IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES	)	**REPLY BRIEF**
Appellee	)	**ON BEHALF OF 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

NOW COMES appellant, by and through the undersigned counsel, and files this reply brief pursuant to Rule 19(a)(7)(B) of this Court's rules of practice and procedure.

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APPENDICES

A. *United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 651 (N.M. Ct. Crim. App. Oct. 17, 2017).

B. *United States v. Koch*, No. ARMY 20160107, 2018 CCA LEXIS 34 (A. Ct. Crim. App. Jan. 29, 2018).

C. Army Government Appellate Division 10-Day Letter.

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SUMMARY OF REPLY

This Court granted review to determine whether the Army Court of Criminal Appeals was right when it applied R.C.M. 905(e) and R.C.M. 919(c) to hold that "the mere failure to object is a valid waiver and not forfeiture." *United States v. Burris*, No. 20150047, slip op. at 3, 2017 CCA LEXIS 507 at *5 (A. Ct. Crim. App. Jul. 28, 2017) (sum. disp. on recon.) (citing R.C.M. 905(e); R.C.M. 919(c)) (emphasis in original) (JA at 71). The Appellee's brief does not address the granted issue; it does not even mention the rules in question (outside of restatement of the granted issue). Fundamentally, the Appellee concedes that the Army court was wrong: The mere failure to object to improper character evidence and improper argument is not waiver.

The Appellee's brief does, however, make a novel claim that Appellant affirmatively waived the error of the prosecution's improper use of character and improper argument. Relying on *United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009), and *United States v. Ahern*, 76 M.J. 194 (C.A.A.F. 2017), the Appellee asserts that the conduct of Appellant's trial defense counsel constitutes an affirmative waiver by Appellant. As discussed below, however, *Campos* undermines the Appellee's argument, *Ahern* is inapposite, and an analysis of the factors required for affirmative waiver reveals that there was no waiver in this case.

But if there was a waiver, then Appellant has a *prima facie* claim of ineffective assistance of counsel in the findings stage of his court-martial. Appellant raised this claim before the Army court, and again raised it in his brief to this Court, however neither the Army court's decisions nor the Appellee's brief even acknowledge the claim.[1] Were this Court to find waiver – either by application of procedural rules or through the conduct of Appellant's trial defense counsel – remand is still required to determine whether that waiver denied Appellant his Sixth Amendment right to the effective assistance of counsel.

Nevertheless, this Court simply need not reach the Appellee's affirmative waiver argument because it is outside the scope of the granted issue. Furthermore, forfeiture (in the absence of procedural waiver) is the law of the case.

Accordingly, this Court should reject the Appellee's newfound waiver argument, reverse the decision of the Army court, and remand for a proper Article 66 review. In the alternative, this Court should reverse the findings and sentence because it was plain error for the military judge to allow the prosecution to focus on a caricature of Appellant as *The Beast*, present the alleged assaults upon Appellant's wife as appearances of *The Beast*, and argue to the members that *The*

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[1] A separate claim of ineffective assistance of counsel in the sentencing phase was fully litigated in the lower court and raised in the supplement to Appellant's petition for review, but this Court did not grant review of that issue.

Beast was a perfect name for Appellant because it fit the allegations made by Appellant's wife. That plain error caused Appellant to be convicted because he met certain characteristics, not because the evidence proved he committed certain acts.

DISCUSSION

THE APPELLEE CONCEDES THE OBVIOUS.

"[I]t is always commendable and constructive to have appellate counsel concede the obvious in briefs and at oral argument." *United States v. Honea*, 77 M.J. 181, __ n.5, 2018 CAAF LEXIS 59, at *9 n.5 (C.A.A.F. Feb. 1, 2018). Appellant's primary brief explains how military law in general, this Court's precedent in particular, settled principles of *stare decisis*,[2] and the impending rulemaking action of the President all establish that the mere failure to object to improper character evidence and improper argument is forfeiture, not waiver.

The Navy-Marine Corps court acknowledges that "application of waiver – as opposed to forfeiture – when a defense counsel fails to object to improper argument of government counsel, would significantly depart from the CAAF's improper argument jurisprudence." *United States v. Motsenbocker*, No. 201600285, slip op. at 5, 2017 CCA LEXIS 651, at *6 (N.M. Ct. Crim. App. Oct. 17, 2017) (op. on recon.) (copy provided as Appendix A). Even the Army court

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[2] *Cf. United States v. Blanks*, __ M.J. __, __, No. 17-0404, slip op. at 4-6 (C.A.A.F. Feb. 28, 2018) (addressing factors and applying *stare decisis*).

now doubts its finding of waiver under the circumstances presented here. *See United States v. Koch*, No. ARMY 20160107, slip op. at 7-8, 2018 CCA LEXIS 34, at *10-11 (A. Ct. Crim. App. Jan. 29, 2018) (copy provided as Appendix B). The Appellee's brief follows suit, making no effort to defend the Army court's 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 (JA at 71) (emphasis omitted).

