**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

**REPLY TO GOVERNMENT ANSWER**

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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Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Quartermaster Seaman Apprentice (QMSA) Raiden Andrews, the Appellant, hereby replies to the Government's brief concerning the granted issue, filed October 16, 2017.

## 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?**

### A. The issue before this Court is whether the lower court erred in its prejudice analysis.

The Trial Counsel (TC) and Assistant Trial Counsel (ATC) made improper closing arguments that constituted prosecutorial misconduct.[1] The lower court found as much and neither party appealed that ruling. Rather, as discussed in the original brief and outlined below, the issue before this Court is whether the lower court erred in its prejudice analysis.

The granted issue draws on language from the three-prong test for prejudice outlined in *United States v. Fletcher*.[2] "Severe prosecutorial misconduct"

[1] *United States v. Andrews*, 2017 CCA LEXIS 283,*27-28 (N-M. Ct. Crim. App. Apr. 27, 2017).
[2] 62 M.J. 175, 184 (C.A.A.F. 2005).

references the first prong of the test—"severity of the misconduct."[3] Here, the lower court, as a part of its prejudice analysis, concluded that "on balance, the misconduct was severe."[4] Yet it later reached the flawed conclusion that because the "government's case was strong relative to the defense case" the severe prosecutorial misconduct did not impact QMSA Andrews' substantial rights.[5]

This flawed analysis was the driving issue in QMSA Andrews' supplement to his petition,[6] and it is the crux of the issue currently before this Court. Therefore, it is not necessary for this Court to revisit the lower court's conclusion that "prosecutorial misconduct occurred."[7]

**B. Under the doctrine of *stare decisis*, the Government has failed to provide sufficient justification for this Court to overrule the line of precedent establishing that courts review improper argument for plain error in the absence of an objection.**

QMSA Andrews did not waive appellate review of the improper arguments at issue. Should this Court broaden the aperture of the granted issue to also include a review of whether the TC and ATC committed prosecutorial misconduct, then it should test the arguments at issue for plain error in the absence of an objection. As the Government conceded, QMSA Andrews preserved the issue with respect to

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[3] *Id.*
[4] *Andrews*, 2017 CCA LEXIS 283 at *29.
[5] *Id.* at *30-31.
[6] Supplement to Petition for Grant of Review, *United States v. Andrews*, No. 17-0162/NA (C.A.A.F. Jun. 26, 2017).
[7] *Andrews*, 2017 CCA LEXIS 283 at *27-28.

one type of improper argument, and this Court reviews the remaining improper arguments for plain error.[8]

Nevertheless, the Government asked this Court to overrule an entire line of precedent establishing the standard that applies when reviewing issues of improper argument.[9] As the basis for this request, the Government cited *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017), an unrelated case where this Court interpreted the waiver provision in Military Rule of Evidence (M.R.E.) 304—a rule that is not at issue in the case at hand.

When evaluating a request to overrule its prior decisions, this Court applies the doctrine of *stare decisis*.[10] Under this doctrine, "adherence to precedent 'is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial opinions, and contributes to the actual and perceived integrity of the judicial process.'"[11] Any departure from the doctrine of *stare decisis* requires the Government to provide "sufficient justification" for the departure.[12] And when deciding whether to overrule prior precedent, this Court examines "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable

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[8] Appellee's Br. at 20.
[9] *Id.* ("Precedent to the contrary should be overruled.").
[10] *United States v. Quick*, 74 M.J. 332, 335-36 (C.A.A.F. 2015).
[11] *Id.* (quoting *United States v. Tualla*, 52 M.J. 228, 231 (C.A.A.F. 2000) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).
[12] *Id.* at 338 (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

expectations of servicemembers; and the risk of undermining public confidence in the law."[13] Here, the Government has not provided sufficient justification to warrant this Court's departure from the precedent established in cases such as *United States v. Fletcher*[14] and *United States v. Pabelona*.[15]

First, the relevant precedent is neither unworkable nor poorly reasoned. In *Fletcher*, and more recently in *Pabelona*, this Court stated the standard for reviewing issues of improper argument in the absence of an objection at trial was plain error—not waiver.[16] Moreover, *Fletcher* established a clear and workable framework for evaluating the propriety of a prosecutor's closing arguments in the absence of an objection.

Second, there are no relevant intervening events. *Ahern*—a case interpreting M.R.E. 304—made no mention of R.C.M. 919 or how this Court should review issues of improper argument.[17] As such, *Ahern* is not a relevant intervening event.

Third, given this Court's repeated application of plain error to issues of improper argument in the absence of an objection, servicemembers, and their counsel, have no reason to expect that a failure to object could later bar appellate review. The same holds true for QMSA Andrews and his attorneys.

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[13] *Id.* at 336.
[14] 62 M.J. at 179 ("In the absence of an objection, we review for plain error.").
[15] 76 M.J. 9, 11 (C.A.A.F. 2017) (stating that when "defense counsel fail[] to object to the arguments at the time of trial, we review for plain error").
[16] *Fletcher*, 62 M.J. at 179; *Pabelona*, 76 M.J. at 11.
[17] *Ahern*, 76 M.J. at 194.

