IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
v.	)	
	)	
Major (O-4)	)	Crim. App. Dkt. No. 20150047
ERIK J. BURRIS,	)	
United States Army,	)	USCA Dkt. No. 17-0605/AR
Appellant	)	

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

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ISSUE PRESENTED

CITING RULES FOR COURTS-MARTIAL 905(e) AND 919(c), THE ARMY COURT HELD THAT THE FAILURE OF APPELLANT'S TRIAL DEFENSE COUNSEL TO OBJECT TO IMPROPER CHARACTER EVIDENCE AND IMPROPER ARGUMENT WAIVED ANY ERROR. THIS COURT, HOWEVER, TREATS SUCH FAILURES AS FORFEITURE AND TESTS FOR PLAIN ERROR. WHICH COURT IS RIGHT?

STATEMENT OF STATUTORY JURISDICTION

The Army Court of Criminal Appeals reviewed this case pursuant to Article 66, Uniform Code of Military Justice [hereinafter UCMJ]. *United States v. Burris*, No. 20150047, 2017 CCA LEXIS 315 (A. Ct. Crim. App. May 8, 2017) (unpub. mem. op.) (JA at 1). Appellant filed a timely motion for reconsideration and suggestion for reconsideration *en banc.* (JA at 20). The Army court granted reconsideration but denied reconsideration *en banc*. *United States v. Burris*, No. 20150047, 2017 CCA LEXIS 507 (A. Ct. Crim. App. July 28, 2017) (unpub. sum. disp. on recon.) (JA at 68, 69). Appellant filed a timely petition for review with this Court and this Court granted review. Accordingly, this Court has jurisdiction under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

On January 25, 2015, Appellant was convicted contrary to his pleas, by a general court-martial composed of officer members, of eight offenses:

1. Assault consummated by a battery of his wife, W.A.B., on or about December 24, 2010, in violation of Article 128, UCMJ;

2. Assault consummated by a battery of his wife, W.A.B., on divers occasions between on or about March 1, 2010, and on or about May 31, 2012, in violation of Article 128, UCMJ;

3. Assault consummated by a battery of his wife, W.A.B., on or about November 8, 2012, in violation of Article 128, UCMJ;

4. Assault consummated by a battery of his daughter, D.E.-B., on or about April 15, 2012, in violation of Article 128, UCMJ;

5. Forcible rape of his wife, W.A.B., on divers occasions between on or about March 1, 2010, and on or about May 31, 2012, in violation of Article 120(a)(1), UCMJ (2006);

6. Forcible rape of his wife, W.A.B., on or about November 8, 2012, in violation of Article 120(a)(1), UCMJ (2012);

7. Willfully disobeying a superior commissioned officer on or about August 15, 2013, in violation of Article 90, UCMJ; and

8. Forcible sodomy of his wife, W.A.B., between on or about February 1, 2012, and on or about February 28, 2012, in violation of Article 125, UCMJ.

(JA at 170-175 (Charge Sheets); JA at 602-603 (findings)).

On the same day as they announced their findings, the members sentenced Appellant to confinement for 20 years, total forfeitures, and dismissal. (JA at 605).

Three hundred twenty-five days later, on December 16, 2015, the convening authority approved the adjudged confinement and dismissal, and ordered the confinement executed. (JA at 176).

Appellant's case was docketed with the Army Court of Criminal Appeals on December 23, 2015. Appellant filed his brief and assignment of errors with the

Army court on February 22, 2016. With his brief Appellant filed a motion for expedited review of his case by the Army court, and the motion was granted on February 23, 2016. (JA at 72-76).

One year, two months, and fifteen days after granting Appellant's motion for expedited review, the Army court issued its initial opinion in Appellant's case, on May 8, 2017. (JA at 1). A timely petition for reconsideration, followed by a timely petition for review and this Court's grant of review, followed.

STATEMENT OF FACTS

Appellant is a decorated Army Judge Advocate who was the Chief of Justice for the 82d Airborne Division at the time the allegations forming the basis of his convictions were made against him. (JA at 429, 614). The prosecution emphasized this point during its opening statement, telling the members:

> You've read the flyer. You see the destruction caused by this former chief of military justice.

(JA at 187). The prosecution also introduced the members to *The Beast* during its opening statement, telling them that *The Beast*:

> is the name the accused gives his own alter ego. That is the name the accused gives the alter ego that sexually assaults [W.A.B.] time and time again.

(JA at 186). *The Beast* was the central theme of the prosecution's case against Appellant.

