IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Raiden J. ANDREWS
Quartermaster Seaman Apprentice
(E-2)
United States Navy,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim. App. Dkt. No. 201600208

USCA Dkt. No. 17-0480/NA

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

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Issue Granted

THE LOWER COURT FOUND SEVERE PROSECUTORIAL MISCONDUCT. THEN IT AFFIRMED THE FINDINGS AND SENTENCE, GIVING ITS IMPRIMATUR TO THE PROSECUTORIAL MISCONDUCT IN QMSA ANDREWS' CASE. DID THE LOWER COURT ERR?

Statement of Statutory Jurisdiction

Because the convening authority approved a sentence that included a punitive discharge, the U.S. Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice.[1] This Court therefore has jurisdiction under Article 67, UCMJ.[2]

Statement of the Case

A panel of officers and enlisted members, sitting as a general court-martial, convicted Quartermaster Seaman Apprentice (QMSA) Andrews, contrary to his plea, of one specification of Article 120, UCMJ.[3] The members acquitted QMSA Andrews of two specifications of Article 120, UCMJ, and a military judge convicted him, pursuant to his pleas, of one specification of Article 86, UCMJ,[4] one specification of Article 95, UCMJ,[5] one specification of Article 107, UCMJ,[6]

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[1] 10 U.S.C. § 866(b)(1) (2012).
[2] 10 U.S.C. § 867 (2012).
[3] 10 U.S.C. § 920 (2012).
[4] 10 U.S.C. § 886 (2012).
[5] 10 U.S.C. § 895 (2012).

one specification of Article 112a, UCMJ,[7] and one specification of Article 121, UCMJ.[8] The members sentenced QMSA Andrews to reduction to pay grade E-1, confinement for thirty-six months, forfeiture of $1,616.00 per month for thirty-six months, and a dishonorable discharge. The convening authority (CA) adjusted the adjudged forfeiture amount to $1,566.90 per month to reflect QMSA Andrews' pay at the time of sentencing, approved the adjudged sentence, and, except for the punitive discharge, ordered it executed.[9]

On April 27, 2017, the NMCCA affirmed the findings and the sentence as approved by the CA.[10] On August 18, 2017, this Court granted QMSA Andrews' petition for review.

Statement of Facts

After a night of drinking and socializing, QMSA Andrews got into bed with AB.[11] They were staying overnight at the home of Interior Communications Third Class Petty Officer (IC3) Krueger and his wife Ms. Wade.[12] Once in bed, QMSA

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[6] 10 U.S.C. § 907 (2012).
[7] 10 U.S.C. § 912a (2012).
[8] 10 U.S.C. § 921 (2012).
[9] Convening Authority Action, CMO 16-16.
[10] *United States v. Andrews*, No. 201600208, 2017 CCA LEXIS 283 (N-M. Ct. Crim. App. Apr. 27, 2017).
[11] JA at 0459.
[12] Ms. Wade divorced IC3 Krueger after the incident and no longer shares his last name. JA at 0154.

Andrews asked AB if she wanted to have sex.[13] She threw up, but QMSA Andrews did not mind and was still willing to be intimate with her.[14] He asked her again if she wanted to have sex.[15] "Yes," she answered and took off her own pants.[16] They began having sex in the missionary position.[17] AB moaned, scratched QMSA Andrews' back, pulled him closer, and grabbed his hair.[18] Then she told QMSA Andrews to stop, and they stopped having sex.[19]

Later, AB made a sexual assault report to the Naval Criminal Investigative Service (NCIS) and accused QMSA Andrews of "drugging" her.[20] NCIS opened an investigation, but did not search for evidence to corroborate AB's accusation that she was drugged.[21] Instead, the investigation focused on confronting QMSA Andrews with AB's accusations.[22] Before interviewing QMSA Andrews, Special Agent Marsteller secretly recorded a conversation he had with IC3 Krueger.[23] The day after the secret recording, Special Agent Marsteller interviewed QMSA

[13] JA at 0459-60.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] JA at 0246.
[21] JA at 0383.
[22] JA at 0296-97, 0460.
[23] JA at 0297.

Andrews.[24] In both an interview with NCIS and a secretly recorded conversation with IC3 Krueger, QMSA Andrews stated that he believed the sexual intercourse was consensual.[25] He also expressed his belief that, in looking back "several months after the encounter" he "*now believe[d]*" that AB agreed to have sexual intercourse with him because she confused him with another person—Machinist's Mate Third Class Petty Officer (MM3) Hills.[26]

Despite QMSA Andrews' statements to the contrary, the Government charged him with sexually assaulting AB.[27]

I. The secret recording.

After QMSA Andrews learned that AB alleged he sexually assaulted her, he tried to make sense of the situation. His retrospective impression was that AB did not realize who he was and stopped the sexual encounter once she did; NCIS agents captured this retrospective impression during a secretly recorded conversation.[28]

QMSA Andrews did not misrepresent who he was in an effort to induce AB into having sexual intercourse with him.[29] Instead, there was a misunderstanding.[30]

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[24] *Id.*
[25] JA at 0459-60, 0462-71.
[26] *Andrews*, 2017 CCA LEXIS 283 at *19 (emphasis in original).
[27] JA at 0127-29.
[28] JA at 0462-71; *Andrews*, 2017 CCA LEXIS 283 at *19-21.
[29] JA at 0459-60, 0462-71.
[30] *Id.*

He thought AB consented to having sex with him.[31] And there was evidence suggesting AB thought she consented to sex with a different person—MM3 Hills.[32] When she realized her mistake, the sex stopped.[33]

II. QMSA Andrews' statement.

Without QMSA Andrews' statement, the Government had no direct evidence of sexual intercourse.[34] And in describing the circumstances surrounding the sexual intercourse, QMSA Andrews described events that were different than what the trial counsel (TC) and assistant trial counsel (ATC) presented in closing.

Seaman Andrews went to the beach with a group of people that included AB.[35] They spent the first part of the day together "at the beach . . . just hanging out and partying."[36] Seaman Andrews believed AB "seemed like a cool person to hang out with."[37] As a part of the group, he spent time with AB at the beach, had dinner with her, and partied with her later that night.[38] While he acknowledged his interaction with AB was limited, he stated that he did talk to her three times: (1)

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[31] *Id.*
[32] *See* JA at 0384.
[33] JA at 0459-60, 0462-71. There was evidence admitted at trial of AB's mistaken belief. For example, Ms. Wade remembered that AB stated: "At first, I thought it was [MM3 Hills], then I realized it wasn't. I got scared, and I threw up." JA at 0311. The lower court omitted this portion of Ms. Wade's testimony from its opinion. *See Andrews*, 2017 CCA LEXIS 283.
[34] *Andrews*, 2017 CCA LEXIS 283 at *24 n.61.
[35] JA at 0459.
[36] JA at 0488.
[37] *Id.*
[38] *Id.* JA at 0459-60.

