IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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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 SUSTANTIAL 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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2006), because Appellee's approved sentence included a dishonorable discharge and one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2006).

Statement of the Case

A panel of members sitting as a special court-martial convicted Appellant, contrary to his pleas, of one specification of using Spice in violation of a lawful general order, one specification of signing an official document with the intent to deceive, and one specification of larceny, in violation of Articles 92, 107, and 121, UCMJ, 10 U.S.C. §§ 892, 907, and 921 (2006). The Members sentenced Appellant to three months of

confinement and a bad conduct discharge. The Convening Authority approved the sentence as adjudged, and except for the punitive discharge, ordered it executed.

Statement of the Facts

A. Appellant was acquitted of five of the eight charges at trial.

Of the remaining charges against Appellant, an F/A-18 Aircraft Mechanic, some were dismissed. Others had their specifications merged, or resulted in a Members' acquittal, including: wrongful use of "bath salts," and Xanax (charged as a general orders violation); soliciting Squadron-mates to do the same; defrauding the United States of Basic Allowance for Housing (BAH); and using provoking speech and communicated threats towards, among others, his Squadron leadership. (J.A. 6-11.)

B. The Initial Instructions to the Members and Voir Dire.

Prior to the taking of evidence, the Members were subjected to thorough voir dire. Each Member assured the Court and counsel for both parties that they would be able to follow the instructions of the Military Judge, and apply the law that was required to be applied to this case. (J.A. 53-60.) Trial Defense Counsel exercised no peremptory challenges to the panel. (J.A. 60.)

C. Appellant objected to eighteen alleged instances of prosecutorial misconduct, but did not object to four instances.

1. Appellant did not object to Trial Counsel's Opening Statement, but the Military Judge instructed that opening statements are neither evidence nor the law.

Trial Counsel claimed in her opening statement that the case was about "decay, drugs, and dishonesty." (J.A. 65.) Trial Counsel continued by adding that "The accused appeared to be somewhat untruthful." (J.A. 65.) There was no contemporary objection by Trial Defense Counsel. Nor did Trial Defense Counsel object at the close of Trial Counsel's opening.

After a brief opening statement from Trial Defense counsel, the Military Judge then gave the following instruction:

> MJ: Okay. Members, once again, opening statements of counsel are not evidence and with respect to any recitation of the law or standards of proof, I will be instructing you on those items. And is [sic] there any conflict between anything that counsel has told you with respect to what I will tell you with respect that, you must accept my version. Can all members follow that instruction?
>
> Affirmative response by all members.

(J.A. 69.)

2. The Article 39(a) Sessions.

a. Appellant made two objections during the testimony of Lance Corporal (LCpl) J.N. Teets. One 404(b) objection was subsequently withdrawn, and the second objection as to speculation was overruled. This occurred outside of the hearing of the Members.

Because of a pending administrative separation, LCpl Teets testified under a grant of testimonial immunity. (J.A. 77.) LCpl Teets testified that he was assigned to the Squadron S-8 shop. According to Teets, the S-8 was an organizational waypoint for Marines pending some form of separation. (J.A. 77.) He and the Appellant worked together. (J.A. 78.)

LCpl Teets testified on direct about his knowledge of Appellant's use of spice. Specifically, Trial Counsel asked LCpl Teets if he had ever discussed his positive urinalysis with Appellant. (J.A. 79.) Responding in the affirmative, LCpl Teets added that Appellant told him on several occasions that his urinalysis could not have tested positive for Spice, because "they can't test for [Spice]." (J.A. 79.) LCpl Teets went on to say that he had never discussed other drugs with Appellant. (J.A. 79.) Based on that answer and as a point of clarification, Trial Counsel then asked follow-up questions of LCpl Teets which, in turn, led to an objection by the Defense and the departure of the Members. The following colloquy pertains:

TC: Did you ever discuss——did he ever ask you——did he ever ask you to use drugs with him?

WIT: Not directly, but in a way where my statement was given to CID, I believe it was. It was an offer or invitation——.

(J.A. 79.) There was no objection raised by Trial Defense Counsel to this question. The colloquy continued:

TC: Can you explain what the circumstances were?

WIT: Yes, ma'am, I was——.

(J.A. 79.) At this point Trial Defense Counsel objected to a question pertaining to the circumstances of the invitation. Specifically his objection was speculation and improper lay opinion. The Military Judge thereupon asked the Members to withdraw. (J.A. 79-80.)

What followed was a 39(a) session where the Military Judge probed the dual nature of Trial Defense Counsel's objection. First, the Military Judge scrutinized Trial Counsel's question. Specifically asserting he was concerned about a potential 404(b) problem, the Military Judge sought to help Trial Defense Counsel clarify his objection:

MJ: Okay, so there is no objection as to [404(b)]? No issue with respect to that?

DC: No, your Honor. I suppose it goes to the charge.

(J.A. 80.) Trial Defense Counsel thereafter limited his objection to this evidence as to speculation. (J.A. 80.) After voir dire of the witness, the Military Judge overruled the

objection. (J.A. 81-82.) These events occurred outside of the hearing of the Members. (J.A. 80-82.)

> b. During the testimony of Gunners Mate, Third Class (GM3) M. Robidart Appellant registered three objections. The first, 404(b), was subsequently changed to hearsay and sustained. The second and third objections were based on 404(b) and sustained. The military judge held four 39(a) sessions, two called *sua sponte*, and issued two curative instructions.

Appellant's acquaintance with GM3 Robidart was twofold. First, he knew her from when she supervised the S-8. But more importantly, he knew her as a result of GM3 Robidart's acquaintance with Appellant's wife. (J.A. 89-90.) Trial Counsel intended to use GM3 Robidart's testimony to show that, during the charged timeframe, Appellant's wife told her that Appellant had been using drugs; and that she knew this because he treated her poorly when he was using drugs; that Appellant had specific knowledge about Spice, its nature, and effect; and that Appellant had admitted to abusing prescription drugs. But as Trial Counsel started down the first path, Trial Defense Counsel objected not to the question, but to the answer. (J.A. 91.)

The first of several Art. 39(a) sessions ensued. The Members and the Witness withdrew from the courtroom. Trial Defense Counsel's initial objection was relevance. (J.A. 91.) But shortly after the members withdrew his objection changed to

improper character evidence under Mil. R. Evid. 404. Trial Defense Counsel further clarified that his objection was not to the question posed, but to the evidence he anticipated would come from the witness:

> DC: Yes Sir. My objection that I had it should not be relevance but 404. *I am concerned of testimony coming out* about why it is they broke up and basically putting evidence showing that my client and wife fought.

(J.A. 91 (emphasis added).) But after the Military Judge clarified exactly what it was Trial Counsel was attempting to elicit from the witness, the Defense again changed tack, substituting in a hearsay objection instead:

> MJ: What is it that you want——what do you believe that she is going to say that is relevant?
>
> TC: That she is going to say that when he was using drugs he was treating her poorly.
>
> MJ: Okay. Do you have an objection to that?
>
> DC: Hearsay and then——I mean you have charged him with using drugs on specific occasions.

(J.A. 92.) The hearsay objection being resolved, the witness resumed her position on the witness stand and the Members returned. Shortly thereafter another 39(a) session followed. Once more the Members withdrew from the courtroom to the deliberation room.

During the second 39(a) session the Military Judge expressed concern that Trial Counsel might be getting into

"404(b) evidence or other acts evidence." (J.A. 96.) Accordingly, the Military Judge stated that Trial Counsel needed to "narrow down" the period being questioned to the period that was charged; instructed Trial Counsel to direct her questions towards the charged substances; and if Trial Counsel were unable to do so, offered to ask the witness questions to "vector [the witness] in." (J.A. 96-98.) Trial Counsel stated she understood the instruction and was given the opportunity to voir dire the witness outside the presence of Members. (J.A. 98-102.)

After hearing Trial Counsel's voir dire of the witness, Trial Defense Counsel again objected, this time both on grounds of hearsay and speculation. (J.A. 102.) The Military Judge sustained Trial Defense Counsel's hearsay objection. (J.A. 103.) The Members remained in the deliberation room during this process.

The Military Judge then asked Trial Defense Counsel his position on the proffered testimony elicited during Trial Counsel's voir dire. (J.A. 103). Specifically, the Military Judge was interested in Trial Defense Counsel's thoughts on Appellant's apparent knowledge of Spice. The following colloquy occurred:

> MJ: [to Trial Defense Counsel] what is your position on that?

DC: I do not object to that, sir.

MJ: You have no objection to that?

DC: I imagine 404(b) is what Captain Holmes will go with that, your Honor.

MJ: What is that?