The prosecution called Appellant's wife, W.A.B., to testify about five alleged sexual assaults committed against her by Appellant. They were said to have occurred: (1) in the first month of their marriage, before Appellant's deployment to Afghanistan (JA at 273-274); (2) during mid-deployment leave (R&R) (JA at 287-288); (3) after Appellant returned from Afghanistan but before he left for the Graduate Course in Charlottesville (JA at 313-315); (4) when Appellant visited W.A.B. in Texas while enrolled in the Graduate Course (JA at 329-330); and (5) in their home in Pinehurst, North Carolina (JA at 334, 344-345). None of the alleged sexual assaults were witnessed by any other person, nor are there contemporaneous medical records or law enforcement reports that might corroborate W.A.B.'s claims, or even precise dates of the alleged incidents. Rather, filling the void created by the absence of evidence, the prosecution elicited testimony about *The Beast* in connection with the allegations.

Specifically, when the assistant trial counsel questioned W.A.B. about the first alleged sexual assault at trial, the question was asked after a 28-page exposition into the general nature of the relationship between W.A.B. and Appellant. (JA at 246-273). Then, rather than ask W.A.B. if appellant ever assaulted her, the assistant trial counsel asked W.A.B. about Appellant's return for mid-deployment leave (R&R) and whether there was "anything that had occurred between you and Erik that left you with any questions about what it would be like

to see him [that day]?" (JA at 273). In response, W.A.B. testified about an alleged sexual assault from months earlier, before Appellant deployed, concluding her story by stating:

> That's when I -- the first time I met *The Beast*. So, when he was coming home in December, yeah, I was not sure who I was going to see. I definitely did not want to see *The Beast*.

(JA at 275). The second alleged sexual assault was similarly elicited as an appearance of *The Beast*, when trial counsel asked:

> Q. [W.A.B.], did you ever see *The Beast* during Erik's R&R?
>
> A. Yes. There was -- there was one night that I did.
>
> Q. I need you to describe that night.

(JA at 287). The third alleged sexual assault was also presented as an appearance of *The Beast*:

> Q. Now, I want to go back and talk -- we talked about some details about the tickle torture and the tooshie squeeze. And I want to go back and talk about *The Beast* during this time.
>
> When Erik gets back from Afghanistan ----
>
> A. Yes.
>
> Q. -- in that period before he leaves for Charlottesville.
>
> A. Yes.
>
> Q. Do you ever see *The Beast* again?
>
> A. Yes.

Q. I need you to take me through a particular instance that you can remember.

(JA at 313). And then again with the final alleged assault:

Q. You said *The Beast* came out in North Carolina, too?

A. Yes.

Q. Let me ask you a question, [W.A.B.], about *The Beast* . . .

(JA at 334).

Finally, at the conclusion of the prosecution's direct examination of W.A.B., the assistant trial counsel elicited the following testimony:

Q. I want to ask you a question. You've been talking about *The Beast* a lot all morning.

A. Yes.

Q. Who is *The Beast*?

A. *The Beast* is a name that Erik gave for his sexual -- his uncontrollable sexual urges.

Q. But, [W], who is it?

A. To me ----

Q. Is it another person?

A. To me -- to me *The Beast* is this complete different person, this evil, angry, animal that comes at you. It doesn't have any empathy for you at all, just attacks you and is non-responsive ----

DC: Objection, Your Honor.

MJ: Basis?

DC: Unresponsive.

MJ: Overruled.

Q. Continue, [W].

A. ---- unresponsive to my telling him to stop or asking him, "Please stop. What are you doing? It hurts." You know, there was no communication back.

Q. Okay.

A. *The Beast* was this totally different personality of --

Q. But who does the personality belong to?

A. To Erik. Erik Burris. Erik Burris is *The Beast*.

(JA at 365-366). These were just some of the many times that the prosecution invoked *The Beast* while questioning witnesses. (*See* JA at 236, 237, 238, 239, 244, 274-278, 287, 291, 297, 313-314, 316-319, 323, 332-334, 361, 363-366).

Having made *The Beast* the focus of the case, the trial counsel completed the prosecution's character attack in closing argument:

> But that doesn't change the other times when Erik Burris doesn't listen, doesn't stop, when *The Beast* as he described it himself, as he names it -- what does a beast to do? Does a beast listen? Does a beast talk? Does a beast want your opinion, your insight on what's happening? No. A beast takes. A beast doesn't reason, and it doesn't care. It was a perfect name because that's exactly what [W.A.B.] described to you from this stand in this courtroom when she talked about the times that Erik Burris would force his finger into her, force his penis into her when she was crying and saying no.

(JA at 556).