"during dinner," (2) "when she was dancing," and (3) when he "asked her if she wanted to have sex."[39]

Seaman Andrews stated that prior to the sexual intercourse he asked "hey do u [sic] want to have sex" and before she answered, she "thru [sic] up."[40] Even though she vomited, QMSA Andrews explained that he "didn't care" and was still willing to be intimate with her.[41] So he asked AB again if she wanted to have sex and she said, "yes."[42] He then pulled down his pants, and AB responded, taking her own pants off.[43] They both left their shirts on and "began having sex in the missionary position."[44] AB put her arms around QMSA Andrews and began to moan before scratching his lower back.[45] He "believe[d] that she had sensation due to the fact that she scratched his back and the way [they] were going at it."[46] She then pulled him closer and grabbed his hair before telling him "no" or "stop."[47] As soon as AB said "stop," QMSA Andrews "backed off" and "went back to the

[39] JA at 0459-60.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] JA at 0490.
[47] JA at 0400, 0459-60, 0490.

other side of the bed."[48] Once the sexual intercourse ended, QMSA Andrews observed AB stand up, put on her clothes, and leave the room.[49]

III. Witnesses corroborated QMSA Andrews' statement.

Ms. Wade, in describing her observations of AB just before AB went to the bedroom, testified as follows:

> Q: You testified a few minutes ago that you asked [AB] "Do you need anything else?"
> A: Yes.
>
> Q: She was able to respond to you?
> A: Yes.
>
> Q: She told you, "No, I just want to go to sleep."
> A: Yes.
>
> Q: Just prior to that you had other conversations with her?
> A: Yes.
>
> Q: Even though she was intoxicated?
> A: Yes.
>
> Q: And she was able to express desires to you?
> A: Yes.
>
> Q: And you would ask her a question, and she would respond?
> A: Yes.[50]

[48] JA at 0459-60.
[49] JA at 0500-01. AB testified that she left the room without any panties on. JA at 0249. However, Ms. Wade testified that AB was wearing panties, and thus clothed, similar to what QMSA Andrews had described. JA at 0160, 0165, 0173.
[50] JA at 0172-73.

In addition, IC3 Krueger corroborated that AB could appreciate the nature of the sexual conduct. When QMSA Andrews left the bedroom that night, he had scratches on his back.[51] Petty Officer Krueger conceded that the scratches were the type that happen "when you're hitting it just right."[52]

Finally, to the extent AB testified that she did not have a memory of the sexual intercourse, her testimony was consistent with an alcohol-induced blackout.[53] This means she was still able to both say "yes" to sexual intercourse and physically participate in it. Dr. Fromme, a professor of clinical psychology at the University of Texas, testified that during a blackout AB would have been able to "engag[e], . . . interact[] with [her] environment, . . . [and remain] aware of what's going on . . . ."[54]

[51] JA at 0193, 0208, 0461.
[52] *Id.* QMSA Andrews also observed that IC3 Krueger opened the door to the bedroom while he was having sexual intercourse with AB. JA at 0515. Petty Officer Krueger, however, testified against QMSA Andrews. JA at 0182. He also served as an informant for NCIS during the investigation and wore a recording device to secretly record a conversation with QMSA Andrews. As a result, he was not punished for providing alcohol to QMSA Andrews, who was a minor at the time of the incident. JA at 0206.
[53] JA at 0317-38.
[54] JA at 0339.

IV. Improper closing argument.

A. The assistant trial counsel invented admissions to uncharged misconduct.

The members convicted QMSA Andrews of Specification III, Charge V, which alleged that QMSA Andrews penetrated AB's "vulva with his penis, when A.B. was incapable of consenting to the sexual act due to impairment by alcohol, and that condition was known or reasonably should have been known by the accused."[55] To establish QMSA Andrews knew AB was incapable of consenting, the ATC offered the following argument as "the real reason [QMSA Andrews] went into that room[:]"

> We don't have to speculate. He told us. "My reason behind this is I assumed she thought I was [MM3 Hills]." What does this show? This shows that he knew she was unconscious in there, and if she became conscious, she would be so confused in the dark, so incompetent, so incapable of consenting, that her confusion will allow him to have sex. He's admitting to it.[56]

Seaman Apprentice Andrews, however, never stated he was counting on AB to not recognize him or that he hoped AB would confuse him with MM3 Hills.[57] In fact, QMSA Andrews flatly denied it. As the lower court found, QMSA Andrews "specifically told NCIS that at the time he entered the bedroom, he did

[55] JA 0127-29, 0457.
[56] JA at 0399.
[57] *Andrews*, 2017 CCA LEXIS 283 at *20.

not intend for Ms. AB to confuse him for Petty Officer H[ills]."[58] Yet the ATC invoked the language of the military judge's reasonable doubt instruction and argued "you can be firmly convinced that [QMSA Andrews] sexually assaulted her *because of what he is saying*."[59] He then continued this line of argument, stating:

> Seaman Apprentice Andrews was counting on [AB] not recognizing him. He was counting on that, and so that's why that factor is so important. *He admits, and in fact, he says that he was counting on the fact that I hope that she will confuse me with [MM3 Hills]*. Maybe she'll think I'm [MM3 Hills]. He's counting on it, *and that's evidence* that she was impaired that he knew she was impaired, and *its evidence in of* [sic] *itself*.[60]

Immediately following ATC's closing argument, civilian defense counsel objected, stating:

> I object to a portion of trial counsel's closing argument, specifically, and I wrote it down verbatim a few minutes ago. "Andrews is counting on her not recognizing him before he goes in the room." And then again, before he goes in the room, "I hope she will confuse me with [MM3 Hills]." That is the uncharged misconduct which has been the topic of other discussions. And that's under the circumstances that's improper argument, and it should be--I would ask you for an instruction to the panel members to ignore that?[61]

The Government did not charge QMSA Andrews with violating Article 120(b)(1)(D), UCMJ, committing a sexual assault through concealment of his

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[58] *Andrews*, 2017 CCA LEXIS 283 at *19; JA at 0498.
[59] JA at 0400 (emphasis added); *see also* JA at 0399 (instruction).
[60] JA at 0410 (emphasis added).
[61] JA at 0414.