DC: I imagine——I mean Captain Holmes is offering that ——if I can ask the trial counsel——

MJ: What is the purpose for asking that?

TC: His personal awareness and knowledge of the drug ——that the accused know of what the drug is.

MJ: He is charged with using it right?

TC: Yes, sir. I believe that this is circumstantial evidence going toward somebody who may have used it. And that combined with actual direct evidence that we already put in.

(J.A. 103-104.)

After taking argument on Appellant's apparent knowledge that Spice has a stronger effect than marijuana, the Military Judge asked Trial Counsel if she had provided the required notice of Mil. R. Evid. 404(b) evidence. (J.A. 103-104.) Trial Counsel acknowledged that she had not, but pointed out that the rule states "upon request." (J.A. 105.) However after considering the relative strength of the proffered evidence, and in view of the lack of notice, the Military Judge ruled that he would not allow testimony on Appellant's knowledge of Spice on direct, but that he might reconsider and allow it in rebuttal. (J.A. 107.)

After addressing the admissibility of Appellant's knowledge of Spice, the Military Judge turned to evidence of Appellant's demeanor. (J.A. 108.) The Military Judge noted that, while he would allow Trial Counsel the opportunity to lay foundation for questions pertaining Appellant's change in demeanor, he viewed it as an "[u]phill battle, but go ahead." (J.A. 108-110.)

After warning the witness to testify only about things the accused "...personally said to [the witness] or [the witness] personally overheard," specifically to avoid hearsay, and instructing the witness on what hearsay means, the Military Judge asked the Bailiff to bring the Members back in. (J.A. 110-111.)

But shortly after, as Trial Counsel attempted to ask foundational questions relative to the Appellant's demeanor, the following examination took place:

> TC: 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?
>
> WIT: Well, do you mean as far as how he acted while he was working for me?
>
> TC: How did he act? What was his personality like?
>
> WIT: To be honest, ma'am, very combative and he didn't——
>
> MJ: Hang on.
>
> DC: Members. Head out.

(J.A. 111.)

The Military Judge then gave detailed instructions to Trial Counsel how to lay foundation, the need to follow those instructions, and to not get into specifics. (J.A. 111-112.)

After the Members reentered the courtroom, Trial Counsel resumed her attempt to lay foundation and the following questions ensued:

TC: GM3 Robidart, thank you for bearing with me.

WIT: Yes, ma'am.

TC: So what was the date again that you jointed the S-8?

WIT: I believe it was around May 20——May 25th, yes, ma'am.

TC: And how often did you see the accused?

WIT: Every day.

TC: And how many hours a day?

WIT: Like I said before, it was, you know, were in and out. It was a supply maintenance shop so—but, you know, it was——our hours were from 0700 to 1530-1600 every day.

TC: So how well do you know him?

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

TC: And would you recognize any changes in him?

WIT: At work, yes ma'am.

TC: And did you recognize any physical changes in him during that time?

WIT: Yes, ma'am.

TC: And can you please tell the court what those were.

WIT: There were a couple days, ma'am, that he came in——

MJ: When?

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

MJ: Okay.

WIT: 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.

TC: How is that different from how you knew him before?

WIT: 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. *Can all members follow that instruction?* One last question, move on.

(J.A. 112-113 (emphasis added).) The Record of Trial includes a hand-written note with a line directed towards the above bolded interrogatory, and bearing the initials "S.K." along with a date——"5 Apr 12. This note indicates "Affirmative response by all members." (J.A. 113). The Military Judge in the subject case was Lieutenant Colonel Stephen Keane, U.S. Marine Corps. (J.A. 1.)

In accordance with the Military Judge's direction to "... move on," the Trial Counsel then shifted gears to her last point with this witness, Appellant's admitted use of prescription drugs. (J.A. 113.) Trial Counsel inquired as to Appellant's conversations with the witness about his prescription drug use, why Appellant said he used those prescription drugs. (J.A. 113-114.) GM3 Robidart testified that Appellant said he used his prescription to get high, and Trial Defense Counsel raised an objection based of Mil. R. Evid. 404. (J.A. 114.) The Military Judge sustained the objection, stating:

> 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?*
>
> *Affirmative response from all members.*

(J.A. 114 (emphasis added).)

Trial Counsel followed this admonition to the Members up with a question relative to Appellant's acquisition of prescription narcotics, whereupon Trial Defense Counsel reiterated his objection. (J.A. 114.) The Military Judge called for another Article 39(a) session, and both the Members and the witness departed the courtroom. (J.A. 115.) The Members did not again hear from GM3 Robidart. (J.A. 115-126.)

During the 39(a) session and outside of the hearing of both the Members and the witness, the Military Judge restricted heard

arguments from both parties. (J.A. 115-120.) In order to clarify GM3 Robidart's testimony, the Military Judge sought to voir dire the witness outside of the hearing of the Members. In that regard the following colloquy transpired:

> MJ: Yeah. All right. I am going to see what she says before we get into semantics of whether we even need to address this. And how often did you see the accused?
>
> DC: Yes, sir.
>
> MJ: I want to see if she will actually even say those things because I suspect she will not.
>
> TC: Sir, she just testified pretty much to before Limiting——
>
> MJ: *Bring her in.* I want to hear it.
>
> TC: Yes, sir.
>
> BLF: Yes, sir.

(J.A. 120.)

Appellant's brief asserts that Record next reflects the *Members* reentered the courtroom. But despite the fact the Record does not reflect that the *witness*, GM3 Robidart, reentered the courtroom, the next activities reported by the Record are questions posed to GM3 Robidart by the Trial Counsel (J.A. 120); followed by GM3 Robidart withdrawing from the courtroom (J.A. 122); GM3 Robidart reentering the courtroom (J.A. 125); GM3 Robidart again exiting the courtroom (J.A. 126); and finally by the Members reentering the courtroom (J.A. 126).

Nothing in the Record reflects that *any* of the testimony solicited from GM3 Robidart on voir dire was seen or heard by the Members. (J.A. 120-126). Instead the Members next heard from Lieutenant Commander Terrien. (J.A. 126.)

c. During the testimony of Lieutenant Commander (LCDR) B.D. Terrien Appellant registered one objection which was sustained. The Military Judge called two 39(a) sessions, one *sua sponte* and issued two curative instructions.

As the Squadron Flight Surgeon, LCDR Terrien had treated the Appellant (J.A. 126, 129, 135.) But before he could offer testimony to that effect, the Military Judge called yet another Article 39(a) session, and the Members again departed the courtroom. (J.A. 129.)

During the Article 39(a) session, the Military Judge expressed concern that Trial Counsel's questions may potentially invade the patient-psychotherapist privilege found in Mil. R. Evid. 513. (J.A. 129-131.) Trial Counsel, however, assured the Court that she was not trying to introduce any statements or evidence obtained during examinations. Instead she intended to use LCDR Terrien to demonstrate whether he had prescribed Appellant Xanax in the July—June timeframe. (J.A. 131.) The Military Judge instructed Trial Counsel to not "get into any psychotherapist-patient privilege." (J.A. 134.)

Subsequently the Members reentered the courtroom. Trial Counsel thereupon resumed her direct examination of LCDR

Terrien. (J.A. 135.) LCDR Terrien went on to testify that he treated Appellant; that, during the period of June through July, Appellant did not have a prescription for Xanax; and to the side effects of Xanax and other anxiety medications. (J.A. 135-137.) During this testimony Trial Defense Counsel made a single objection——speculation, asking for a legal conclusion——which was properly overruled by the Military Judge. (J.A. 136.)

Trial Counsel then inquired if Appellant had been prescribed any other anti-anxiety medications during the June-July period. (J.A. 138.) In order to do so, Trial Counsel sought to use Appellant's medical record. The Military Judge asked Trial Defense Counsel if he had any objection to Trial Counsel using the medical record in this manner. (J.A. 138.) Trial Defense Counsel replied "No, objection, sir." "You have no objection?" the Military Judge again inquired. Trial Defense Counsel replied a second time "No, sir." (J.A. 138.) After LCDR Terrien reviewed Appellant's medical record, the following testimony ensued:

> WIT: He was in——I think June timeframe he was prescribed Seroquel which might be——if that is what you are referring to, yes, he was then prescribed something.
>
> TC: Yes, sir. Do you still need your memory [sic] at this stage?
>
> WIT: No. No. No.
>
> TC: Okay. Thank you. Can you please describe to the

[M]embers what Seroquel is?

WIT: 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 hallucination, delusions. It is also currently——it is used for that. It is also used for bipolar conditions manic and depressive bipolar conditions.

(J.A. 138.) At this point Trial Defense Counsel objected.