Appellant's defense counsel did not object to the extensive testimony about Appellant as *The Beast* throughout the trial, or to the trial counsel's argument that *The Beast* was a perfect name for Appellant.[1] On appeal, however, Appellant asserted that the testimony about him as *The Beast* was improper character evidence and that the trial counsel's assertion that it was a perfect name was improper argument. The matter was fully briefed and was addressed at oral argument. (*See* JA at 78 (order)). But the Army court's decision did not decide the matter. Instead, the Army court held that "[A]ppellant waived his right to claim impermissible character evidence and improper argument because he failed to object at trial." *Burris*, No. 20150047, slip op. at 1, 2017 CCA LEXIS 315 at *1 (mem. op.) (JA at 1).

Appellant moved for reconsideration, highlighting that the Army court's finding of waiver conflicts with decisions of this Court, and emphasizing that "[t]he parties agreed that 'improper argument is a question of law reviewed de novo' and that 'when no objection is made at trial, prosecutorial misconduct is reviewed for plain error.'" (JA at 21 (quoting JA at 89)). Appellant's motion also raised the issue of ineffective assistance of counsel, explaining that:

> because the parties agreed that plain error was the appropriate standard of review, appellant did not assert that he received ineffective assistance of counsel on

[1] Appellant's civilian defense counsel fell ill during the trial. (JA at 546).

> findings based on the failure of his defense counsel to object. The Panel did not invite briefing on this issue, nor was it addressed in the Panel decision.

(JA at 25).

The Army court declined to consider the case *en banc* and the panel issued a summary opinion on reconsideration that reaffirmed its earlier decision, holding that "based on the procedural rules at issue here, the mere failure to object is a valid waiver and not forfeiture." *Burris*, No. 20150047, slip op. at 3, 2017 CCA LEXIS 507 at *5 (sum. disp. on recon.) (citing Rule for Courts-Martial [hereinafter R.C.M.] 905(e); R.C.M. 919(c)) (emphasis in original) (JA at 71). The Army court did not address Appellant's claim of ineffective assistance of counsel in findings.

Additional facts are set forth below as necessary.

SUMMARY OF ARGUMENT

In the federal civil courts, waiver and forfeiture are clearly different: forfeiture is the failure to make a timely assertion of a right, while waiver is the intentional relinquishment or abandonment of a known right. Military law, however, does not clearly differentiate between waiver and forfeiture, and the word *waiver* is often used to mean *forfeiture*.

R.C.M. 905(e) and 919(c) use the word waiver. The structure of the rules, their history, and this Court's precedent, however, show that the word waiver in R.C.M. 905(e) and 919(c) means forfeiture. In the absence of a timely objection,

the admission of improper character evidence and the presentation of improper argument are forfeited and reviewed for plain error. The Army court's conclusion to the contrary is wrong.

There are many permissible themes for a court-martial prosecution, but character assassination is not one of them. Nevertheless, the prosecution of Appellant focused on a caricature of him as *The Beast*, the alleged assaults upon Appellant's wife were presented as appearances of *The Beast*, and the trial counsel argued that *The Beast* was a perfect name for Appellant because it fit the allegations made by Appellant's wife. That was a propensity-based theme that caused the members to convict Appellant because he fit certain characteristics, not because the evidence proved he committed certain acts. Allowing it was plain and obvious error.

Reversal is required.

STANDARD OF REVIEW

"Whether an accused has waived an issue is a question of law [you] review *de novo*." *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citing *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005)). "The interpretation of a provision of the Manual for Courts-Martial is a matter of law also to be reviewed *de novo*." *United States v. Rendon*, 58 M.J. 221, 224 (C.A.A.F. 2003) (citing *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002)).

ARGUMENT

MILITARY LAW OFTEN USES THE WORD WAIVER TO MEAN FORFEITURE.

Relatively recently, in *United States v. Olano*, the Supreme Court explained:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

507 U.S. 725, 733 (1993) (marks and citations omitted). The distinction between waiver and forfeiture is an important one. Waiver "extinguishes an error." *Id*. But when an error is merely forfeited by the failure to make a timely objection, appellate tribunals have inherent power to address it if the error is plain. *Id*. at 734. *See also Wiborg v. United States*, 163 U.S. 632, 646 (1896) ("Where a plain error has been committed in a matter vital to defendants, this court is at liberty to correct it"); Advisory Committee's Notes on Fed. R. Crim. P. 52(b) (the plain error rule "is a restatement of existing law"); S. Ct. R. 24.1(a) ("the Court may consider a plain error not among the questions presented").[2]

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[2] This Court has the same power and a similar rule. U.S.C.A.A.F. R. 21(d). *See also United States v. McCarthy*, 29 C.M.R. 574, 575-576 (C.M.A. 1960) (noticing a plain error under Rules of Practice and Procedure, United States Court of Military Appeals, Rule 4).