Finally, to change the law now would undermine public confidence. During the time of QMSA Andrews' trial and appeal at the lower court, this Court's precedent was clear: it reviewed improper argument under a plain error standard in the absence of an objection.[18] The lower court even considered *Ahern*, as the Government has suggested this Court should do, and rejected it, deciding instead to follow *Fletcher* and apply plain error in the absence of an objection.[19] To shift course now would constitute a stark departure from precedent and deprive QMSA Andrews of appellate review on an issue this Court has repeatedly stated it reviews for plain error. It would not promote an "evenhanded, predictable, and consistent development of legal principles," and would cause servicemembers and their attorneys to question whether it is prudent to "rel[y] on judicial opinions."[20]

In sum, the Government has not provided sufficient justification for this Court to depart from established precedent. And as a result, should this Court decide to go back and review whether the TC and ATC committed prosecutorial misconduct, it should test their arguments for plain error in the absence of an objection, just as this Court stated it would in cases like *Fletcher* and *Pabelona*.

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[18] *Fletcher*, 62 M.J. at 184; *Pabelona*, 76 M.J. at 11.
[19] Order Granting Motion to Cite Supplemental Authority, *United States v. Andrews*, No.201600208, (N-M. Ct. Crim. App. Apr. 24, 2017).
[20] *Quick*, 74 M.J. at 335-36 (quoting *Tualla*, 52 M.J. at 231 (quoting *Payne*, 501 U.S. at 827)).

### C. This Court cannot be confident that the members convicted QMSA Andrews on the evidence alone.

Given the severity of the misconduct, the lack of curative instructions, and the competing accounts of the sexual intercourse in question, this Court cannot have confidence that the members convicted QMSA Andrews on the evidence alone.[21] Accordingly, it should set aside and dismiss Specification 3 of Charge V.

#### 1. The military judge failed to cure the severe prosecutorial misconduct.

The military judge failed to issue any specific curative instructions. In arguing that the military judge cured the improper argument, the Government cited the military judge's generic limiting instruction to the members: "arguments of counsel are not evidence."[22] However, as this Court observed in *Fletcher*, and the Government failed to mention in its brief, a "generic limiting instruction" and a "single rebuke" are not always adequate to remedy improper arguments.[23] Rather, military judges should "interrupt[] the trial counsel" before they run "the full course of [their] impermissible argument."[24]

In QMSA Andrews' case, just as in *Fletcher*, the military judge's response to the improper argument in her courtroom was "mild."[25] Even when the defense

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[21] *Fletcher*, 62 M.J. at 184.
[22] Appellee's Br. at 31.
[23] *Fletcher*, 62 M.J. at 185.
[24] *United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977).
[25] *Fletcher*, 62 M.J. at 185.

requested a curative instruction, the military judge refused to take action.[26] And contrary to the Government's assertion, QMSA Andrews did not withdraw his request for a curative instruction. Rather, the Civilian Defense Counsel stated "our position is this is a situation created by the government in this particular case, and the curative instruction that we gave [the military judge] is the only way out of it without a mistrial."[27] The military judge acknowledged the position of the defense, confirming their objection was "certainly noted for the record."[28]

**2. The Government's evidence supporting the conviction was weak.**

In arguing that the strength of its case established a lack of prejudice, the Government, in its forty-three page brief, omitted any mention of a central fact: before the sexual intercourse, AB "took her pants off."[29] And unlike the Government, when this Court evaluates the weight of the evidence, it cannot ignore Prosecution Exhibit 5, which established that after QMSA Andrews asked AB if she wanted to "have sex," she did more than just vomit. She verbally said "yes" and removed her own pants.[30]

To assess the strength of the Government's evidence, this Court weighs the evidence against the elements the Government must prove beyond a reasonable

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[26] JA at 0423-24.
[27] *Id.*
[28] *Id.*
[29] JA at 0459-60.
[30] *Id.*

doubt.[31] Here, this analysis also requires an assessment of the reliability of AB's testimony, as well as Prosecution Exhibits 4 and 5—QMSA Andrews' statements to Naval Criminal Investigative Service.[32] And a complete review of the evidence demonstrates the evidence supporting a sexual assault conviction was weak.

**Conclusion**

Given the nature and severity of the prosecutorial misconduct in QMSA Andrews' case, the lack of any specific curative measures from the military judge, and the competing accounts of sexual intercourse, this Court cannot be confident that the members convicted QMSA Andrews on the evidence alone. Accordingly, this Court should set aside and dismiss Specification 3 of Charge V to ensure QMSA Andrews receives a new trial that is free of prosecutorial misconduct.

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[31] *Fletcher*, 62 M.J. at 184 (articulating the third prong of the prejudice test as "the weight of the evidence supporting conviction").
[32] JA 0458-60.

**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 October 25, 2017.

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