DC: Your honor, I object.

(J.A. 138.) The Military Judge thereupon admonished the Members to ignore that evidence, telling them:

MJ: Sustained. Strick [sic] the last question and answer from your mind.

(J.A. 138.) After having that evidence stricken, the Members again departed the courtroom. Another 39(a) session ensued. (J.A. 139.)

Expressing concern that "...the jury's been tainted by hearing evidence that he was taking schizophrenia medication" the Military Judge again turned to Trial Defense Counsel for a response. (J.A. 139.) Trial Defense Counsel again posed no objection to the proffered evidence. Instead, Trial Defense Counsel stated that he *desired* the admission of this evidence, as it apparently fit within his theory of the case. (J.A. 139-140.) The Military Judge thereafter cautioned Trial Defense Counsel that if he "open[ed] the door" that such evidence could be admitted by the Government. (J.A. 140.)

MJ: Well, once it's out there it is out there. So I gave you the opportunity to object. You didn't object. This impermissible evidence came in. I am about to give an instruction on it, but I am not going to give the instruction. I will wait until after your cross because quite frankly it sounds to me like you're going to open the door to that evidence coming in anyway, right?

I mean if you are going to start asking about Seroquel then she can ask about what Seroquel is used to treat.

DC: Yes, sir. I will ask after the trial counsel completes direct to have a recess before going into cross-examinations so I can consider the options.

MJ: Do you want an instruction right now to the members?

DC: *Not yet, sir,* because I want to consider if I need to get into that material.

(J.A. 140.)

After the Members reentered the courtroom, Trial Counsel asked three simple questions to which there was no objection, and thereupon turned the witness over for cross-examination. (J.A. 142.) As Trial Defense Counsel did not ask questions about Seroquel, the Military Judge gave the curative instruction he had previously offered to the defense:

MJ: Members, as I instructed you earlier, there was an objection a question regarding a prescription for Seroquel and the purposes behind or the——what that drug is used to treat. I sustained that objection. As I have instructed you before, in that regard *you must completely disregard* the question and the answer and not consider them for any purpose whatsoever. *You will put them out of your minds* as if the question-and-answer had not

been asked or presented and *decide this case solely based on the evidence properly brought in front of you.* So any inference positive or negative as a result from that question or answer just needs to——*strike it from your minds* completely.

Is there any member who cannot follow that instruction?

Negative response from all members.

(J.A. 144-145 (emphasis added).)

d. During the testimony of LCpl I.L. Carrillo Appellant made three objections, one for hearsay which was subsequently withdrawn, one under Mil. R. Evid. 404(b) for which the Trial Counsel requested and received a limiting instruction, and one for relevance, which Trial Counsel conceded and the Military Judge sustained.

LCpl Carrillo was called to testify as to Charge III, provoking words. (J.A. 145-155.) Like GM3 Robidart, LCPL Carrillo knew both Appellant and Appellant's wife. (J.A. 146-147.) He was specifically asked to testify pertaining to a phone call he received from the Appellant on or about July 20, 2011. (J.A. 147.) That testimony went as follows:

TC: And now let's move on to July of this year, specifically [July 20, 2011]. What happened that day?

WIT: I was coming from getting dinner. I was with a friend of mine. And I received a phone call. I was getting a phone call and I looked at my phone and it was from him. And I answered the phone and pretty much like the conversation went, like, something as, like, listen here you [explicative deleted] or mother [explicative deleted]. If you ever talk to my wife again, I am going to come up to the squadron and break your [explicative deleted] neck because you talked to

> her or whatever, I was speaking to his wife that day because I was getting my clearance taken care [sic]. It is called an ISO prep. And I briefly spoke to her about my motorcycle getting stolen. She asked me if I thought it was him. Roger that.

(J.A. 147.) Trial Defense Counsel did not object.

LCPl Carrillo went on to testify that Appellant stated that he would "blow [LCpl Carrillo's] [explicative deleted] brains out." (J.A. 147.) Appellant also stated he would shoot Gunnery Sergeant French in the face, one of his Staff NCOs, because according to Appellant, Gunnery Sergeant French had sex with Appellant's wife. (J.A. 147-148.) LCpl Carrillo testified that he took Appellant's threat seriously. (J.A. 148.) Trial Defense Counsel did not object.

Trial Counsel inquired why LCpl Carrillo took Appellant's threats seriously. (J.A. 150-151.) The following examination ensued:

> TC: So what happened earlier in the day that also made you take this very seriously?
>
> WIT: I——while 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——he was about to do something crazy. That, you know, he has been acting very differently for me to be worried.

(J.A 151.) Trial Defense Counsel made a hearsay objection, but then withdrew it, and despite this the Military Judge overruled

the objection. (J.A. 151.) Continuing with direct examination of LCpl Carrillo, Trial Counsel asked:

> WIT: May I continue with what I was saying?
>
> TC: Yes, please.
>
> WIT: 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 about [sic] 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. 151.) Trial Defense Counsel *did* object:

> DC: Objection, 404.

(J.A. 151.)

Trial Counsel himself asked the Military Judge for a limiting instruction by asking that the final sentence of the testimony be stricken:

> TC: Sir, again, this is going to——we can strike that last comment about the bike.

(J.A. 151.) And, in view of that request and the objection, the Military Judge instructed to limit the Members' use of this evidence with an instruction:

> MJ: Members, I believe that is the second time it has been referenced something about the potential that [Appellant]——
>
> 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 [M]embers follow that instruction?

TC: Thank you, sir.

(J.A. 152 (emphasis added).) Trial Defense Counsel agreed with this limiting instruction:

MJ: Does that satisfy you with that instruction?

DC: Thank you, sir.

(J.A. 151-152.) All Members stated they could disregard the testimony. (J.A. 152.)

Trial Counsel thereafter continued with her direct examination of the witness:

TC: Were there any additional long-term changes that you made in life after these threats?

WIT: 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. 153.) Trial Defense Counsel objected on grounds of relevance, Trial Counsel conceded the answer was irrelevant, and the objection was sustained. *Id*.

e. <u>During the testimony of Gunnery Sergeant (GySgt) C. French there was one Mil. R. Evid. 404(b) objection. The objection was sustained and the Military Judge issued a curative instruction</u>.

The following day the United States brought GySgt French to the stand. He was called to testify relative to the threats registered against his life, and the life of LCpl Carrillo. (J.A. 161.) The relevant testimony elicited was:

TC: What was the specific——what was the specific threat to you?

WIT: That [the Appellant] was going to come into the back office and shoot me in the face.

TC: And what was your first reaction?

WIT: 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.

(J.A. 161.) Trial Defense Counsel objected on grounds of hearsay. Explaining to Trial Defense Counsel that the proffered evidence was not hearsay, the Military Judge suggested instead a possible relevance and 404(b) objection:

MJ: Well it's not hearsay. 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?

(J.A. 161.) Taking this signal, Trial Defense Counsel objected, citing relevance and 404(b); the Military Judge sustained the objection. The Military Judge issued a limiting instruction:

MJ: Okay. I'm going to sustain it for that. Sustained on the last question regarding [Appellant's] prior record.

To Mbrs: *Don't consider any information regarding [Appellant's] prior record.*

(J.A. 161 (emphasis added).)[1]

[1] The words and punctuation "To Mbrs:" was again a hand-written note with the initials S.K., presumably belonging to the Military Judge, LtCol Stephen Keane.

f. During the testimony of Corporal (Cpl) R.C. Morris Appellant registered three objections. Two M.R.E. 404(b) objections were made, both of which were sustained. A third objection was initially raised under Mil. R. Evid. 404(b) but was subsequently changed to relevancy and sustained.

The next witness brought to the stand was Cpl Morris. Cpl Morris worked and lived with Appellant. (J.A. 164.) After laying basic foundational evidence, Trial Counsel made the following inquiry:

TC: And what kind of a roommate was he for you?

WIT: He was a good roommate. It was good times.

TC: And did anything start changing later?

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

(J.A. 165.) The Defense objected to this colloquy. *Id*. The Military Judge quickly dispatched the evidence by sustaining the raised objection. (J.A. 165.) Trial Counsel attempted to continue her direct examination of the witness:

TC: In specifics, how did things change as a landlord for you?

(J.A. 165.) Once again Trial Defense Counsel objected, phrasing his objection in terms of Mil. R. Evid. 401 and 404, and the Military Judge called for another 39(a) session. (J.A. 165.) Both the Members and the witness withdrew from the courtroom. (J.A. 165.)