The Supreme Court's jurisprudence did not always so clearly differentiate between waiver and forfeiture. Justice Scalia observed in 1991 that "the Court uses the term waive instead of forfeit . . . . The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision." *Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) (marks omitted). The Court's precision in the period since *Olano* is somewhat unique, and the Court recently observed that "the terms waiver and forfeiture – though often used interchangeably by jurists and litigants – are not synonymous." *Hamer v. Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 n.1 (November 8, 2017). *See also Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably. . .").

This Court has also long acknowledged that waiver means "an intentional relinquishment or abandonment of a known right or privilege." *United States v. Care*, 40 C.M.R. 247, 250-251 (C.M.A. 1969) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938))). Nevertheless, "this Court's cases have frequently addressed waiver but rarely in the context of extinguishing error and depriving the court of an opportunity for review. Rather, this Court more often addresses waiver in the context of plain error review." *United States v. Harcrow*, 66 M.J. 154, 156 n.1 (C.A.A.F. 2008) (marks omitted). Put differently, "military courts [fail] to consistently distinguish between

the terms waiver and forfeiture." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *Harcrow*, 66 M.J. at 156 n.1). Military courts aren't alone, however; military law as a whole often uses the word waiver to mean forfeiture, with the inherently contradictory edict that certain errors are *waived absent plain error*.

Examples abound. The current version of the Rules for Courts-Martial, for instance, repeatedly states that the mere failure to object "constitutes waiver of the objection in the absence of plain error." R.C.M. 920(f); 1005(f). *See also* R.C.M. 1106(f)(6) ("shall waive . . . in the absence of plain error"). This Court's precedent acknowledges that these rules say waiver but mean forfeiture. *See United States v. Davis*, 76 M.J. 224, 229 (C.A.A.F. 2017) (citing *United States v. Payne*, 73 M.J. 19, 22-23 (C.A.A.F. 2014)) (addressing R.C.M. 920(f)); *United States v. Fisher*, 21 M.J. 327, 328 n.1 (C.A.A.F. 1986) (addressing R.C.M. 1005(f)); *United States v. Green*, 37 M.J. 380, 385 (C.A.A.F. 1993) (addressing R.C.M. 1106(f)(6)). This Court's decision in *Green* and R.C.M. 1106(f)(6) are prototypical examples. Article 60(e) (formerly Article 60(d)), UCMJ, requires a convening authority to consider the recommendation of his staff judge advocate or legal officer prior to acting on the result of a court-martial, and it guarantees the accused an opportunity to respond to the recommendation. But it also states that if an accused fails to object to the recommendation, then that failure "waives the right to object thereto."

Article 60(e), UCMJ. Nevertheless, the plain language of R.C.M. 1106(f)(6) and this Court's precedent reveal that the word waiver in Article 60(e) means forfeiture. *Green*, 37 M.J. at 380 (finding no plain error). *See also United States v. Rice* 33, M.J. 451, 452-453 (C.A.A.F. 1991) (granting relief for plain error in recommendation despite failure to object); *United States v. Clear*, 34 M.J. 129, 132-133 (C.A.A.F. 1992) (same); *United States v. DeMerse*, 37 M.J. 488, 491-493 (C.A.A.F. 1993) (same); *United States v. Edwards*, 45 M.J. 114, 116 (C.A.A.F. 1996) (same); *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999) (same); *United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F. 2003) (same).

So too with R.C.M. 905(e)[3] and 919(c).

THE WORD WAIVER IN R.C.M. 905(e) AND 919(c) MEANS FORFEITURE.

Neither R.C.M. 905(e) nor R.C.M. 919(c) references plain error. This Court's precedent, however, explains that both rules use the word waiver to mean forfeiture and that plain error review applies.

"R.C.M. 905(e) is a 'raise or waive' rule, typically known as a rule of forfeiture." *United States v. Chapa*, 57 M.J. 140, 146 (C.A.A.F. 2002) (Sullivan,

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[3] As discussed further, *infra*, R.C.M. 905(e) does not apply to the prosecution's presentation of Appellant as *The Beast* because it is not an issue required to be raised before entry of pleas and because applicable rules are "otherwise provided in [the] Manual." R.C.M. 905(e).