identity.[62] Initially, the military judge stated she would be "happy" to give a curative instruction.[63] She then changed her mind, stating "I don't see a remedy for the defense."[64] The civilian defense counsel asked for a mistrial[65]—a request the military judge denied[66]—and he further requested the following curative instruction—an instruction the military judge refused to give:

> You may have heard argument that the accused was counting on [AB] not recognizing him before going into the room. There is no evidence the accused concealed his identity from [AB]. You may not rely on this argument to convict the accused. I remind you that argument of counsel is not evidence.[67]

Throughout the Article 39(a) hearing, civilian defense counsel reiterated his objection, stating:

> There is no other reasonable way to interpret what he just said, "Counting on her not to recognize him." He said that first. And then he followed up with, "Before he goes in the room, I hope she will confuse me with [MM3 Hills]." That's uncharged misconduct. That's not a basis upon which to convict him.[68]

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[62] JA at 0127-0129.
[63] JA at 0414.
[64] JA at 0417.
[65] *Id.*
[66] *Id.*
[67] JA at 0422. Civilian defense counsel renewed this objection after the military judge offered an alternative instruction, stating "our position is this is a situation created by the government in this particular case, and the curative instruction that we gave you is the only way out of it without a mistrial." JA at 0423-24. The military judge then acknowledged the objection stating "your objection is certainly noted for the record." *Id.*
[68] JA at 0419.

In this exchange, the civilian defense counsel highlighted that QMSA Andrews' purported admission to uncharged misconduct, in fact, did not exist: "[t]here is no evidence the accused concealed his identity from A.B."[69] Yet the military judge refused to implement any specific curative measures and later prevented the civilian defense counsel from responding to this "uncharged theory of liability" in his closing argument.[70]

Despite civilian defense counsel's improper argument objection, both the military judge and the trial counsel analyzed the objection as a relevance issue.[71] After reasoning that the members could "convict [QMSA Andrews] if they used [it] as evidence of his knowledge of her state,"[72] the military judge ruled the invented admission to uncharged misconduct was relevant, not more prejudicial than probative, and passed the M.R.E. 403 balancing test[73] "because it does

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[69] JA at 0414, 0422 ("[U]nder the circumstances that's improper argument . . . .").
[70] During his closing argument, the civilian defense counsel attempted to address the "five theories" of liability that the Government presented. The Government charged three theories in the alternative: (1) asleep or unconscious, (2) incapable of consenting, and (3) causing bodily harm, and presented two more through evidence or argument: (4) "he put a drug in my drink" and (5) "I hope she will confuse me with [MM3 Hills]." JA at 0410, 0443-44. The TC objected to this line of argument and the military judge sustained it. JA at 0444.
[71] JA at 0415-25.
[72] JA at 0419.
[73] Mil. R. Evid. 403.

directly correspond to elements at issue in this case."[74] And the ATC made his position on the issue clear:

> [I]f our appellate brethren are reading this later I'll just note that the appellate exhibit with my closing argument—this entire argument came from the words of the accused himself, which is on slide 10, which says "my reasoning behind this. I assumed she thought I was [MM3 Hills]." So that's where this is coming from. I didn't invent evidence or introduce evidence. . . . I astutely noted earlier, he didn't put on [MM3 Hill's] shirt. He did[n't] [sic] put on a mask. He didn't do anything, and I didn't allude that he did anything . . . *I'm perplexed at the reasoning here, and I don't think it's an issue*.[75]

On appeal, however, the lower court disagreed with the ATC, finding his argument "inappropriately mischaracterize[d] appellant's statement to NCIS and [took it] out of the context in which [it was] made."[76] The lower court then concluded the ATC's argument constituted "plainly improper argument."[77]

B. The assistant trial counsel misstated the law.

Seaman Andrews' defense was that AB consented, or in the alternative, that he had a mistake of fact as to consent.[78] Accordingly, the military judge instructed the members that QMSA Andrews was "not guilty of Specification 3 if he did not know that [AB] was incapable of consenting due to impairment by alcohol or if he

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[74] JA at 0425.
[75] JA at 0424 (emphasis added).
[76] *Andrews*, 2017 CCA LEXIS 283 at *21.
[77] *Id*.
[78] JA at 0430-31, 0441-42.

mistakenly believed that [she] was capable of consenting and such belief on his part was honest and reasonable."[79]

During his closing argument, the ATC attempted to explain the concept of consent to the members. In doing so, he presented the law as it pertained to consent under Article 120, UCMJ, as follows:

> [R]emember consent is a freely given agreement by a competent person. . . . Now, in terms of competency, let me frame it, so there is no mistake that we've proven this beyond a reasonable doubt. Think of a different context.
>
> Let's assume for an instant that somebody sharing these kinds of incompetency traits walks into a Navy recruiting office and we don't know what happens in there. But within a few minutes, somebody having these level [sic] of incompetency runs out of there or just stumbles and cries and shakes and says, "I didn't want to enlist." Or "I didn't want to commission." And the Navy recruiter says, "Nope, nope, she actually did."
>
> Or going into a hospital with that level of intoxication that level of low competency walks into a hospital and that person has an otherwise fine nose and says that I want a neuroplasty. I want nose surgery. And on the operating board says, "What's happening to me?" and leaves and the surgeon is saying, "No, no, they really, really wanted it."
>
> Would that make any sense? Would those people get in trouble? They would . . . but even those analogies aren't very good because the analogy would be more accurate if it was like this. If someone like AB having these levels of incompetency's [sic] staying in a room the door is closed, assured by her friends that she safe [sic] and a Navy recruiter sneaks in there and then comes out [sic] enlistment paperwork and says, "I got her. She really wanted to do this. She consented to this." Or someone goes in there and starts to perform

[79] JA at 0380.

> surgery, and she runs out of there that will be more accurate because she was in a safe space . . . she didn't count that there will be a young man, a new guy whose only interest was getting lucky. There was no freely given agreement. She wasn't competent to do so anyway.[80]

The lower court concluded the ATC's argument was an "erroneous exposition of the law."[81] Expounding on the issue, the lower court cautioned that "analogies of this type are fraught with peril" and then found that the ATC's argument was "confusing, irrelevant, misleading, and plainly improper."[82]

In addition, when addressing the credibility of AB's testimony, the ATC argued it was "credible. It's uncontroverted, and you can believe it, and you can convict on that alone."[83] The lower court reviewed this argument and while it did not find plain error, it did state that it "could . . . be viewed as a misstatement of the law defining sexual assault given that Ms. AB did not know whether the appellant had actually penetrated her vulva with his penis."[84]

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[80] JA at 0405-06.
[81] *Andrews*, 2017 CCA LEXIS 283 at *25 (citing *United States v. Abernathy*, 24 C.M.R. 765, 774-75 (A.F.B.R. 1957)) (internal quotation marks omitted).
[82] *Andrews*, 2017 CCA LEXIS 283 at *27.
[83] JA at 0407. The ATC summarized AB's testimony as follows: "'I woke up. I went to bed and the next thing I know I feel pressure, and then I realize that it's this "new guy" on top of me.' And she woke up to Seaman Apprentice Andrews on top of her." *Id.* He then argued that her testimony was sufficient to convict on alone. *Id.*
[84] *Andrews*, 2017 CCA LEXIS 283 at *24 n.61.