During the Article 39(a) session the Military Judge advised Trial Counsel that she could not put on "a bunch of evidence that [Appellant] is a druggy and, therefore, he probably used some drug at some point" and that "it would have to be circumstantially related to the time that you charged him with using a specific drug." (J.A. 166.) Trial Counsel proffered that the witness would testify Appellant was late with his rent, and sleep all day; Trial Defense Counsel countered that such evidence was improper character evidence, as it was not corroborated by any other witness saying these drugs exhibit such symptoms. Trial Counsel then offered to change her order of questioning to make the symptoms relevant. (J.A. 166.)

The remainder of the Article 39(a) session revolved around the nature of the circumstantial evidence the Trial Counsel sought to offer, and was conducted exclusively outside of the hearing of the Members. Trial Counsel was instructed by the Military Judge to tie her examination to a specific drug. (J.A. 168-169.) In order to ferret out what evidence was, and was not, admissible, the witness was subjected to a lengthy voir dire. (J.A. 169-176.) Only after these issues were considered were the Members brought back into the courtroom. (J.A. 178.) While Trial Defense Counsel did, in fact, raise another objection under Mil. R. Evid. 404(b), he subsequently withdrew

that objection, and objected as to relevance. The Military Judge sustained the relevance objection. (J.A. 189.)

Subsequently Cpl Morris testimony was concluded with no further improper character evidence objections being sustained. (J.A. 179-180.)

g. During the testimony of both Cpl Kelly and Chief Warrant Officer 3 (CWO3) S.D. Easton Appellant registered one objection under Mil. R. Evid. 404(b) and two hearsay objections. The Military Judge sustained all three objections.

During these witnesses' examinations, the Military Judge sustained a single improper character evidence objection and two hearsay objections. (J.A. 193, 195, 198.)

Specifically, Cpl Kelly was first asked if anything was found in Appellant's room after he moved out. Trial Counsel sought evidence that Cpl Kelly had found items the Appellant was alleged to have stolen, as charged in Charge IV Specification 2. But the witness had apparently found other items as well, and was unclear what the Trial Counsel sought in her question. Based on the following dialogue, Trial Defense Counsel was likewise confused:

MJ: [To Trial Defense counsel] Hold on. Do you have an objection?

DC: Never mind, your honor.

MJ: No objection?

DC: No objection.

MJ: Very well. [To the witness] Go ahead.

WIT: I found a glass bowl.

DC: Objection.

MJ: Response?

TC: I'm not going into that line of questioning.

MJ: Are you going to withdraw that question?

TC: I'm withdrawing the question.

MJ: The objection is sustained with respect to the last question.

Just lead.

(J.A. 192-193.) The hearsay objection was similarly resolved when sustained by the Military Judge. (JA. 195.)

CWO3 Easton, a Personnel Officer at MCAS Miramar, testified relative to Charge IV[2], Specification 1 and Charge V. He stated that a Member of his organization had been contacted by a member of Appellant's command relative to Appellant's entitlements. Trial Defense Counsel objected on hearsay grounds, but then tried to change the objection to foundation. (J.A. 197.) After a brief discussion, the objection was sustained in part and overruled in part:

TC: And were the corrections then made at that time?

WIT: Private Hornback came in soon after. I believe he spoke to Sergeant Soriano. I'm not sure.

[2] Appellant was found Not Guilty of this charge.

DC: Objection. Hearsay.

MJ: Response?

TC: Sir, I want to align the dates with when the IPAC was notified with when the——

MJ: *I don't know if the question called for hearsay.*

DC: It sounded like she was essentially asking for Soriano to be testifying. So therefore having——

MJ: No, he just said that the accused spoke to Soriano or Soriano spoke to the accused. He didn't talk about anything that they said; right? The context of the conversation would be hearsay. The fact that they spoke is not hearsay.

DC: I guess, Your Honor, as I understood what he was saying is he's basically relaying the conversation that he had with Soriano. Or maybe my objection should be foundation.

MJ: All right. Well, its overruled for now. I want to hear the answer to the question, then you can renew your objection.

DC: Yes, sir.

WIT: Ma'am, IPAC became aware as Sergeant Soriano was contacted by a member of Private Hornback's command, and he was concerned that Private 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. *The first part* of the statement, that IPAC became aware of it because someone contacted——from the command contacted IPAC is not hearsay, and that is allowed.

(J.A. 197-198 (emphasis added).)

3. Appellant objected twice during Trial Counsel's closing argument and rebuttal, and the Military Judge provided curative instructions.

a. Trial Counsel's closing argument led to two objections for improper argument, both of which were sustained. The Military Judge issued a curative instruction.

Having received no objection during opening, Trial Counsel repeated her theme of "drugs, decay, and dishonesty." She went on to paraphrase Napoleon Bonaparte, stating "[t]he infectiousness of a crime is like that of the plague." (J.A. 223.) Trial Defense Counsel objected to the quote. He based his objection on Mil. R. Evid. 404. The Military Judge immediately sustained the objection. (J.A. 223.)

Later in her closing, Trial Counsel returned to the Bonaparte quote, stating "[w]hat it comes down to is that the accused's life was decaying of the course of that year" and "[Appellant] became that criminal infection." (J.A. 234.) Trial Defense Counsel objected again, and again the Military Judge quickly sustained Trial Defense Counsel's objection. (J.A. 234.)

Trial Counsel concluded her argument by stating that stated "[the command] has taken action in the form of these charges before you" and "the [G]overnment is confident that you will

find [Appellant] guilty beyond a reasonable doubt." (J.A. 234.) Trial Defense Counsel did not object.[3]

Trial Counsel's closing covers eleven pages of the Record, and resulted in three objections, two of which were sustained. (J.A 223-234.)

b. The Military Judge Immediately Instructed the Members.

After Trial Counsel's closing, the Military Judge immediately administered the following limiting instruction to the Members:

> One, with respect to that last question, you all agree the [C]onvening [A]uthority is not expecting a certain result in this case, that [you are] 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 any of that

[3] During Trial Counsel's closing argument, the Military Judge incorrectly stated that he struck all of Cpl Morris' testimony. (R. 453.) Initially, the Military Judge did strike Cpl Morris' testimony. (R. 278.) However, upon Cpl Morris' testimony being immunized, the Military Judge allowed further examination. (R. 287.) All parties and the Military Judge agreed that Cpl Morris' testimony in its entirety was not struck, and the Military Judge instructed the Members that he had not struck Cpl Morris' testimony that Appellant admitted to using Spice. (R. 501-02.)

> evidence or arguments of a counsel that the accused is a bad person or has general criminal tendencies and that he, therefore, committed the offenses charged. You need [sic] 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 [M]embers follow that instruction? Affirmative response from all [M]embers.

(J.A. 234-235.)

c. Trial Counsel's Rebuttal Argument is the source of two allegations of improper argument to which there was no objection.

During her rebuttal argument Trial Counsel used four personal pronouns:

(1) "you saw the dependence application itself";

(2) "[t]his is probably the most simple [Department of Defense] form I have ever seen";

(3) "[f]or some reason, the defense wants to discredit Lance Corporal Powers and Carney. . . I'm not really sure why"; and

(4) "[n]ow [M]embers, the next main issue the defense spoke to you about, the main excuse, I should say, is that Kelly and Morris planted those camera cards".

(J.A. 242-244.) Trial Defense Counsel did not object.

Trial Counsel's rebuttal argument went on to address Trial Defense Counsel's assertion that the witnesses presented by the United States were untruthful. (J.A. 244-245.) Specifically she stated:

> The [D]efense contends the fact 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 the difference in their stories. If they were lying, don't you think they would have put their heads together and gotten their story straight. There are differences because they didn't, because they each perceived something differently while they're going through that room. They're not Siamese twins locked at the hip as the defense might contend. These are individuals thinking independent Marines. . . . They did not collaborate on this story. They were not fabricating the story. They swore that they were telling the truth on that stand. . . .

(J.A. 243.) Trial Defense Counsel again did not object.

Trial Counsel's rebuttal argument consisted of four and one half pages, during which Defense Counsel' only objection, arguing facts not in evidence, was overruled. (J.A. 474-475.)

d. The only instance of a sustained improper argument objection without a curative instruction occurred during Trial Counsel's Sentencing Argument, but the Military Judge did properly instruct on sentence. The final allegation of improper argument alleging unlawful command influence, went unobjected.

The sole objection for which there as a sustained objection, but no contemporaneous limiting instruction from the Court, occurred during Trial Counsel's argument on sentence. (J.A. 280-281.) But the Members did hear the Military Judge instruct the Trial Counsel as follows:

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.
>
> TC: Yes, sir.

(J.A. 280-281.) Subsequently the Trial Counsel went on to add "And lastly, the commander's main goal is to preserve good order and discipline." (J.A. 282.) There was no objection.