S.J. concurring). *See also Chapa*, 57 M.J. at 142 n.4 ("The passive waiver referred to in RCM 905(e) . . . is synonymous with the term 'forfeiture' used by the Supreme Court in *United States v. Olano*"); *United States v. Godshalk*, 44 M.J. 487, 490 (C.A.A.F. 1996) ("absent plain error, failure to move to suppress evidence, dismiss the charges, or grant other appropriate relief constitutes waiver" (emphasis added)); *United States v. Kaiser*, 58 M.J. 146, 153 (C.A.A.F. 2003) (waiver "absent plain error"); *United States v. Inong*, 58 M.J. 460, 465 (C.A.A.F. 2003) ("[F]ailure at trial to raise the issue of illegal pretrial punishment waives that issue for purposes of appellate review absent plain error." (emphasis added)); *United States v. King*, 58 M.J. 110, 111 (C.A.A.F. 2003) ("[F]ailure at trial to raise the issue of pretrial restriction tantamount to confinement waives that issue for purposes of appellate review in the absence of plain error." (emphasis added)). *Cf. United States v. Gudmundson*, 57 M.J. 493, 495 n.3 (C.A.A.F. 2002) ("The Rules for Courts-Martial use the term 'waived' rather than 'forfeited' to describe a failure to preserve an issue by timely objection."). *Contra United States v. Treat*, 73 M.J. 331, 339 (C.A.A.F. 2014) (Stucky, J., dissenting) (rule means waiver).

Similarly, "the language of waiver found in RCM 919(c), Manual for Courts-Martial, United States, 1984, is not technically precise." *United States v. Causey*, 37 M.J. 308, 312 (C.A.A.F. 1993) (Sullivan, C.J., concurring). Rather:

> Despite the language of "waiver" in RCM 919(c), Manual for Courts-Martial, United States (1995 ed.), we have

> repeatedly held that where there is no defense objection to the prosecution's argument, we review for plain error. *See United States v. Carpenter*, 51 M.J. 393, 396 (1999); *United States v. Sweeney*, 48 M.J. 117, 121 (1998); *cf. United States v. Causey*, 37 M.J. 308, 312 (CMA 1993) (Sullivan, J., concurring).

United States v. Diffoot, 54 M.J. 149, 151 n.1 (C.A.A.F. 2000). *See also United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) ("Failure to object to improper argument before the military judge begins to instruct the members on findings constitutes waiver. In the absence of an objection, we review for plain error." (citations omitted)); *United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017) ("Because defense counsel failed to object to the arguments at the time of trial, we review for plain error."). *Contra United States v. Marsh*, 70 M.J. 101, 108 n.1 (C.A.A.F. 2011) (Ryan, J., dissenting) (rule means waiver).

That precedent of this Court – concluding that the word waiver in R.C.M. 905(e) and 919(c) actually means forfeiture – rests firmly on at least four pillars.

First, "the rule in military law is that failure to object doesn't constitute a waiver." *Hearings before a Subcommittee of the House Committee on Armed Services on H. R. 2498*, 81st Cong., 1st Sess., at 794 (Mar. 17, 1949) (testimony of Colonel Wiener) (reprinted in *Index and Legislative History, Uniform Code of*

Military Justice (1950)).[4] While "Congress delegated to the President certain rulemaking authority under Article 36, UCMJ, . . . not everything in the [Manual for Courts-Martial] represents an exercise of that authority, and the President does not have the authority to decide questions of substantive criminal law. *United States v. Fosler*, 70 M.J. 225, 231 (C.A.A.F. 2011) (citing *United States v. Jones*, 68 M.J. 465, 472 (C.A.A.F. 2010) (citing *Ellis v. Jacob*, 26 M.J. 90, 92 (C.M.A. 1988))). Accordingly, this Court's precedent explaining that the word waiver in R.C.M. 905(e) and 919(c) actually means forfeiture is a faithful application of military law to an imprecisely drafted rule.

Second, the basis for R.C.M. 905(e) – and for the similarly-worded R.C.M. 801(g) – is Fed. R. Crim. P. 12(f) (1977). *See* Manual for Courts-Martial (2016 ed.), Appendix 21 at 52. *See also id*. at 41 (discussing R.C.M. 801(g)). When R.C.M. 905(e) was promulgated in 1984, Fed. R. Crim. P. 12(f) stated that failure to object constituted waiver "but the court for cause shown may grant relief from the waiver." *See* H. Doc. 93–292 at 8; 416 U.S. 1001 (1974). *See also Murray v. Carrier*, 477 U.S. 478, 502 (1986) (Stevens, J., concurring) (discussing cause to grant relief). That is not a waiver in the correct understanding of the term, and the current version of Fed. R. Crim. P. 12 deliberately omits the word waiver "to avoid