With no party – and not even the Army court itself – defending the Army court's holding, this Court can confidently reach the obvious conclusion: The Army court was wrong.

THE GRANTED ISSUE IS A NARROW QUESTION OF RULE INTERPRETATION AND *STARE DECISIS*; THE APPELLEE'S BRIEF ARGUES SOMETHING COMPLETELY DIFFERENT.

This Court granted review to reconcile the Army court's holding that R.C.M. 905(e) and 919(c) render the failure of Appellant's defense counsel to object a valid waiver, with this Court's longstanding precedent to the contrary. That grant was necessary because "it is this Court's prerogative to overrule its own decisions." *United States v. Davis*, 76 M.J. 224, 228 n.2 (C.A.A.F. 2017). But the Appellee does not ask this Court to overrule its precedent and affirm the reasoning

of the Army court. Rather, the Appellee asks this Court to decide a completely different issue.

This Court's "action need be taken only with respect to issues specified in the grant of review." Article 67(c), UCMJ. This Court did not grant review to determine the factors required for an affirmative waiver of the right of an accused at a court-martial to be convicted based only on the facts, including whether the "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." *Ahern*, 76 M.J. at 197 (quoting *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (quoting *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008) *(*quoting *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted)))). Nor did this Court grant review to determine whether those factors are present in this case. Instead, this Court granted review to determine if plain error review applies in the absence of timely objection (and perhaps, in the interests of judicial economy and to preserve Appellant's right to speedy appellate review, to find plain error and reverse Appellant's convictions).

Furthermore, the absence of affirmative waiver is the law of the case. In its initial opinion the Army court held that:

> Regarding evidentiary errors, "[a] party may claim error in a ruling to admit or exclude evidence only if the error materially prejudices a substantial right of the party and: if . . . a party, on the record: timely objects or moves to

> strike . . . .” Military Rule of Evidence [hereinafter Mil. R. Evid.] 103(a) (emphasis added). However, “[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.” Mil. R. Evid. 103(f) (emphasis added). Regarding argument by counsel, “[f]ailure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection.” Rule for Courts-Martial [hereinafter R.C.M.] 919(c) (emphasis added).

United States v. Burris, No. 20150047, slip op. at 3-4, 2017 CCA LEXIS 315 at *5-6 (A. Ct. Crim. App. May 8, 2017) (unpub. mem. op.) (marks and emphases in original) (JA at 3-4). Appellant moved for reconsideration; the Appellee did not. (JA at 20). The Army court then issued a second opinion, emphasizing that:

> Based on the general rule for trial objections and the more-specific rule concerning improper arguments, the mere failure to raise the issue before adjournment or to object before panel instructions is sufficient to constitute the intentional relinquishment or abandonment of the right to raise these claims on appeal.

Burris, No. 20150047, slip op. at 3, 2017 CCA LEXIS 507 at *5 (sum. disp. on recon.) (JA at 71). Appellant sought this Court’s review; the Appellee did not.

The Army court’s finding of waiver was the product of a reinterpretation of procedural rules. The Army court did not analyze the factors required for an affirmative waiver of an accused’s right to be convicted based only on the facts, nor did it determine if those factors are met in this case. Neither party asserted that the Army court erred in failing to conduct that analysis or even that waiver applied.

Rather, the parties agreed that forfeiture and plain error review applies. (*See* JA at 89 (Gov't Div. Br.)). Then, the Appellee opposed this Court's grant of review and "relie[d] on its response filed with the Army Court of Criminal Appeals." (Gov't Div. 10-Day Ltr. (copy provided as Appendix C)). Only after this Court granted review and Appellant filed his brief did the Appellee assert waiver.

"Under the 'law of the case' doctrine, an unchallenged ruling 'constitutes the law of the case and binds the parties.'" *United States v. Morris*, 49 M.J. 227, 230 (C.A.A.F. 1998) (quoting *United States v. Grooters*, 39 M.J. 269, 273 (C.M.A. 1994)). The Army court found procedural waiver, not affirmative waiver. Appellant challenged the finding of procedural waiver and the Appellee challenged nothing. The absence of affirmative waiver is, therefore, the law of the case and is binding upon the Appellee.

Accordingly, this Court should not entertain the Appellee's newfound waiver argument.[3]

THERE WAS NO WAIVER.

If, however, this Court does entertain the Appellee's waiver argument, then an analysis of the factors required for affirmative waiver shows that there was no waiver.

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[3] It is not without irony that the Appellee sees waiver in the failure of Appellant's trial defense counsel to raise a point at an earlier stage, while itself taking the liberty to now raise a point that it failed to raise at an earlier stage.