Following argument the Members were instructed on their duties with regard to assigning a sentence for the charges of which Appellant had been convicted. (J.A. 284-292.)

Summary of Argument

There was no error. Trial Counsel's comments, taken individually, were not misconduct that impacted Appellant's substantial rights. Trial Counsel obeyed the Military Judge's instructions, argued relevant evidence, and conducted herself within the legal norms of a court-martial.

Appellant briefs twenty-two allegations of prosecutorial misconduct, fifteen of which are tied to improper character evidence and the remainder of which allege some form of hearsay or improper argument. Of those twenty-two allegations, two related to Trial Counsel's closing argument were forfeited and

two others went unobjected; fifteen led to sustained objections; two objections were overruled; and one objection was withdrawn. The Military Judge issued seven curative instructions, and held at least four Article 39(a) sessions where the objectionable material was discussed outside of the hearing of the Members. Even if erroneous, no prejudice occurred, and thus the fairness of Appellant's trial was not infected by prosecutorial misconduct. Finally, this Court did not grant review of, and should reject Appellant's call to review, the lower court's assumption of error and resolution of the case on prejudice grounds. Nevertheless, the lower court did so properly, similar to the analysis in cases where post-trial delay is alleged.

Argument

APPELLANT WAIVED AND FORFEITED REVIEW OF SOME ALLEGATIONS. FURTHER, APPELLANT RECEIVED A FAIR TRIAL AND WAS NOT DEPRIVED DUE PROCESS: THE JUDGE RESOLVED SOME ISSUES OUTSIDE THE PRESENCE OF THE MEMBERS, AND ISSUED CURATIVE INSTRUCTIONS. PROCEEDING DIRECTLY TO LACK OF PREJUDICE IS UNREMARKABLE AND WITHIN THE DISCRETION OF APPELLATE COURTS.

A. Unobjected-to allegations of prosecutorial misconduct during findings arguments are tested for plain error. But this Court should apply waiver, as the Rules for Court-Martial direct such practice, and because the trial court is the most appropriate venue to resolve complaints surrounding arguments of counsel.

1. This court should apply waiver to the two unobjected-to allegations of misconduct during findings arguments.

Failure to object to improper findings arguments constitutes waiver. R.C.M. 919(c). The plain text of R.C.M. 919(c) forecloses appellate review altogether when an accused fails to object. *Id.* This differs from other provisions that, unlike R.C.M. 919(c), treat failure to object as waiver "in the absence of plain error." *Cf. United States v. Marsh*, 70 M.J. 101, 108 (C.A.A.F. 2011) (Ryan, J., concurring in part and dissenting in part) (noting the same wording of R.C.M. 1001(g) and comparing that rule with R.C.M. 920(f); 1005(f); 1106(f)(6), which by contrast, treat failure to object as waiver "in the absence of plain error").

Policy interests weigh in favor of strictly applying R.C.M. 919(c) waiver in the absence of constitutional or structural error. Doing so would serve the interests of justice, as it would require all complaints regarding improper argument to be addressed by the military judge, who is much better situated to evaluate the potential prejudice of inflammatory arguments on the proceedings. Following the President's plain language also ensures a more robust record for appellate courts to evaluate, enabling a more deferential standard of review.

Applying waiver in this manner will not prejudice an accused's ability to receive a fair trial. Indeed, electing not to object may in many instances supplement defense trial strategy. Similarly, applying waiver here also would not prejudice Appellant, who demonstrated the capacity to object during Trial Counsel's summation——twice——allowing the Military Judge to admonish Trial Counsel and issue a curative instruction. (J.A. 223, 234.)

For these reasons, for at least the two instances where Appellant concedes that there was no contemporaneous objection, this Court should revisit prior case law to the contrary, apply the plain language of the Rule, and find that Appellant's failure to contemporaneously object at trial waived this issue. (Appellant's Br. at 27, fn 10.)

2. Unobjected-to, and unwaived, errors are subject to plain error review.

This Court has previously noted that it reviews allegations of improper conduct *de novo* for plain error. *Marsh*, 70 M.J. at 104. Should this Court test for plain error, Appellant still carries the burden to demonstrate that "(1) there is error, (2) the error is clear or obvious, and (3) the error materially prejudiced a substantial right of the accused." *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

The harmlessness of an error is to be determined after a review of the entire record of trial. *See, e.g., Delaware v. Van Arsdall,* 475 U.S. 673, 681 (1986). Here a review of the entire Record reveals that Appellant fails to meet his burden under plain error review. In his brief Appellant concedes to three instances of unobjected-to material, one in Trial Counsel's opening statement and one in Trial Counsel's rebuttal argument on findings, and one in Trial Counsel's sentencing argument. (Appellant's Br. at 27, fn. 10.)[4] However a review of

[4] Appellant's "conceded to" count in his brief does not line up with the unobjected to allegations found in Appendix I, as in his brief he cites to one instance of unobjected to material which the United States views somewhat differently. Specifically, Appellant points to the *sua sponte* intervention of the Military Judge during Trial Counsel's argument on findings when she stated ". . . the command has taken...action in the form of these charges" as another instance of unobjected to material. (J.A. 234.) But as the Military Judge immediately thereafter intervened and issued a curative instruction, any

Appendix I to Appellant's brief reflects Appellant actually believes there are *four* instances of unobjected-to material: one in Trial Counsel's opening statement ("decay, drugs and dishonesty" (J.A. 65)); two in Trial Counsel's rebuttal argument ("...the most simple form I have ever seen." (J.A. 242) and "...Kelly and Morris planted those camera cards." (J.A. 243)); and one in Trial Counsel's argument on sentence ("...the commander's goal..." (J.A. 282)).

Viewing these pleadings in a light most favorable to the Appellant, it appears therefore that he raises four instances of unobjected-to material. But even when viewed in that light, Trial Counsel's opening statement, closing, rebuttal and sentencing argument, encompassed a scant twenty-one pages of a 557 page Record. The unobjected-to errors alleged actually appear on only four of those twenty-one pages. Appellant fails to identify how these minor, negligible references were error, much less clear error——or if they were, how they had a substantial or injurious effect or influence on the Members' verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). As such he fails to satisfy his plain error burden.

Any error, and prejudice, from these four unobjected-to occasions is far from clear. The Military Judge gave general or

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error associated therewith was immediately cured. (J.A. 235-235).

specific instructions which foreclosed any possible adverse impact from such statements, which Appellant neither objected to, nor does he demonstrate now that the Members were unable to follow. As to the first, the Military Judge gave a prophylactic instruction cautioning that opening statements were neither law nor evidence, which the Members stated they would follow. (CITE.) As to the second and third comments during rebuttal argument, the Military Judge specifically instructed that closing arguments are *not* evidence. (J.A. 222.)

The Judge also instructed pointedly: "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 maters in which they were alleged." (J.A. 234.) Finally, even if there was any error——Appellant fails to explain what norm is broken——in announcing the truism that the Convening Authority only wants to preserve "good order and discipline," the Military Judge instructed the Members very clearly: "the convening authority is not expecting a certain result in this case." (J.A. 234-35.) Appellant cites nothing to demonstrate that the Members could not follow these instrutions, much less that there was clear error.

Moreover, the results of trial demonstrate that these unobjected-to comments did not "infect" the trial or deprive

Appellant of due process. At the inception of trial, the Appellant faced six charges under which there were thirteen specifications. (J.A. 14-17.) Of those charges and specifications, four charges and eight specifications made it to the Members for deliberation on findings. The fact that the Members acquitted on five of those eight specifications stands as ample testament to the degree to which the Members listened to and applied the instructions of the Military Judge. (J.A. 278-279.) Given the relatively minor nature of the purported misconduct, the curative measures taken by the Military Judge, and the strength of the Government's case, there was no error in the four instances to which there was no objection. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

But even if Appellant carries this burden and demonstrates prejudice under plain error's third prong, this Court still has the discretion to grant no relief. "Improper argument does not, per se, violate a defendant's constitutional rights." *Jeffries v. Blodgett,* 5 F.3d 1180, 1191 (9th Cir. 1993). "Nothing in Article 59(a), UCMJ, mandates reversal even when an error falls within its terms." *United States v. Humphries*, 71 M.J. 209, 214 (C.A.A.F. 2012). The plain error doctrine "'is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Fisher*, 21 M.J. 327, 328-29 (C.M.A. 1986).