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[4] Colonel Wiener made this point in support of his argument against detailing trial defense counsel to represent the accused in every general court-martial.

possible confusion." Advisory Committee's Notes on 2014 amendments to Fed. R. Crim. P. 12(c)(3). Similarly, R.C.M. 919(c) "is based on Fed. R. Crim. P. 29.1." Manual for Courts-Martial (2016 ed.), Appendix 21 at 68. That too is not a waiver rule, and the civil courts treat the mere failure to object to improper argument as forfeiture. *See United States v. Young*, 470 U.S. 1, 6 (1985) (reviewing improper argument, in the absence of objection, for plain error). Accordingly, this Court's precedent explaining that the word waiver in R.C.M. 905(e) and 919(c) actually means forfeiture is a faithful application of the principles of law generally recognized in the United States district courts. *See* Article 36(a), UCMJ.

Third, "courts indulge in every reasonable presumption against waiver." *Berghuis v. Thompkins*, 560 U.S. 370, 403 (2010) (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). Waiver is an "intentional relinquishment or abandonment," and the precise requirements for waiver "depend on the right at stake." *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (quoting *Harcrow*, 66 M.J. at 156 (quoting *Olano*, 507 U.S. at 732-733)). Accordingly, this Court's precedent explaining that the word waiver in R.C.M. 905(e) and 919(c) actually means forfeiture is a faithful application of the correct meaning of waiver, and "the passive waiver concept properly has been restricted to actions of trial defense counsel which leave appellate tribunals with insufficient factual

development of an issue necessary to resolve a question of law raised on appeal." *United States v. Graves*, 50 C.M.R. 393, 396 (C.M.A. 1975).

Finally, "rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Treating the mere failure to object as waiver does not promote justice, particularly in Appellant's case where "the record is sufficiently complete to resolve the question raised on appeal." *United States v. Helfin*, 50 C.M.R. 644, 646 (C.M.A. 1975) (rejecting waiver). Accordingly, this Court's precedent explaining that the word waiver in R.C.M. 905(e) and 919(c) actually means forfeiture is an extension of the fundamental notion that plain error review promotes the ends of justice, and that:

> we can do substantial justice in every case and this is our major objective; and let us make it crystal clear – or at least as clear as our powers of expression will permit – that, whenever, to do substantial justice, it becomes necessary to notice an error, then objection or no objection, as far as we are concerned that error will be noted.

United States v. Fisher, 15 C.M.R. 152, 156 (C.M.A. 1954).

Rather than rigidly forcing modern lexicon upon decades-old rules, this Court's precedent properly interprets the word waiver in R.C.M. 905(e) and 919(c) as it was intended by the drafter: to mean forfeiture.

If, however, this Court concludes otherwise, then forfeiture should nevertheless apply to the failure of Appellant's defense counsel to object to the

extensive testimony about Appellant as *The Beast*, and to the trial counsel's argument that *The Beast* was a perfect name for Appellant, because *stare decisis* compels that result.

STARE DECISIS REQUIRES APPLYING FORFEITURE.

Whether or not this Court agrees with prior decisions applying forfeiture and reviewing for plain error when the defense fails to object to the admission of improper character evidence and the presentation of improper argument, "the principles of *stare decisis* weigh heavily against overruling it now." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). As Chief Judge Stucky recently observed:

> *Stare decisis* is defined as "[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation." Black's Law Dictionary 1626 (10th ed. 2014). The doctrine encompasses at least two distinct concepts, only one of which is raised by this case: (1) "an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself" (horizontal stare decisis); and (2) courts "must strictly follow the decisions handed down by higher courts" (vertical stare decisis). *Id*.

United States v. Quick, 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J., dissenting) (marks in original) (emphasis added). *See also Dickerson*, 530 U.S. at 443 ("the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification" (marks and citations omitted)).

This Court's well-settled precedent establishes that plain error review applies to the prosecution's use of *The Beast* as the central theme of its case against Appellant. Because Appellant's defense counsel did not object to the many times that the prosecution elicited testimony about Appellant as *The Beast,* this Court reviews admission of that evidence for plain error. *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (citing *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007); *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998); R.C.M. 905(e))). *See also United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007) ("Where an appellant has not preserved an objection to evidence by making a timely objection, that error will be forfeited in the absence of plain error" (citing Mil. R. Evid. 103(d))). Additionally, because Appellant's defense counsel did not object to the trial counsel's argument that *The Beast* was a perfect name for Appellant, this Court reviews that argument plain error. *Pabelona*, 76 M.J. at 11 (citing *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004). *See also Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing *Rodriguez*, 60 M.J. at 88).