C. The assistant trial counsel and trial counsel repeatedly called QMSA Andrews a liar and made inflammatory arguments.

The ATC did not limit his closing argument to inventing admissions and misstating the law. Even though QMSA Andrews did not testify, the ATC made it a point to repeatedly call him a liar.[85] And the TC followed suit.[86] Together, they called QMSA Andrews a liar more than twenty times.[87] On appeal, the lower court found that while not problematic in every instance, "often times . . . [the] derogatory comments were not tethered to a government theory of the case or supported by any 'rational justification.'"[88] Accordingly, the lower court found these comments constituted improper argument and concluded "that the sheer number of disparaging comments, often accompanied by no detailed analysis . . . constituted plain error."[89]

The ATC's argument included the following statements:

- There is no evidence, no credible evidence that [AB] agreed to sex. You might be thinking . . . [QMSA Andrews said] I asked her again, and she said, "Yes," isn't that credible evidence? It's not. And here's why. He's a liar.[90]

- You probably picked some of it up yourself, but let's – I'm not going to show every single lie he tells, but let's talk about some of them.[91]

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[85] JA at 0391-0413.
[86] JA at 0446-53.
[87] JA at 0391-0413, 0446-53.
[88] *Andrews*, 2017 CCA LEXIS 283 at *15-16.
[89] *Id.* at *15.
[90] JA at 0395.
[91] *Id.*

- Yeah, go do it you might get lucky. Does that make sense? It shouldn't because it's not true. He's lying? Why is he lying? He's trying to get away with sexually assaulting this woman, and that's the rationale behind every single lie he tells in his statement.[92]

- He's lying about [IC3 Krueger]. It's obvious, you can't believe him, and he's lying to cover up his sexual assault.[93]

- This is even more obvious; his lies about [MM3 Hills]. I wonder if you caught this. And you can kind of see the mind of a liar working here.[94]

- So he throws out that first lie. Okay. "I didn't know about [MM3 Hills]." That would make it more reasonable for him to go in the room. Well, "I didn't know about it; I thought maybe she's available." That's why he's lying. He's trying to cover it up.[95]

- The kind of answers that liars get caught up in when they lose track of their lies, this is their response, "I didn't, but afterward, I found out."[96]

- If you're confused; it's because you are paying attention. If you're confused, it's because this liar has been caught in another lie. And he's lying to cover up his sexual assault.[97]

- And he's lying about consent.[98]

- So when he's telling you the story of his consent; it's obviously and demonstrably a lie.[99]

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[92] JA at 0396.
[93] JA at 0397.
[94] *Id.*
[95] *Id.*
[96] JA at 0398.
[97] JA at 0399.
[98] JA at 0400.
[99] *Id.*

- So that's his story, okay. And that's wrong, and he's lying about it, and it's clear that he's lying about it.[100]

- His story is—his lie that he's coming in there with is "Oh, no, no, no it's totally consensual, totally consensual."[101]

- She said, "Stop," I stopped. And that's his story. That is his story that is not true.[102]

- And he recognizes that, but again he's lying almost every step of the way.[103]

- That's how this nineteen-year-old lying mind, this frenzied mind is working at this point because he's trying to get away with sexual assault.[104]

- Is there an agreement? All the evidence says there wasn't except for his lying and demonstrably false statement. So you can discredit it.[105]

- It is still a crime. Let me say that one more time, even if you buy every lying word out of his mouth. He is still a criminal.[106]

The ATC then honed his charge of lying, focusing on QMSA Andrews' exculpatory statements. After telling the members they could not believe a "lying word out of [QMSA Andrews'] mouth," he argued, "[but] you can believe the parts

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[100] *Id.*
[101] JA at 0401.
[102] JA at 0402.
[103] *Id.*
[104] *Id.*
[105] JA at 0403.
[106] *Id.*

that were corroborated by other witnesses, and you also can believe when it's against his interests."[107]

In rebuttal, the TC added:

- [T]heir client is lying. NCIS was up here—you saw the video, again, watch the video—watch the whole video.[108]
- No, no, that's not true. That's not true. He lied. He says [IC3 Krueger] looked in that room.[109]
- Looking in that bedroom, that's a lie.[110]
- They want to make a big deal about these scratches. Their own client is lying, so let's talk about the scratches.[111]

Furthermore, they called QMSA Andrews "Don Juan," and characterized his defense as something out of a "fantasy world."[112] Such arguments included the following:

- That's what we call a fanciful, speculative ingenious doubt because that doesn't really exist in any reality that we live in.[113]
- If you think that Quartermaster Seaman Apprentice Andrews is a "Don Juan" type of guy, who can stroll into a bedroom . . . then you should acquit him.[114]

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[107] JA at 0405.
[108] JA at 0448.
[109] *Id.*
[110] *Id.*
[111] JA at 0448-49.
[112] JA at 0408, 0449.
[113] JA at 0392.
[114] JA at 0391.

- Again, remember what reasonable doubt is. It's not a fanciful imagination. It's not a nineteen-year-old seaman apprentice who's a "Don Juan" type, who's able to coast [sic] consent out of passed out women lying in vomit-stained sheets. That's a fanciful imagination. It doesn't make any sense in the world that we live in.

- Let's just have kind of a mental exercise that that world that Seaman Andrews wants us to live in exists, that this "Don Juan" type can coax some kind of sexual interlude was [sic] someone who's passed out on vomit stained sheets. Let's assume that world exists just for a second. I know it's an ingenious idea, but let's assume that's true . . . It is still a crime.[115]

- So in this play world we're living in where she [sic] saying yes she is not competent to do so, and it's still a crime.[116]

- [L]et's go back into this imaginary world for a second, and if it happened the way that Seaman Apprentice Andrews said . . . .[117]

- And then in that fake fantasy world, she just would not remember any of that the next day . . . .[118]

- If we go with this fantasy world where the defense would like us to reside, she's engaged in an intimate act, right.[119]

D. The trial counsel and assistant trial counsel disparaged defense counsel and injected their personal opinions.

The TC and ATC accused defense counsel of disbelieving their client and injected their personal opinions,[120] including the following statements:

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[115] JA at 0403.
[116] *Id.*
[117] JA at 0408.
[118] *Id.*
[119] JA at 0449.
[120] On over 90 occasions the ATC and TC used the personal pronouns "I" or "we." JA at 0391-0413, 0446-53.