When an appellant satisfies the three-pronged plain error test, an appellate court may discretionarily grant relief if it determines that the error "'seriously affect(s) the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Olano*, 507 U.S. 725 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157 (1936)); *United States v. Powel*, 49 M. J. 460, 465 (C.A.A.F. 1998). The Supreme Court has suggested that courts may likewise deny relief where the alleged error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings, without first deciding that an appellant's substantial rights were prejudiced by the alleged error. *See United States v. Cotton*, 535 U.S. 625 (2002); *Johnson v. United States*, 520 U.S. 461, 470 (1970).

Appellant concedes at least two instances of purported misconduct during Trial Counsel's closing where there was no contemporaneous objection, first with regard to her comments in rebuttal (J.A. 234); and second during Trial Counsel's sentencing argument. (J.A. 282; Appellant's Br. at 27, fn. 10., App. I) Waiver applies to these instances, and this Court should therefore decline to grant relief under the plain error analysis for the remaining two. But should this Court decline to invoke waiver, this Court should then decline to grant relief under the plain error analysis for all four minor instances in a record of 557 pages.

B. Objected-to comments are reviewed de novo: first, the comments must violate some norm; second, the comments must impact or prejudice a substantial right; finally, in light of curative instructions and the entire record, the comments must actually have prejudiced the appellant and denied him a fair trial.

Improper conduct is a question of law reviewed *de novo*. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). Appellant bears the burden to demonstrate prosecutorial misconduct. *See United States v. Alerre* 430 F.3d 681, 689 (4th Cir. 2005).

The Supreme Court has said that, to justify reversal, it is not enough that the prosecutor's remarks or conduct were improper; the relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Jenkins,* 54 M.J. 12, 24 (C.A.A.F. 2000) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). The mere violation of prosecutorial norms, without more, is not due process error. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 ("The result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in *Miller* and *Brady*, *supra*, to amount to a denial of constitutional due process." (citations omitted)). "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is

the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

Prosecutorial misconduct is generally defined as "action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). But this misconduct, qua the violation of norms, itself is insufficient to mandate reversal. *Meek,* 44 M.J. at 5 (citing *Greer v. Miller*, 483 U.S. 756, 765 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).)

The second inquiry requires appellate courts to analyze each legal norm violated by a prosecutor, and determine whether the violation impacted or prejudiced an accused's substantial right. *Meek,* 44 M.J. at 5 (citing *United States v. Hasting*, 461 U.S. 499 (1983); *United States v. Morrison,* 449 U.S. 361 (1981)). Finally, if a substantial right is implicated, then appellate courts proceed to the third inquiry, which requires examination of whether actual prejudice rises to the level of depriving the appellant a fair trial, considering all the facts of a particular case. *Meek*, 44 M.J. at 5. In the military, this final "prejudice" analysis is encompassed by the *Fletcher* test. *See also United States v. Thomas,* 62 F.3d 1332, 1343 (11th Cir.

1995); *see also United States v. Morrison,* 449 U.S. at 365; *Davis v. Zant,* 36 F.3d 1538, 1546 (11th Cir. 1994); *United States v. Lighty*, 616 F.3d 321, 359 (4th Cir. 2010).

Although a comment may violate a norm and, standing alone, prejudice a substantial right, once the entire record is considered, including curative instructions, the comment may be harmless. *Thomas,* 62 F.3d at 1343 ("even if the remarks were prejudicial, they 'may be rendered harmless by curative instructions to the jury.'" (citation omitted)). *See also Lighty*, 616 F.3d at 359 (employing a six-factor test for prejudice, but, like *Meek,* distinguishing between mere "prejudice to a substantial right" which does not require reversal, and prejudice to substantial rights that denies an appellant a fair trial).

"[I]t is not the number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." *Meek*, 44 M.J. 1, 6 (C.A.A.F. 1996). Appellate courts gauge the overall effect of counsel's conduct on the trial itself and not counsel's personal blameworthiness. *Smith* at 220. The misconduct must have been "so pronounced and persistent as to permeate the entire atmosphere of the trial." *Chirinos,* 112 F.3d at 1098 (punctuation and citations omitted). Moreover, "[p]rejudicial testimony will not mandate a mistrial when there is other

significant evidence of guilt which reduces the likelihood that the otherwise improper testimony had a substantial impact upon the verdict of the jury." *United States v. Rodriguez-Arevalo,* 734 F.2d 612, 615 (11th Cir. 1984).

This Court in *Fletcher* created a "factor test" for determining the third factor, the impact of prosecutorial misconduct on a trial. 62 M.J. at 184. The *Fletcher* test looks, in light of the entire record, at: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. This is not unlike tests other Circuits have crafted in order to determine if violations of prosecutorial norms, which potentially prejudice substantial rights, do so to the point of denying an appellant a fair trial. *See, e.g., Lighty,* 616 F.3d at 362.

C. Where prosecutorial misconduct is alleged, this Court first looks to violations of norms. But reversal is only proper where violations both (1) impact substantial rights, standing alone, and (2) in light of the entire record, so infect the trial as to deny an appellant due process.

Appellant alleges that Trial Counsel committed multiple instances of improper conduct, and that Appellant is entitled to a new trial. (Appellant's Br. 40.) These allegations may be fairly classified into two general categories: (1) repeatedly asking questions purported to solicit improper character

evidence under Mil. R. Evid. 404(b), and injecting hearsay throughout; (2) introducing Unlawful Command Influence and vouching. (Appellant's Br. at 27-29.)

Appellant cites *United States v. Crutchfield*, 26 F. 3d 1098 (11th Cir. 1994), for the proposition that prosecutorial misconduct may include the improper introduction of character evidence. But *Crutchfield* is inapposite. The prosecutor there: (1) was a former customer of the appellants, so had a personal interest in the outcome of the case; (2) introduced irrelevant character evidence that one of the co-appellants was a drunkard, marijuana user, and violent man; (3) introduced "sexual character evidence" of the other co-appellant; (4) flagrantly violated Fed. R. Evid. 403, 608, and 609; and (5) did so after the judge instructed the prosecutor as to the impropriety of his attacks. *Id.* The *Crutchfield* court described the prosecutor's conduct as "intentional misconduct." *Id.* at 1103.

In contrast, Trial Counsel here had no such personal interest in the outcome of the case. Trial Counsel, a Captain, may have received guidance from the Military Judge, but Appellant fails to demonstrate "flagrant" violations, or those calculated to produce an outcome. The evidence she pursued was at least circumstantially related to the offenses of which the Appellant stood charged. Finally, fifteen of twenty-two instances Appellant now raises were addressed by judicial

instruction, four were waived or forfeited, two were withdrawn, and one was overruled. This case may sound in the banality of errors committed by junior trial counsel trying a moderately complex case, but not in the intentional and flagrant conduct of serious prosecutorial misconduct. This case is not *Crutchfield.*

1. Trial Counsel's direct examinations and arguments to admit circumstantial evidence of drug use did not violate the legal norms or standards of the court-martial process. There was no error.

Appellant's bears the burden of demonstrating prosecutorial misconduct. *Allere*, 430 F.3d 681, 683. Appellant bases his claim on Trial Counsel's attempts to offer circumstantial evidence related to charges that Appellant's used and solicited others to use Spice and Bath Salts, leading to hearsay and improper character evidence objections, as well as improper argument based on vouching and unlawful command influence.

Appellant identifies instances of purported improper Mil. R. Evid. 404(b) and hearsay evidence each phase of the trial. But nothing prevents counsel from attempting to offer evidence he or she reasonably believes will be admitted. *See United States v. Chirinos,* 112 F.3d 1089 (11th Cir. 1997). The Record demonstrates Trial Counsel reasonably believed the evidence would be admitted. (J.A. 79, 90, 111, 113.) Appellant bears the burden of demonstrating otherwise, and he has pointed to no rule or standard violated by Trial Counsel, other than Mil. R.

Evid. 404(b), which was the subject of vigorous objection and debate during trial. The fact that the 404(b) evidence was debated, however, does not alone demonstrate error.

Next Appellant complains about Trial Counsel's argument. In argument, "trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Improper comments made by a trial counsel during argument can amount to prosecutorial misconduct. *Fletcher*, 62 M.J. at 184. A trial counsel cannot inject into argument irrelevant matters, personal opinions, and facts not in evidence. *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007). The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *United States v. Andrews*, 22 F.3d 1328, 1341 (5th Cir. 1994) (quotation omitted).

Given that Appellant was charged with using controlled substances, stealing from fellow Marines, and falsifying official documents to steal from the U.S. Government, the theme of "drugs, decay, and dishonesty" applied to the facts of the case and charges against Appellant. This theme was a "hard" argument, but not a foul one, and did not inject irrelevant matters, or personal opinions as in *Fletcher.*

"It is improper for a trial counsel to interject herself into the proceedings by expressing a 'personal belief or opinion

as to the truth or falsity of any testimony or evidence.'" *Fletcher*, 62 M.J. at 179 (*quoting United States v. Horn*, 9 M.J. 429 (C.M.A. 1980)). Such improper opinions or beliefs include "giving personal assurances that the Government's witnesses are telling the truth," and "offering substantive commentary on the truth or falsity of the testimony and evidence." *Id*.