No special justification supports departing from those precedents now. Rather, at least three special justifications support applying *stare decisis* and retaining those precedents. First, the Appellee (represented by the Army Government Appellate Division) agreed before the lower court that "improper

argument is a question of law that is reviewed *de novo*," and that "when no objection is made at trial, prosecutorial misconduct is reviewed for plain error." (J.A. at 89). Second, the Appellee has not asked this Court to revisit the applicable precedents.[5] And finally, the Joint Service Committee recently proposed changing R.C.M. 919(c) to align with this Court's precedent applying forfeiture. *See* 82 Fed. Reg. 31952 (Jul. 11, 2017) (proposed amendments to the Manual for Courts-Martial).

For these reasons this Court should follow prior decisions applying forfeiture and reviewing for plain error when the defense fails to object to the admission of improper character evidence and to the presentation of improper argument, even if this Court now doubts the correctness of those decisions.

If, however, this Court decides otherwise, then forfeiture should nevertheless apply to the failure of Appellant's defense counsel to object to the extensive testimony about Appellant as *The Beast*, and to the trial counsel's argument that *The Beast* was a perfect name for Appellant, because the circumstances of those failures do not amount to waiver.

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[5] This Court should not reward Appellee if – at this late date – it suddenly and opportunistically reverses course and suggests that waiver applies, because Appellee is "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

APPELLANT DIDN'T WAIVE THE ERROR.

Regardless of this Court's ultimate determination of the meaning of R.C.M. 905(e) and 919(c), the failure of Appellant's defense counsel to object to the admission of improper character evidence and to the presentation of improper argument was not waiver in this case because R.C.M. 905(e) does not apply and because Appellant's defense counsel did not intentionally relinquish or abandon Appellant's right to be convicted based only "on the facts, not a litmus-paper test for conformity with any set of characteristics, factors, or circumstances." *United States v. Banks*, 36 M.J. 150, 161 (C.A.A.F. 1992). *See also United States v. Wells*, __ F.3d __, __, Nos. 14-30146, 15-30036, slip op. at 36, 2018 U.S. App. LEXIS 866, at *42 (9th Cir. Jan. 11, 2018) (J.A. at 96) (quoting *Banks*, 36 M.J. at 161).

R.C.M. 905(e) does not apply to this issue. The rule states:

> (e) *Effect of failure to raise defenses or objections*. Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other motions, requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

Manual for Courts-Martial (2016 ed.), Part II, R.C.M. 905(e). The first sentence of the rule applies only to matters that must be raised "before pleas are entered." *Id*.

Any alternative reading would render the third sentence surplusage. *See United States v. Custis*, 65 M.J. 366, 370 (C.A.A.F. 2007) (principles of statutory construction used in construing Manual provisions); *United States v. Sager*, 76 M.J. 158, 162 (C.A.A.F. 2017) (discussing canon against surplusage). The first sentence therefore does not apply to this issue because no rule required the defense to object, prior to entry of pleas, to the prosecution's presentation of Appellant as *The Beast*. Furthermore, the third sentence of the rule applies only to matters not "otherwise provided [for] in this Manual." R.C.M. 905(e). That too does not apply to this issue because review of the admission of improper character evidence and the presentation of improper argument are both otherwise provided for in the Manual for Courts-Martial.

Specifically, Mil. R. Evid. 103(f) applies to review of the admission of improper evidence. The rule states:

> (f) *Taking Notice of Plain Error*. A military judge may take notice of a plain error that materially prejudices a substantial right, even if the claim of error was not properly preserved.

Manual for Courts-Martial (2016 ed.), Part III, Mil. R. Evid. 103(f). The rule is taken from Fed. R. Evid. 103(d), and the apparent limitation to a *military* judge taking notice of plain error was added in 2013 and is purely stylistic. *See* Manual for Courts-Martial (2016 ed.), Appendix 22 at 3. *See also* Manual for Courts-Martial (2012 ed.), Part III, Mil. R. Evid. 103(d) (former wording). Accordingly,

Mil. R. Evid. 103(f) permits this Court to take notice of the plain error of allowing the extensive testimony about Appellant as *The Beast* and, therefore, R.C.M. 905(e) does not apply.

Additionally, because R.C.M. 919(c) addresses objections to argument on the findings, R.C.M. 905(e) does not apply to the failure of Appellant's defense counsel to object to the trial counsel's improper argument that *The Beast* was a perfect name for Appellant.