- That's out outrageous. It's a smoke screen. I want to talk about not believing something. The defense doesn't believe their own client.[121]

- I can't think of anyone who gets so drunk, upswings and eventually passes out.[122]

- [Discussing scratches on QMSA Andrews' back:] I don't know where they came from. I don't know maybe it happened at the beach, maybe they happened that night, maybe they are defensive, she scratches him as she tries to get away from him. I don't know.[123]

- Their own client is lying, so let's talk about the scratches.

The lower court reviewed these statements and again found improper argument. Evaluating the TC's argument that the "defense doesn't believe their own client," the lower court found it was "a bald assertion that would naturally cause the members to infer that civilian defense counsel was . . . knowingly lying to the members."[124] Therefore, it was "plainly improper."[125]

E. The lower court found severe prosecutorial misconduct.

The lower court concluded that "prosecutorial misconduct occurred," that "the misconduct was severe[,]" and that "the military judge did not take any specific curative measures in response to [the] plainly improper

[121] JA at 0447.
[122] JA at 0412.
[123] JA at 0449.
[124] *Andrews*, 2017 CCA LEXIS 283 at *22.
[125] *Id.*

arguments . . . ."[126] Nevertheless, the lower court refused to provide QMSA Andrews any relief.[127]

V. The Judge Advocate General and the Deputy Judge Advocate General praised the assistant trial counsel's advocacy.

For the ATC's work on QMSA Andrews' case and several others, the Judge Advocate General of the Navy and his deputy recognized him as the "Trial Counsel of the Year," citing his "skillful advocacy [that] resulted in a 100% conviction rate in contested cases."[128] This award required a nomination from the ATC's Commanding Officer to the Deputy Judge Advocate General of the Navy.[129] And recipients of a "Superior Performance Award," like "Trial Counsel of the Year," typically receive a Navy and Marine Corps Achievement Medal.[130]

Summary of Argument

During closing argument, the ATC invented admissions. He presented these invented admissions as evidence and argued that the members should use them to find the Government met its burden of proof on Specification 3 of Charge V. The ATC and TC then went on to repeatedly call QMSA Andrews a liar, mock him and his defense counsel, misstate the law, and otherwise make inflammatory

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[126] *Id.* at *28-30.
[127] *Id.* at *30.
[128] Supplement to Petition for Grant of Review at App. 2, *United States v. Andrews*, No. 17-0162/NA (C.A.A.F. Jun. 26, 2017) (redacted).
[129] JA at 0115.
[130] JA at 0123.

arguments. In sum, the TC and ATC's conduct constitutes prosecutorial misconduct. And as a result of the TC and ATC's improper arguments, this Court cannot have confidence that the members convicted QMSA Andrews on the evidence alone.

Argument

THE LOWER COURT FOUND SEVERE PROSECUTORIAL MISCONDUCT. THEN IT ERRONEOUSLY AFFIRMED THE FINDINGS AND SENTENCE, GIVING ITS IMPRIMATUR TO THE PROSECUTORIAL MISCONDUCT IN QMSA ANDREWS' CASE. TO CORRECT THE LOWER COURT'S ERRONEOUS FINDING OF HARMLESS ERROR, THIS COURT MUST SET ASIDE AND DISMISS SPECIFICATION 3 OF CHARGE V.

Standard of Review

Improper argument is a question of law this Court reviews *de novo*.[131]

Discussion

Our "system of justice [is] dedicated to a search for truth,"[132] and in our system, it is the duty of the trial counsel "to seek justice, not merely convict."[133] Their aim should not be to attain a 100% conviction rate, but instead to ensure the

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[131] *United States Sewell*, 70 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Frey*, 73 M.J. 245 (C.A.A.F. 2014)).
[132] *Nix v. Whiteside*, 475 U.S. 157, 173 (1986).
[133] *United States v. Fletcher*, 62 M.J. 175, 182 (C.A.A.F. 2005) (quoting *United States v. White*, 486 F.2d 204, 206 (2nd Cir. 1973) (internal quotation marks omitted)).

twofold aims described in *United States v. Berger*: "that guilt shall not escape or innocence suffer."[134] Here, the TC and ATC lost sight of their duties and used a series of improper arguments to persuade the members to convict QMSA Andrews on Specification 3, Charge V.[135]

I. The improper argument materially prejudiced QMSA Andrews' substantial rights.

"The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused."[136] The NMCCA found the following were plainly improper arguments:

- Attributing statements to QMSA Andrews that he never made such as the claim that QMSA Andrews admitted he was "hoping" that AB would confuse him with MM3 Hills.[137]

- Accusing the civilian defense counsel of not believing his client.[138]

- Analogizing the standard for a lack of consent under Article 120, UCMJ, to "the levels of impairment which would preclude someone from enlisting or accepting a commission in the Navy or having nose surgery . . . ."[139]

- Repeatedly describing QMSA Andrews' statement to NCIS as "fanciful," a "fake fantasy world," and "imaginary world."[140]

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[134] *Fletcher*, 62 M.J. at 179 (citing *United States v. Berger*, 295 U.S. 78, 88 (1935)).
[135] *Andrews*, 2017 CCA LEXIS 283 at *9-29.
[136] *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (internal quotations omitted).
[137] *Andrews*, 2017 CCA LEXIS 283 at *20.
[138] *Id.* at *21-22.
[139] *Id.* at *25-27.
[140] *Id.* at *14-16.

- Using the words "liar" and "lying" to describe QMSA Andrews, or stating that QMSA Andrews told a "lie" or "lies," approximately twenty five times without charging QMSA Andrews with a violation of Article 107, UCMJ, or "tether[ing the argument] to a government theory of the case."[141]

Because the Government did not appeal these findings, the only question for this Court is whether the improper argument prejudiced QMSA Andrews. To assess the prejudice of trial counsel's misconduct, this Court balances three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."[142] This Court must reverse when "trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone."[143]

A. Factor 1: The misconduct was severe.

In determining the severity of the misconduct, there are five indicators this Court considers: (1) "the instances of misconduct as compared to the overall length, (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

[141] *Id.*
[142] *Fletcher*, 62 M.J. at 184.
[143] *Id.*

the trial, (4) the length of the panel's deliberations, and (5) whether the trial counsel abided by any of the rulings from the military judge."[144]

There was pervasive misconduct across the ATC's closing argument and the TC's rebuttal argument.[145] Their arguments constituted thirty-one pages of the record.[146] The ATC's closing argument was twenty-three pages in length. Of those twenty-three pages, he spent nine pages—nearly 40% of his argument—branding QMSA Andrews a liar.[147] And the misconduct did not stop there.