Improper vouching includes "the use of personal pronouns *in connection with* assertions that a witness was correct or to be believed." *Id*. at 180 (citation omitted) (emphasis added). The Court noted that "prohibited language includes, 'I think it is clear,' 'I'm telling you,' and 'I have no doubt,'" while "acceptable language includes 'you are free to conclude,' 'you may perceive that,' or 'a conclusion that may be drawn.'" *Id*. In personally vouching for the truth or falsity of certain evidence, a prosecutor "places the prestige of the government behind a witness through personal assurances of the witness's veracity." *Id*. (*quoting United States v. Necoechea*, 986 F.2d 1273, 1276 (9th Cir. 1993)).

The circumstances in *Fletcher* epitomize this rule, and provide clear examples of improper vouching. In that case, the trial counsel "repeatedly vouched for the credibility of the Government's witnesses and evidence." *Id*. In one example, the trial counsel stated, "[w]e know that that was from an amount that's consistent with recreational use, having fun and partying

with drugs." *Id*. She also offered an opinion that the Government's expert witness was "the best possible person in the whole country to come speak with us about this." *Id*.

Whether a trial counsel's argument is improper is more case-specific than other areas of prosecutorial misconduct. *Compare Id., with United States v. Terlep*, 57 M.J. 344, 349 (C.A.A.F. 2002). In *Terlep*, the court held no plain error because trial counsel's argument that witness told the truth "could reasonably be construed as simply calling the court's attention to the victim's fortitude." *Terlep*, 57 M.J. at 349. There, the trial counsel noted during argument that "the victim [of rape] 'has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, *to tell you the truth*.'" 57 M.J. at 347.

In the present case, Trial Counsel's statements are merely observations and commentary regarding the evidence that was presented——*not* personal opinions that place the Government's prestige behind the witness' veracity. Although Trial Counsel uses personal pronouns in her arguments, she does not use them *in connection with* assertions that witnesses were truthful. *Fletcher*, 62 M.J. at 180.

On only two occasions, Trial Counsel defends witnesses' veracity but uses the Record to support their veracity. First,

she states that Corporals Kelly and Morris were not "fabricating their stories", and cites to the Record's facts to support their truthfulness. (J.A. 243-44.) Second, regarding Lance Corporals Powers and Carney, she states the "the defense wants to discredit Lance Corporal Powers and Carney, Karen Carney here." J.A. 244.) "I'm not really sure why." *Id*. She then goes back to the Record citing their cross-examination, that Trial Defense Counsel did not cross-examine them on their veracity, and that their recollected testimony was clear. *Id*. Quite simply, there are no instances in Trial Counsel's rebuttal argument where she uses personal pronouns in connection with asserting a witness' veracity. Instead, she looks to the Record to argue their truthfulness, which is entirely permissible.

Trial Counsel's asserting Government witnesses' veracity, through facts in the Record, mirrors the comments made by the trial counsel in *Terlap.* There, the trial counsel noted that "the victim 'has weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, *to tell you the truth*.'" *Terlep*, 57 M.J. at 347. Here, the Trial Counsel noted that the facts showed Corporals Morris and Kelly both walked through a room and perceived their surrounding differently, but were silent regarding corroboration (J.A. 243); and that the facts did not show that they "ha[d] a dog in the fight;", and that Trial

Defense Counsel's cross-examination was unable to produce any such evidence. (J.A. 244.) Accordingly, like *Terlep*, this Court should find that Trial Counsel did not vouch for the Government witnesses, but merely called the factfinders' attention to the existent or non-existent facts surrounding each witness' testimony. *Id*. at 349.

Finally, Appellant argues that the Trial Counsel invoked the name of the convening authority. The two complained of instances both occur during argument. The first, "and the Command has taken action in the form of these charges before you;" and the second "And lastly, the commander's main goal is to preserve good order and discipline;" constitute 27 words in a 557 page record. But more importantly, in the first instance resulted in an immediate curative instruction from the Military Judge (J.A. 234.); and there was no objection to the second. As the lower court noted, the Military Judge found these comments improper, and instructed accordingly. But they were limited in nature and not "...conveyed as a desired or intended result by the convening authority."

Upon close scrutiny, the Record reveals that though the admissibility of certain evidence was vigorously debated, Trial Counsel obeyed the Military Judge's instructions, acknowledged Trial Defense Counsel's objections, and earnestly argued the Government's position regarding the admissibility of contested

circumstantial evidence. While is true that, from time-to-time the Military Judge curtailed Trial Counsel's examinations, occasionally ordered her to "move on", called Article 39(a) sessions, or *sua sponte* instructing the Members to disregard the testimony that had just been introduced, but on each occasion the Trial Counsel abided by the direction of the Court. Indeed, she repeatedly adjusted her examinations to heed the Military Judge's instructions and "move[d] on" to other areas of inquiry. "Prosecutorial misconduct is a basis for reversal only if, in the context of the entire trial and in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused." *United States v. Beasley,* 72 F.3d 1518, 1525 (11th Cir.), *cert. denied,* 518 U.S. 1027 (1996). As such, this Court should find Trial Counsel committed no misconduct in these instances and they should not be considered as instances of misconduct in this Court's *Fletcher* analysis. There was no error here, and none that implicated Appellant's substantial rights.

2. Even if Trial Counsel committed instances of misconduct which had the potential of impacting substantial rights, their severity was minor, the Military Judge repeatedly gave tailored curative instructions and the Government's case was strong. There was no prejudice.

Assuming this Court determines Trial Counsel committed instances of misconduct implicating Appellant's substantial

rights, under *Fletcher*, Appellant was not deprived a fair trial. This Court examines three factors: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the weight of evidence supporting the conviction. *Fletcher*, 62 M.J. at 184.

a. Assuming actual misconduct implicating substantial rights, the severity was minimal.

Five factors assist in evaluating severity: (1) the raw number of instances of misconduct; (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.

In *Fletcher* this Court determined that the misconduct "permeated [trial counsel's] entire findings argument," and did "not stand as isolated incidents of poor judgment in an otherwise long and uneventful trial." *Fletcher* at 184-85. In an attempt to portray these facts in that light, Appellant cites to numerous purported instances of prosecutorial misconduct throughout the Record of Trial. But they generally fall into four different categories: those where Trial Defense Counsel objected before very little, if any, improper testimony was actually elicited; those where the Military Judge allowed a

limited inquiry into the evidence; those where the improper evidence was unsolicited; and those which occurred during 39(a) sessions and outside of the hearing of the members. At best it constitutes twenty-two instances of purported misconduct in a 557 page Record of a two-day Special Court-Martial where the Members deliberated for over two hours. Most importantly, very little, if any, objectionable material made it to the Members.

b. The Military Judge here gave six tailored curative instructions, as well as a "master" curative instruction, to cure any prejudice from fifteen sustained objections. Trial judges are given considerable deference as an assessment of prejudice is presumed to underlie judicial curative instructions. Of the other seven alleged instances: two were withdrawn; and one was overruled. Thus only one instance, during sentencing, received no curative action. The remaining four were waived or forfeited.

Curative instructions may render a remark harmless, which in a vacuum would have been prejudicial. *Thomas*, 62 F.3d at 1343; *United States v. Lichenstein*, 610 F.2d 1272, 1282 (5th Cir. 1980), *cert. denied*, 447 U.S. 907 (1980). This is because absent evidence to the contrary, appellate courts presume that court-martial members follow the instructions given by military judges. *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012). Moreover, inherent in every curative instruction crafted by trial judges is the judge's on-the-spot assessment of the prejudice the instruction is meant to cure. *See, e.g., United*

States v. Blevins, 555 F.2d 1236, 1240 (5th Cir. 1977) ("it is apparent from the record that the trial court felt that any possible prejudice was adequately avoided by his instructions."). This Court should give deference to the Trial Court's implicit determination of the curative effect of the curative instructions on any possible prejudice, absent any evidence the Military Judge did not understand the possible prejudice the instruction was supposed to cure, or did not know the law. Curative instructions, after all, are meant for one thing in these circumstances: to cure possible prejudice. And trial judges are best-suited to assess that prejudice.

