations, delusions. It is also used for bipolar conditions manic and depressive bipolar conditions."	J.A. at 138.
➢ Q. "So what happened earlier in the day that also made you take this very seriously?" ➢ A. "[W]hile conducting my ISO prep I went up to S-2 where his wife currently works or was currently working at the time. After completing my training, we spoke a few brief words about my motorcycle being stolen. She then further stated that he was about to do something crazy. That, you know, he has been acting very differently for me to be worried." . . . . ➢ A. "May I continue with what I was saying?" ➢ Q. "Yes please." ➢ A. ". . . She further asked me if I really thought he stole my bike. And I told her yes."	J.A. at 150-51.
➢ Q. "Were there any additional long-term changes that you made in life after these threats?" ➢ A. "Yes, ma'am. I still -- I don't go to -- I don't leave my house even if it's to check the mail without leaving my door unlocked."	J.A. at 153.
➢ Q. "And what was your first reaction?" ➢ A. "My first reaction was with a hundred-plus Marines and sailors working for me, I was, like, wait, what? And when I went into the OIC's office and discussed it with him, they had discussed other information concerning further NJP's and that Appellant no longer had anything else to lose. He was at the bottom of the rank structure." ➢ DC: "Objection. Hearsay as to what the other members were saying in this meeting." ➢ TC: Sir, again, the effect on his state of mind at this stage." ➢ MJ: ". . .I'm not sure what the relevance of him being at the bottom of the rung – I mean, do you have a relevance or improper character evidence objection? ➢ DC: "As well."	J.A. at 161.
➢ Q. "And what kind of roommate was he for you?" ➢ A. "He was a good roommate. It was good times."	J.A. at 165. (Continued on next page.)

➢ Q. "And did anything start changing later?" ➢ A. "Towards the spring, I'd say, there was just kind of a drastic change in the way he acted." ➢ Q. "And how is that?" . . . . ➢ Q. "In specifics, how did things change as a landlord for you?"	J.A. at 165
➢ Q. "Can you please tell the members the reason why you were still receiving BAH with dependents after you should have notified the IPAC?" ➢ A. "Yes, ma'am. We were on a lease together, wanted to finish up the lease, and then he stopped paying me for the other half of the rent." ➢ Q. "Who's 'he'?" ➢ A. "Private Hornback."	J.A. at 188-89.
➢ Q. "Now, a few weeks after the accused left the apartment and vacated the apartment, did you find anything in his room?" ➢ A. "Yes, ma'am." ➢ Q. "And what is it that you found a few weeks after he was kicked out?" . . . . ➢ A. "I found a glass bowl."	J.A. at 192-93.
➢ Q. "So Corporal Kelly, to the incident that the defense was describing, why did the police show up at the house that night?" ➢ A. "They received a phone call stating domestic violence." ➢ Q. "From whom?" . . . . ➢ Q. "How do you know a call was made?" ➢ A. When I was detained, the police officer said there was a domestic --"	J.A. at 194-95.
Government Closing Argument	
➢ "This case is about drugs, decay, and dishonesty. Napoleon Bonaparte said, 'The infectiousness of a crime is like that of a plague.' The accused is like a criminal infection that is a plague to the Marine Corps --"	J.A. at 223.

➢ "What it comes down to is that the accused's life was decaying over the course of that year. He became that criminal infection --" ➢ "And the command has taken . . . action in the form of these charges before you. The Government is confident that you will find him guilty beyond a reasonable doubt."	J.A. at 234.
➢ "Members, you saw the dependency application itself, the NAVMC 10922. This is probably the most simple DOD form that I have ever seen."	J.A. at 242.
➢ "Now, members, the next main issue the defense spoke to you about, the next main excuse, I should say, is that Kelly and Morris planted those camera cards." ➢ "And the defense contends the fact that there's a discrepancy in their stories means that they're lying. Discrepancies happen when people don't collaborate. They are not collaborating on their stories. That's why there are differences in their stories." ➢ "They did not collaborate on this story. They were not fabricating the story."	J.A. at 243.
Government Sentencing Argument	
➢ "Members, we are here now because you have convicted this Marine of smoking Spice and also of stealing from the U.S. Government. Now, the Spice conviction you found to be true beyond a reasonable doubt, and with that, came the testimonies of two individuals who both heard him say he was using Spice at work. What was he doing at work? He was F-18 mechanic --"	J.A. at 280.
➢ "And lastly, the commander's main goal is to preserve good order and discipline."	J.A. at 282.