The ATC also devoted a significant portion of his closing argument to mischaracterizing QMSA Andrews' statement. The ATC attributed an invented admission to QMSA Andrews, and then literally called it "evidence" when, in fact, it was neither evidence nor an inference. Moreover, this factually misleading recitation of the evidence came on a critical issue in the case—AB's capacity to consent—and incorporated a theme that highlighted an uncharged theory of liability—"like a thief in the night."[148] As this Court is aware, in closing argument

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[144] *Id.*
[145] *See* Statement of Facts.
[146] JA at 0391-0413, 0446-53.
[147] JA at 0395-0403.
[148] JA at 0371. In opening statement the TC argued that QMSA Andrews went into the bedroom like a thief in the night and sexually assaulted AB. Before closing argument the civilian defense counsel objected to the argument about "a thief in the night," stating that it presented an uncharged theory of liability since it implied that QMSA Andrews concealed his identity in order to sexually assault AB. JA at 0371. In closing, the ATC repeatedly referenced the "thief in the night" theme. JA at 0409, 0412. And as this Court has recognized, when evaluating improper

there is a well-understood line: "[c]ounsel should limit their arguments to 'the evidence of record, as well as all reasonable inferences fairly derived from the evidence."[149] Here, the ATC repeatedly crossed that line.

In addition, over the course of an entire page in the record, the ATC gave an erroneous exposition of the law. Article 120, UCMJ, does not purport to employ the civil law concept of "contractual capacity" as the definition of competency to consent.[150] Yet under the guise of explaining the definition of "competent," the ATC argued that because AB was too intoxicated to enter into an enlistment contract or agree to neuroplasty she was also too intoxicated to agree to sexual intercourse—a confusing, irrelevant, misleading, and plainly erroneous analogy.[151]

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argument it considers whether the trial counsel used appropriate themes. *Baer*, 53 M.J. at 239.

[149] *United States v. Burton*, 67 MJ 150, 153 (C.A.A.F. 2009) (quoting *Baer*, 53 M.J. at 237). A prosecutor must limit argument to the facts in the record, reasonable inferences from those facts, and matters of common public knowledge. ABA Standards for Criminal Justice, § 3-6.8(a), § 3-6.9 (4th ed. 2015). Prosecutors may not make arguments that are "speculative and conjectural" or present factually inaccurate recitations of the evidence. *United States v. Azubike*, 504 F.3d 30, 38 (1st Cir. 2007); *United States v. Watson*, 171 F.3d 695, 700 (D.D.C. 1999) ("A misstatement of evidence is error when it amounts to a statement of fact to the jury not supported by proper evidence introduced during trial, regardless of whether counsel's remarks were deliberate or made in good faith."); *Commonwealth v. Kozec*, 399 Mass. 514, 522 (Mass. 1987).

[150] *See, e.g.*, *Williamson v. Matthews*, 379 So. 2d 1245, 1247-48 (Ala. 1980) ("The drunkenness of a party at the time of making a contract may render the contract voidable, but it does not render it void.").

[151] *See Andrews*, 2017 CCA LEXIS 283 at *27.

Finally, the remaining portions of the closing argument are also rife with improper arguments such as: (1) accusing the Defense of not believing their client, (2) calling QMSA Andrews "Don Juan" and mocking his desirability as a sexual partner, and (3) using terms like "fanciful imagination," an "imaginary world," and a "fake fantasy world" to describe QMSA Andrews' defense.[152] The bottom line is that the TC and ATC's improper arguments were pervasive, related back to an improper theme, and constituted a significant departure from their role to ensure that "justice shall be done."[153]

On the remaining three indicators, QMSA Andrews' court-martial is similar to the trial in *United States v. Fletcher*. In *Fletcher*, the court-martial "lasted less than three days and the members deliberated for less than four hours."[154] In QMSA Andrews' case the court-martial lasted three days (excluding sentencing). It included testimony from eight witnesses and a two-hour recording of QMSA Andrews' interview with NCIS.[155] The members deliberated for just under three hours before they found QMSA Andrews guilty of Specification 3, Charge V.[156]

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[152] See *Fletcher*, 62 M.J. at 180 (finding the use of terms like "nonsense, fiction, unbelievable, ridiculous and phony" to describe an accused's defense was improper).
[153] *Berger*, 295 U.S. at 88.
[154] 62 M.J. at 184-85.
[155] JA at 0458.
[156] JA at 0454-56.

And the military judge refused to issue any ruling that would address the TC or ATC's prosecutorial misconduct.[157]

In sum, the TC and ATC's improper arguments, just as in *Fletcher*, "do not stand as isolated incidents of poor judgment in an otherwise long and uneventful trial."[158] To the contrary, they permeated the entire findings argument. Accordingly, the TC and ATC's "misconduct was both pervasive and severe."[159]

B. Factor 2: The military judge failed to take any specific curative measures.

The military judge's failure is at the heart of the material prejudice to QMSA Andrews' substantial rights, and it ties into the second prong this Court considers—the measures adopted (or lack thereof) to cure the misconduct. Here, following the civilian defense counsel's objection, the military judge failed to correct the ATC's invention of evidence, or presentation of it as a fact, through a grant of a mistrial or a curative instruction.

In refusing to grant a mistrial or give a curative instruction, the military judge and civilian defense counsel had the following exchange:

> CDC: There is no other reasonable way to interpret what he just said, "Counting on her not to recognize him." He said that first. And then followed up with, "Before he goes in the room, I hope she will

[157] Before closing argument, the civilian defense counsel objected to the Government arguing that QMSA Andrews went into the bedroom like a "thief in the night," stating that it raised an "uncharged theory of liability." JA at 0370-71.
[158] 62 M.J. at 185.
[159] *Id.*

> confuse me with [MM3 Hills]." That's uncharged misconduct. That's not a basis upon which to convict him.
>
> MJ: No, but the basis on which that if the members so chose to convict him would be if they used that as evidence of his knowledge of her state.[160]

Shortly thereafter the parties had a R.C.M. 802 session and discussed Appellate Exhibit XLVII—the proposed curative instruction from the Defense. In refusing to give the curative instruction, the military judge reasoned the members could use ATC's invented admission from QMSA Andrews—"He admits, and in fact, he says that he was counting on the fact that I hope that she will confuse me with [MM3 Hills]"[161]—in the following ways:

1) "They can consider the notion of the accused's knowledge of who [AB] could have thought the accused was when he had sex with her[;]"[162] and

2) "They can consider [it] for the purposes of accessing whether [AB] . . . was incapable of consenting as to Specification 3."[163]

As this Court observed in *Knickerbocker*, "[a]t the very least" the military judge "should . . . interrupt[] the trial counsel before he r[uns] the full course of his impermissible argument."[164] Here, however, the military judge not only failed to interrupt the TC and ATC's improper arguments or cure the ATC's invention of

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[160] JA at 0419.
[161] JA at 0410.
[162] JA at 0423.
[163] *Id.*
[164] *Fletcher*, 62 M.J. at 185; *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977).

facts following a defense objection, but she expressly permitted the ATC to use his invented facts as the basis for establishing an element of Specification 3—the offense of which the members subsequently convicted QMSA Andrews. Her inability to see the prosecutorial misconduct in her courtroom allowed it to go unchecked, enabling the members to convict QMSA Andrews using "evidence" that did not exist. Accordingly, this factor balances in favor of granting relief to QMSA Andrews.

C. Factor 3: The Government's evidence supporting the conviction was weak.

To assess the strength of the Government's evidence, this Court weighs the evidence against the elements the Government must prove beyond a reasonable doubt.[165] This allows the Court to accurately assess whether it is confident the members convicted QMSA Andrews on the basis of the evidence alone and determine whether the prosecutorial misconduct requires reversal.

1. Evidence of intoxication is not enough to secure a conviction.

In *Fletcher*, this Court considered the appellant's statement that "he had not used cocaine," as well as the "circumstantial evidence concerning his religious and family life that could reasonably have raised questions in the members' minds

[165] *Fletcher*, 62 M.J. at 184 (articulating the third prong of the prejudice test as "the weight of the evidence supporting conviction").

about the strength of the prosecution's evidence."[166] Just as this Court found in *Fletcher* that a positive drug test does not "automatically lead[] to a conviction," it is also true that evidence of intoxication does not automatically lead to a sexual assault conviction.[167] Accordingly, a review of both QMSA Andrews' statement vis-à-vis the remainder of the Government's case and the circumstantial evidence corroborating his statement reasonably raises questions about the strength of the evidence supporting the conviction.[168]

2. Absent QMSA Andrews' statement, the Government had no direct evidence of penetrative sex.

To find QMSA Andrews guilty of Specification 3, Charge V, the Government was required to prove "beyond a reasonable doubt that [QMSA

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[166] *Id.* at 185.

[167] *See United States v. Pease*, 75 M.J. 180 (C.A.A.F. 2016) (defining the evidentiary standard required to prove someone is incapable of consenting); *cf. Fletcher*, 62 M.J. at 185 ("Although this court has upheld convictions in which a urinalysis test was the primary evidence, we have never said that a positive drug test automatically leads to a conviction.").

[168] Of note, the case at hand and *United States v. Sewell*, 76 M.J. 14, 14-15 (C.A.A.F. 2017) are distinct. In *Sewell*, "Appellant's convictions involved six different individuals." *Id.* at 15. Here, QMSA Andrews' sexual assault conviction involved one. In *Sewell*, the Government used 118 images to secure its convictions in addition to witness testimony. *Id.* at 19. Here, the Government relied on conflicting witness testimony. In *Sewell*, the members acquitted the appellant of "ten other specifications, including indecent exposure, unlawful touching, impeding an investigation, and communicating threats." *Id.* at 14. Here, the members acquitted SN Andrews "of two sexual assault specifications . . . charged as alternate theories of proof arising from the same sexual encounter with Ms. AB." *Andrews*, 2017 CCA LEXIS 283 at *29. Therefore, unlike *Sewell*, SN Andrews "received no significant consideration from the panel in the form of an acquittal." *Id.*

Andrews] knew or reasonably should have known that [AB] was incapable of consenting to the sexual act due to impairment by alcohol."[169] "Incapable of consenting" means "lacking the cognitive ability to appreciate the sexual conduct in question" or "the physical or mental ability to make [or] to communicate a decision about whether they agreed to the conduct."[170] Furthermore, if QMSA Andrews "mistakenly believed" that she was "capable of consenting and such belief on his part was honest and reasonable," then, as the military judge instructed, QMSA Andrews was not guilty.[171]

As the trial defense counsel asserted in their motion under R.C.M. 917, the only direct evidence of the charged sexual act—penetrative sex—was QMSA Andrews' statement. AB did not recount a penis penetrating her vagina and the Government would not have been able to meet the elements of Specification 3, Charge V, absent QMSA Andrews' statement to NCIS.

3. AB was able to appreciate the sexual conduct at issue and had the physical and mental ability to agree to it.

Seaman Apprentice Andrews described a consensual sexual encounter, or at a minimum, that he had an honest and reasonable mistake of fact. He saw AB walk under her own power down the hallway towards the bedroom.[172] And while

[169] JA at 0379.
[170] *United States v. Pease*, 75 M.J. 180, 185 (C.A.A.F. 2016).
[171] JA at 0379-80.
[172] JA at 0496.

he did see AB vomit in the bedroom, he stated that he did not have sexual intercourse with her until after she said "yes" and *took her own pants off*.[173] In response to QMSA Andrews' sexual advances, AB moaned, scratched his back, pulled him closer, and grabbed his hair.[174] Then, when AB said "stop," QMSA Andrews stopped. He "went back to the other side of the bed"[175] and observed AB stand up, put on her clothes, and leave the room.[176]

Several witnesses corroborated QMSA Andrews' observations of AB's capacity to consent to amorous activity. Ms. Wade—the last person to see AB before she went into the bedroom—testified that just before going to bed, AB was responsive and able to express desires.[177] Petty Officer Krueger observed that when QMSA Andrews left the bedroom that night he had scratches on his back,[178] describing them as the type that happen "when you're hitting it just right."[179] And while witnesses generally agree that AB was intoxicated at the party, they also observed her kissing MM3 Hills and never expressed concern that she was incapable of consenting to romantic activity with him.[180]

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[173] JA at 0459-60.
[174] *Id.*
[175] *Id.*
[176] JA at 0500-01.
[177] JA at 0172-73.
[178] JA at 0193.
[179] *Id.*
[180] JA at 0140, 0151-52, 0164, 0172-73, 0197.

Furthermore, AB's testimony is not reliable. She did not recall kissing MM3 Hills that night.[181] And regarding the things she did remember, she made baseless accusations and gave contradictory testimony.