While R.C.M. 905(e) does not apply, R.C.M. 919(c) does. But even if this Court does not agree that the word waiver in that rule means forfeiture, Appellant still did not waive the error. "[W]aiver is the intentional relinquishment or abandonment of a known right." *Ahern*, 76 M.J. at 197 (quoting *Gladue*, 67 M.J. at 313) (quoting *Olano*, 507 U.S. at 733 (quoting *Johnson*, 304 U.S. at 464))) (emphasis added). With decades of precedent consistently reaffirming that the mere failure to object in these circumstances is forfeiture, the failure of Appellant's defense counsel to object to the trial counsel's argument in this case did not intentionally waive anything.

Accordingly, the error was forfeited and plain error applies. The Army court's conclusion to the contrary was wrong.

REMAND IS REQUIRED.

"Article 66(c) review is a substantial right. It follows that in the absence of

such a complete review, Appellant has suffered material prejudice to a substantial right." *United States v. Jenkins*, 60 M.J. 27, 30 (C.A.A.F. 2004).

The Army court found "no reason . . . to look beyond appellant's clear waiver." *Burris*, No. 20150047, slip op. at 4, 2017 CCA LEXIS 315 at *6 (mem. op.) (JA at 4). Yet because the mere failure of Appellant's defense counsel to object to the improper character evidence and the improper argument was forfeiture and not waiver, the Army court's refusal to look beyond the failure to object deprived Appellant of a proper review under Article 66(c).[6]

Furthermore, if waiver applies, Appellant has a *prima facie* claim of ineffective assistance of counsel on findings that he raised in his motion for reconsideration but the Army court wholly failed to address. (JA at 25). *See Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial.")

Accordingly, regardless of this Court's resolution of the granted issue, remand is required for a proper Article 66(c), UCMJ, review.

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[6] The Army court's initial decision suggests that review for plain error under Mil. R. Evid. 103(f) is discretionary. (*See* JA at 4 ("a military judge may take notice of a plain error. . ." (emphasis in original))). That's wrong. "[A] Court of Criminal Appeals must review errors that are asserted on appeal but not raised at trial and determine their impact, if any, on an appellant's substantial rights." *Powell*, 49 M.J. at 464 (emphasis added).

UNLESS THIS COURT AGREES THAT THERE IS
PLAIN ERROR.

In the interests of judicial economy, however, this Court should instead grant relief for the military judge's plain error in allowing the prosecution's theme of *The Beast*, and set aside the findings and sentence.

While there are many permissible themes for a court-martial prosecution, character assassination is not one of them. *See* Mil. R. Evid. 404(a)(1). Here, however, the assassination of Appellant's character began with the first sentence of the prosecution's opening statement:

> On 13 November 2012, [W.A.B.] left her husband, Major Burris, fleeing Pinehurst, North Carolina, making her way all the way down to Texas, escaping a controlling, angry, and abusive man, a man who rapes and threatens his wife, a man who assaults his children.

(JA at 182).

The prosecution's opening statement also included assertions that violence "often was the case in the Burris household," (JA at 184), that "when you don't listen to the accused, he will make you listen," (JA at 184), that Appellant used "privacy as a shield to hide his many faces," (JA at 186), and that the prosecution was "going to uncover who the accused truly is" (JA at 187). Then, throughout its case-in-chief, the prosecution elicited testimony about the alleged offenses as appearances of *The Beast*; an evil caricature of Appellant that the trial counsel ultimately argued was "a perfect name" for him. (JA at 556).

This evidence and argument was error because it had no purpose but to suggest criminal disposition, and because propensity arguments, outside of recognized exceptions, are improper. *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009). And it was prejudicial error because it caused the members to convict Appellant not "on the facts, [but on] a litmus-paper test for conformity with any set of characteristics, factors, or circumstances." *Banks*, 36 M.J. at 161. Put differently, this evidence and argument materially prejudiced Appellant's right to "be convicted based on evidence of the crime before the court, not on evidence of a general criminal disposition." *United States v. Hogan*, 20 M.J. 71, 75 (C.M.A. 1985). Appellant was thereby denied his due process right a fair trial.

This is a constitutional error that, under the circumstances, is not harmless beyond a reasonable doubt.

WHEREFORE Appellant respectfully requests that this Honorable Court set aside the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 22, 2018, the foregoing was electronically filed with the Court and delivered to Government Appellate Division.

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of Rule 24(b) because it does not exceed 30 pages.

This brief complies with the typeface and type style requirements of Rule 37 because it is prepared in Times New Roman 14-point typeface using Microsoft Word Version 2016.

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