This is not unlike the mistrial situation, where a judge's assessment of whether a mistrial is appropriate or not, as here, turns on whether he or she believes that any curative instructions "did their job"; indeed, the Record of seven curative instructions here indicates the Judge believed they would cure any possible error. *Cf. United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998); *see also Thomas*, 62 F.3d at 1343 ("Given the considerable weight we afford to a trial court's assessment of the effect of a prejudicial closing remark, we hold that the trial court did not abuse its discretion in denying the Thomases' motion for mistrial." (citations omitted)); *United States v. Herring*, 955 F.2d 703, 710, *cert. denied,* 506 U.S. 927 (11th Cir. 1992) ("We give

considerable weight to the district court's assessment of the prejudicial effect of the prosecutor's remarks and conduct.").

Appellant points to no evidence, and the United States is aware of none, that indicates the Members failed to follow this, or any other, instruction given to them by the Court. Issuing what amounts to a "master curative instruction" re-capping the fifteen instances Appellant now raises on appeal, and the six instructions the Military Judge previously proved, the Military Judge encapsulated what he wanted Members to do, and why:

> ...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 maters in which they were alleged.

(J.A. 234 (emphasis added).) All Members replied affirmatively that they understood that instruction. (J.A. 235.) Furthermore, all Members had, previous to the taking of evidence, assured the Court and counsel for both sides that they would do the same. (J.A. 53-62.) Given that the Members acquitted as to five of the eight charges and specifications which made it to the deliberation room it appears the Record

reflects how seriously the Members were in the execution of their duties.

As previously noted, of the total twenty-two comments Appellant now raises, fifteen resulted in some form of a sustained objection, and all were subjected to six on-the-spot curative instructions, and summarized in one final "master curative instruction." (J.A. 90, 96, 111, 113-114, 138, 150-53, 161, 165, 188-89, 194-95, 223, 225, 234, 280). Four other instances went unobjected-to, and as argued *supra,* were waived or forfeited. (J.A. 65, 242, 243, 282). One objection was overruled (J.A. 79.) Two objections were withdrawn by Defense Counsel. (J.A. 150, 153). Viewed in this light, the sole instance remaining where there was neither a sustained objection nor a limiting instruction occurs in Trial Counsel's sentencing argument, long after the Members had already reached their verdict.

c. The Strength of the Case.

Finally, the evidence regarding Appellant's guilt was strong. Appellant implies that Trial Counsel repeatedly introduced improper character evidence of uncharged and prior drug use, and that this improper evidence likely influenced the Members to believe Appellant guilt of the charged offenses. Trial Counsel produced numerous witnesses to attest to Appellant's smoking of Spice, and to wrongfully receiving

entitlements. But setting aside for the moment the testimonial and documentary evidence produced not only on the orders violation, but also on the false official statement and, relatedly, the larceny, the mere fact that the Members *acquitted* Appellant of five of the eight charged offenses stands as ample testament to the strength of the evidence on the three charges for which they convicted. Accordingly, this Court should find Appellant suffered no prejudice.

In a case such as this where the trial court admonishes counsel and provides numerous instructional safeguards against any potential error there is no prejudice. This case is not unlike *United States v. Chirinos,* 112 F.3d 1089, 1098-1099 (11th Cir. 1997). There the court of appeals found that there was no prosecutorial misconduct when, as here, the prosecutor referred to evidence during opening statement that the prosecutor had reason to believe was admissible, the prosecutor did not refer to the evidence once admonished, the jury was specifically instructed that the prosecutor's statements during opening argument were not evidence, and defense counsel challenged the prosecutor's statement. *Id*.

Similarly, in *United States v. Tolman,* 826 F.2d 971, 973-974 (10th Cir.1987), the Court found no prejudice from the prosecutor's reference, during opening statement, to the presence of the defendant's fingerprints in a drug laboratory.

There the evidence was excluded from the trial because the jury was instructed that opening statements were not to be considered as evidence, and during closing statement the prosecutor told the jury that it should not consider evidence which was not introduced at trial. While the Trial Counsel in the case at bar may not have rendered similar advice in closing, the Military Judge most certainly did. For example:

> MJ: Members of the court, you are about to hear the opening statements of counsel. Opening statements of counsel are not evidence in this case. They are a recitation by counsel of what they believe the evidence will show. And once again, the statements themselves are not evidence.

(J.A. 64); and:

> MJ: Okay. Members of the court, you are about to hear the closing arguments of counsel. You're reminded that arguments of counsel are not evidence.

(J.A. 222); and perhaps most on point:

> MJ: 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 maters in which they were alleged.

(J.A. 234.) In this case Appellant briefs twenty-two allegations of prosecutorial misconduct. Of those twenty-two, four went unobjected; fifteen led to sustained objections; two objections were overruled; and one objection was withdrawn. The sole remaining allegations for which there was no curative instruction comes from Trial Counsel's rebuttal argument on sentencing, long after the Members had returned their verdicts of guilt. As such these comments could not possibly have had a substantial or injurious effect or influence on the members' verdict. *See Brecht*, 507 U.S. at 638. It constitutes a scant sentence in an argument on sentencing in a 557 page record of trial.

In addition throughout the course of the trial the Military Judge issued seven curative instructions, and held at least four Article 39(a) sessions where much of the purportedly objectionable material was discussed outside of the hearing of the Members. "The trial court sustained certain of the objections made by defense counsel, admonished the prosecutor, and instructed the jury to ignore certain remarks made by the prosecutor. The claims of error span the course of a two-day trial and it is apparent from the record that the trial court felt that any possible prejudice was adequately avoided by his instructions." *Blevins*, 555 F.2d at 1240.

For the foregoing reasons there was neither error nor prejudice.

C. "Assuming without deciding" neither prejudices an appellant, nor frustrates appellate review. Nothing in this Court's jurisprudence prevents it, or a lower court, from assuming error in favor of a prejudice analysis.

Appellant also contends that the lower court erred by "assuming without deciding" that the conduct of Trial Counsel in this case was error. "Courts established under Article III of the Constitution may not issue advisory opinions. Courts established under Article I of the Constitution, such as this Court, generally adhere to the prohibition on advisory opinions as a prudential matter." *United States v. Chisholm*, 59 M.J. 151, 152 (C.A.A.F. 2003).

This Court did not grant review of whether an assumption of prejudice was error, nor was it certified to the Court by the Judge Advocate General. This Court need not answer that question, as the issue was not granted. Article 67(c). Regardless, nothing in this Court's jurisdiction limits the lower court's authority to assume prosecutorial misconduct and proceed directly to find any error harmless, just as it did in this case.

In other contexts, this assumption of error is unremarkable. In the post-trial delay context, this Court has frequently assumed the existence of error *arguendo,* and resolved

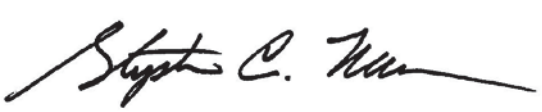
cases on lack of prejudice. *E.g., United States v. Allende,* 66 M.J. 142, 145 (C.A.A.F. 2008). There are other instances where error is assumed in this way, including cases of conflict-free counsel. "Ordinarily prejudice will be assumed from the existence of a conflict, but, to be sure, a conflict will not be inferred from the mere fact of joint representation." *United States v. Fannon*, 491 F.2d 129, 132 (5th Cir. 1974); "However, a lesser showing of prejudice is enough where ineffectiveness is traced to a conflict of interest——rather than some other impairment of the right to counsel——that was not identified and properly waived. *United States v. Burgos-Chaparro*, 309 F.3d 50, 52 (1st Cir. 2002)(citations omitted).

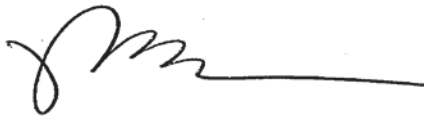
But even accepting Appellant's argument at face value, his argument is swallowed whole by his conclusion. One cannot frustrate appellate review on the one hand and then request it on the other. Appellant asserts that "...one cannot examine—with any particular granularity—the severity of an error without first deciding that it even exists." (Appellant's Br. 31). But such a conclusion would require this Court to return the case for further appellate scrutiny. This makes no sense in view of the particulars of Appellant's *Fletcher* attack on the lower court's holding. As such Appellant apparently agrees that, even in view of the lower court's so-called "decision to obviate the threshold issue," this Court can review the particulars of

Appellant’s case and determine both error and prejudice independently of the lower court’s decision to “assume without deciding.”

Conclusion

Wherefore, the Government respectfully requests that this Court affirm the decision of the lower court.





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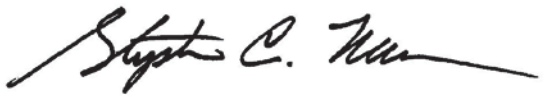

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