Table II

Examples of Instruction and Admonishment from MJ	Record Citations
Government Case-in-Chief	
➢ "[W]as that uncharged misconduct, 404(b), with reference to the spice[?] I mean, what was the purpose of asking that witness about all that first background? He didn't smoke spice with this witness, did he?"	J.A. at 80.*
➢ "I mean you can't just put out there that he used drugs at some point. You have to factor it in to the period charged right?"	J.A. at 92.*
➢ "I am concerned that you are getting into what would be 404(b) evidence or other acts evidence. We've got to narrow this down. I don't know what time period we're talking about. The fact that he used drugs before, you know, if he was having conversations about using drugs outside the charged time period I don't want that going to the members."	J.A. at 96.*

➢ MJ: "I don't want to hear any testimony about drug use -- the accused admitting to drug use -- unless it is the accused admit[ing] to drug use during the charged period. Okay?" ➢ TC: "Yes, sir." ➢ MJ: "All right. So first orient to the charged period. I don't want there to be the possibility that there was drug use before or after the charged period being admitted into evidence. That would be inadmissible. All right?" ➢ TC: "Yes, sir." . . . . ➢ MJ: "And, yeah, I don't want just drug use, coke, cocaine, ecstasy, heroin, marijuana. I want the drug. I want it specified to the drug and during the time period if he has made an admission to that . . . But that is impermissible evidence going to the members if it is outside that window or if it is a different type of drug. Okay?	J.A. at 97.*
➢ "I mean, if someone is charged with using marijuana, you can't come in here and start eliciting testimony or evidence that, you know, he's been around marijuana or he knows things about marijuana. I mean its [*sic*] impermissible character or other acts evidence. I don't think you've given notice of 404(b)."	J.A. at 104.*
➢ "It seems like a lot of this is filtered through hearsay from other people. She -- even the testimony of him knowing about spice is something that she may have overheard in passing. It wasn't like a conversation she was having with the accused. It was -- she testified that she overheard --"	J.A. at 109.*
➢ MJ: "Here is how this should go. How often did you see the accused? Did you interact with him on a daily basis? Were you able to observe the way he acted at work? You don't have to get into the specifics. How well do you know him? How long did he work for you, etcetera, etcetera. Okay. Without her talking about the specifics. Okay. And then presumably, you have some questions about the change in that. Is that right?" ➢ TC: "That is right, sir." ➢ MJ: "All right. Stick to that. Okay?" ➢ TC: "Yes, sir."	J.A. at 111.*
➢ "Okay. Stop this. Disregard all that testimony. Strike that from your memory as though you've never heard it."	J.A. at 113.
➢ "Sustained. Disregard that last question and answer. Can all members follow that instruction? Cast it out of your minds as though you had never heard it. Can all members follow that instruction?"	J.A. at 114.

➢ "That is clearly impermissible evidence. You can't say that he used drugs -- this drug to get high. He misused this prescription drug on this occasion in order to get high to prove that he therefore used drugs and other prescription drugs on a separate occasion to get high."	J.A. at 116-17.*
➢ MJ: "My concern here is that you are getting into all these potential bad acts that aren't specific to the charged offense which would blow this case up. I mean you just can't have that. ➢ TC: "Sir, I need --" ➢ MJ: You need direct evidence that a crime was committed. You can't put all this evidence out there that, yeah, this guy is kind of into drugs and he likes to -- he knows a lot about drugs and he knows a lot about drugs that can't be detected in your system. I mean you have to show evidence that he committed the specific crime on the specific date that you alleged . . . Not that he's a bad guy."	J.A. at 118.*
➢ "Do not get into any psychotherapist [privilege]."	J.A. at 134.
➢ "Sustained. Strick [sic] that last question and answer from your mind."	J.A. at 138.
➢ "Now, I am concerned that the jury's been tainted by hearing evidence that he was taking schizophrenia medication."	J.A. at 139.*
➢ "Well, I am going to let her – I mean I thought Captain Holmes what we talked about that you were just going to ask him about whether he provided Xanax. Did we discuss going into like what Seroquel is used to treat?"	J.A. at 140.*
➢ MJ: "Members, I believe that is the second time it has been referenced something about the potential that the accused --" ➢ TC: "It is uncharged, sir." ➢ MJ: "-- had something to do with a stolen motorcycle. You may not consider that for any reason. Strike that testimony from your minds as though you've never heard it and don't consider it for any purpose. Can all members follow that instruction?"	J.A. at 151-52.
➢ MJ: "I'm not sure what the relevance of him being at the bottom of the rung -- I mean, do you have a relevance or improper character evidence objection?" ➢ DC: "As well." ➢ MJ: "Okay. I'm going to sustain it for that. Sustained on the last question regarding the accused's prior record. Don't consider any information regarding the accused's prior record."	J.A. at 161.
➢ Q. "And how is that?" ➢ DC: "Objection. 404 character evidence." ➢ MJ: "Response? Improper character evidence."	J.A. at 165. (Continued on next page.)