First, she testified that she remembered passing out and believed she was drugged.[182] This allegation was baseless. NCIS did not investigate it, and there was no evidence suggesting QMSA Andrews drugged her.

Second, AB's testimony was contradicted. She testified—claiming to be clear in her recollection—that she had fifteen drinks the night of the party and that when she went to Ms. Wade's room the next morning, she was not wearing panties.[183] During her interview with NCIS, however, AB stated she was "pretty convinced that she had eight beers."[184] And Ms. Wade distinctly recalled that AB was wearing panties the next morning.[185]

In sum, the sexual intercourse was consensual, and the Government's evidence to the contrary was weak. Given the severe, uncured prosecutorial misconduct and the Government's weak evidence, this Court cannot have confidence that the members convicted QMSA Andrews on the evidence alone.

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[181] *Compare* JA at 0152 *with* JA at 0233.
[182] JA at 0246.
[183] JA at 0249.
[184] JA at 0298. There was also testimony that she was drinking a mixed drink called "Pink Panty Droppers," which was also contrary to her testimony. JA at 0187.
[185] JA at 0160, 0165, 0173.

Accordingly, it should set aside and dismiss Specification 3 of Charge V. If the Government wants to convict QMSA Andrews of sexual assault, this Court should require it to do so at a new trial on the evidence alone.

II. This Court cannot have confidence that the members convicted QMSA Andrews on the evidence alone.

Relying on *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017) and *United States v. Sewell*, 76 M.J. 14 (C.A.A.F. 2017), the lower court concluded that the third factor of the *Fletcher* prejudice analysis—strength of the evidence—so overwhelmingly favored the Government that is was dispositive on the improper argument issue, and thus the lower court held it was confident the members convicted QMSA Andrews on the evidence alone.[186] The lower court's conclusion, however, is flawed.

The Government's evidence was weak *when weighed against the elements of Specification III, Charge V,* which is the analysis the lower court failed to conduct and the one that reveals the actual strength of the Government's evidence. Most notably, the Government had no direct evidence of sexual intercourse outside of QMSA Andrews' statement. To account for this evidentiary gap, the Government needed QMSA Andrews' statement in order to prove that his penis penetrated AB's vulva. However, admitting QMSA Andrews' statement as evidence also posed a problem for the Government's case since he described the

[186] *Andrews*, 2017 CCA LEXIS 283, at *28-*31.

sexual intercourse as consensual, which "could reasonably . . . raise[] questions in the members' minds about the strength of the prosecution's evidence."[187] Therefore, to overcome QMSA Andrews' stated belief that the sexual intercourse was consensual—a significant weakness in the Government's evidence—the TC and ATC engaged in severe prosecutorial misconduct, which "tainted the conviction,"[188] materially prejudicing QMSA Andrews' substantial rights.

Given the severity of the prosecutorial misconduct, the lack of any specific curative measures, and the fact that the Government's evidence was weak, the lower court's opinion affirming Specification III, Charge V, is troubling. It allowed the Government to avoid any consequences for committing severe prosecutorial misconduct. And as a result, the lower court's opinion highlighted that in cases involving allegations of alcohol-facilitated sexual assault, a prosecutor can use the following techniques in closing argument to overcome evidentiary weaknesses and secure a conviction that will survive appellate review:

- Make numerous "disparaging comments" about an accused that are "[un]tethered to a government theory of the case or supported by any 'rational justification'" in violation of *Fletcher* and *Knickerbocker*.[189]

- Attribute statements to an accused that "he never made" and argue to the members that they can use the nonexistent statements to convict him.[190]

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[187] *Fletcher*, 62 M.J. at 185.
[188] *Id.* (quoting *White*, 486 F.2d at 204).
[189] *Id.* at *15-16.
[190] *Id.* at *20-21.

- Make "bald assertion[s]" that "naturally cause the members to infer that . . . defense counsel was . . . knowingly lying to the members[,]" such as arguing that defense counsel do not believe their own client.[191]

- Misrepresent the definition of consent under Article 120(b), UCMJ, using the civil law concept of contractual capacity while drawing on "confusing, irrelevant, misleading, and plainly improper" analogies.[192]

Moreover, this Court cannot trust that the Government will effect the course correction that is needed to avoid future instances of prosecutorial misconduct due to improper argument.[193] Rather than counseling the ATC in this case, the Judge Advocate General of the Navy and his deputy publicly praised him for his "skillful advocacy" and recognized him as "Trial Counsel of the Year," noting his "100% conviction rate."[194] The unfortunate result of this award is that it encourages others to emulate the ATC and has thus incentivized future prosecutorial misconduct.

As the Navy JAG Corps' senior leadership made clear in the award it gave the ATC, the consequence the Government cares about the most is the conviction rate—an institutional emphasis that should be chilling to anyone concerned about the quality of military justice since a prosecutor's actual duty is to "to seek justice,

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[191] *Id.* at *22.
[192] *Id.* at *26.
[193] The ATC's closing arguments have led to assignments of error (improper argument) in at least two other recent cases. *See United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 539 (N-M. Ct. Crim. App. Aug. 10, 2017) (unpublished); *United States v. Domingo*, No. 201400408, 2015 CCA LEXIS 575 (N-M. Ct. Crim. App. Dec. 29, 2015) (unpublished) (finding instructional error while noting, without addressing, that Appellant also alleged improper argument).
[194] Supplement to Petition for Grant of Review at App. 2, *United States v. Andrews*, No. 17-0162/NA (C.A.A.F. Jun. 26, 2017) (redacted).

not merely convict."[195] Accordingly, QMSA Andrews respectfully asks that this Court intervene in his case. This is not a problem that will correct itself.

In sum, the evidence supporting QMSA Andrews' sexual assault conviction is weak. The improper argument is plain and obvious, not praiseworthy. The prosecutorial misconduct is severe. And unlike the military judge at trial, this Court cannot ignore it.

Conclusion

The improper arguments of the TC and ATC materially prejudiced QMSA Andrews' substantial rights. As a result, this Court cannot be confident the members convicted QMSA Andrews on the evidence alone. Accordingly, this Court should set aside and dismiss Specification 3 of Charge V in order to ensure QMSA Andrews receives a new trial that is free of prosecutorial misconduct.

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[195] *Fletcher*, 62 M.J. at 182 (C.A.A.F. 2005) (quoting *White*, 486 F.2d at 206 (2nd Cir. 1973) (internal quotation marks omitted)).

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 September 15, 2017.

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This supplement complies with the type-volume limitations of Rule 24(c) because it contains 11,043 words, and it complies with the typeface and style requirements of Rule 37. Undersigned counsel used Times New Roman, 14-point type with one inch margins on all four sides.

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