➢ TC: "No, sir. This goes directly to the charges as far as circumstantial evidence of drug use." ➢ MJ: "Sustained." . . . . ➢ TC: "In specifics, how did things change as a landlord for you?" ➢ DC: "Objection. 404 and then 401, relevance." . . . . ➢ MJ: "Okay. We need a 39(a) session, members, if you could step out, please.	J.A. at 165.
➢ "Okay. What you can't do is get into a bunch of evidence that the accused is a druggy and, therefore, he probably used some drug at some point. That's not admissible evidence."	J.A. at 166.*
➢ "It can't be this amorphous, generalized -- I got it. I mean, you've got a lot of smoke. Where's the fire. I mean, you need to corroborate these things and it needs to be specific. He used drugs on this date. . . ."	J.A. at 168.*
➢ MJ: "Because I'm tired of having the members being exposed to basically character evidence that's not admissible. I mean, you can't -- I just want to reiterate to you, you can't present evidence that the accused is a druggy; therefore, he probably used drugs. You need to present evidence that he specifically used drugs on a certain day and time." ➢ TC: "Yes, sir." ➢ MJ: "And a specific drug. Not that he's just a drug abuser generally and so you should convict him of using drugs. You can't do that. ➢ TC: "Yes, sir." . . . . ➢ MJ: "You could do that at an ad board. You can't do that in federal court." ➢ TC: "Yes, sir."	J.A. at 169.*
➢ MJ sustains objection on relevance grounds.	J.A. at 189.
➢ MJ sustains objection on improper character evidence grounds. ➢ MJ instructs TC to "[j]ust lead."	J.A. at 193.
➢ MJ sustains objection on hearsay grounds.	J.A. at 195.
➢ MJ sustains objection on hearsay grounds.	J.A. at 198.
Government Closing Argument	
➢ MJ sustains objection to TC closing argument on improper character evidence grounds.	J.A. at 223.

➢ MJ to Members, "Yeah. Don't consider that evidence."	J.A. at 225.
➢ MJ sustains objection on improper character evidence grounds.	J.A. at 234.
➢ "Hang on a second. Okay. Members, a couple things. One, with respect to that last question, you all agree the convening authority is not expecting a certain result in this case, that you're to try the case or decide the issues based on the evidence presented before you, and no one is presuming any certain outcome in this case. Additionally, throughout the course of this trial and even during the closing argument, I sustained several objections to character evidence. You may not consider any evidence that was the subject of a sustained objection for any purpose, and you may not consider -- those objections related to character evidence, you may not conclude based on any of that evidence or arguments of counsel that the accused is a bad person or has general criminal tendencies and that he, therefore, committed the offenses charged. You need to base your determination on the admitted evidence in this case and determine if the offenses were committed beyond a reasonable doubt at the specific times and in the specific manner in which they were alleged. Can all the members follow that instruction? Affirmative response from all members."	J.A. at 234-35.
Government Sentencing Argument	
➢ MJ: "Sustained. You have to argue about the crime that he was convicted of. He was convicted of smoking Spice that they observed him smoking." ➢ TC: "Yes, sir." ➢ MJ: "You can't speculate as to other bad acts that he might have done. I want you to stay away from other bad acts or evidence of a general criminal disposition and focus on the offenses of which the accused was convicted."	J.A. at 280-81.

*Denotes instruction given during Article 39a session.

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 8, 2013.

Certificate of Compliance

This brief complies with Rules 24(d) and 37 of this Court's Rules of Practice and Procedure. This brief also complies with the type-volume limitations under Rule 24(c) because it contains less than 14,000 words. Using Microsoft Word version 2003 with 12-point-Court-New font, this brief contains 12,809 words.

DAVID C. DZIENGOWSKI
Lieutenant, JAG Corps, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
1254 Charles Morris Street SE
BLDG 58, Suite 100
Washington Navy Yard, DC 20374
P:(202) 685-7292
F:(202) 685-7426
david.dziengowski@navy.mil
Bar No. 35719