"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." *Olano*, 507 U.S. at 733 (1993) (citations omitted).

The right at stake is a fundamental constitutional right. "Our system of justice is a trial 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). Put differently, "one of the most basic precepts of American jurisprudence [is] that an accused must 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, 73 (C.A.A.F. 1985) (citations omitted). A conviction based on impermissible character is, therefore, a denial of due process. *See Lisenba v. California*, 314 U.S. 219, 236 (1941) ("denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice").

"[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (marks and citation omitted). Furthermore, the Court "ha[s] been unyielding in [its] insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'" *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990)

(citations omitted). Accordingly, insofar as the right to be convicted only on the basis of evidence of the crime before the court is waivable at all, the waiver must be knowing and intelligent, and it should be personal to the accused. Yet this Court need not even reach those questions to find that there was no affirmative waiver here.

The Appellee's brief analogizes the facts of this case to those of *United States v. Campos*, where this Court found waiver after the military judge explained a stipulation of expected testimony to the accused and the accused affirmatively agreed to the stipulation. 67 M.J. at 331. *Campos* is analogous, but not in the way the Appellee suggests. Appellant also agreed to a stipulation. Specifically, Defense Exhibit A is a stipulation of exculpatory facts relating to the absence of reports to law enforcement by Appellant's ex-wife. Before admitting Defense Exhibit A into evidence, the military judge conducted a two-page colloquy with Appellant. (R. at 371-372) (copy provided as Appendix D). The military judge confirmed that Appellant read the stipulation, that Appellant understood it, that Appellant agreed to it, and that Appellant knew he had an absolute right to not enter into it. (R. at 371). Furthermore, the military judge specifically warned Appellant that:

> [Y]ou should enter into the stipulation only if you believe it's in your best interest to do so.

(R. at 371). The military judge then obtained Appellant's affirmative agreement to admission of the stipulation. (R. at 372). He confirmed that agreement with

Appellant's trial defense counsel. (R. at 372). That's a waiver. No such steps, however, were taken regarding *The Beast*. Whatever the requirements for Appellant to waive his right to be convicted on the basis of evidence of the crime before the court, and not because he is *The Beast*, they are certainly at least as demanding as the requirements to admit an exculpatory stipulation of fact.

The Appellee's brief also analogizes this case to *United States v. Ahern*, where "the right at issue . . . is contained within a Military Rule of Evidence." 76 M.J. at 197. *Ahern* is wholly inapposite. Not only is the prosecution of Appellant as *The Beast* an error of constitutional dimension, rather than merely a violation of evidentiary rules, "[b]ut the rule underlying [Ahern's] claim also provides that his failure to object to the admission of the phone calls constitutes waiver of his right to complain that they were used in this fashion." *Ahern*, 76 M.J. at 197. Put differently, absent objection there was no error in *Ahern*. There is no similar predicate in Appellant's case. Improper character evidence and improper argument are improper regardless of whether the accused objects.

The Appellee's brief does not address this Court's decision in *United States v. Gladue*, 67 M.J. 311 (C.A.A.F. 2009), but the Navy-Marine Corps Appellate Government Division recently asserted before this Court[4] that *Gladue* supports a

[4] During oral argument in *United States v. Andrews*, No. 17-0480/NA, on February 28, 2018. The Division did not file an *amicus* brief in this case.

finding of waiver when a military accused's defense counsel fails to object to improper argument. *Gladue*, however, like *Ahern*, is wholly inapposite because in *Gladue* it was the "express waiver of any waivable motions [that] waived claims of multiplicity and unreasonable multiplication of charges." 67 M.J. at 314. Moreover, the express waiver in *Gladue* was part of a written pretrial agreement, and the military judge engaged in a colloquy with Gladue about the waiver provision of that written agreement. 67 M.J. at 312-313 (quoting record). Gladue then explicitly acknowledged that he "freely and voluntarily agree[d] to this [waiver] term of [his] pretrial agreement in order to receive what [he] believe[d] to be a beneficial pretrial agreement." 67 M.J. at 313. In contrast, the failure of Appellant's defense counsel to object to *The Beast* is not an express written waiver, there was no colloquy between Appellant and the military judge about *The Beast*, and Appellant received no benefit for the failure of his defense counsel to object. To the contrary, he received the most egregious detriment.

Appellant respectfully suggests that the right to be convicted on the basis of the evidence alone is so fundamental that it cannot be waived. But if it can be waived, then the waiver must be the knowing and intelligent decision of the accused himself, and not simply assumed from the inaction of the accused's defense counsel or the presentation of evidence in rebuttal. Such waiver, if ever permitted, should also employ procedural safeguards at least as rigorous as those

used to admit an exculpatory stipulation. None of that occurred in Appellant's case.

Accordingly, there was no waiver.

IF APPELLANT'S DEFENSE COUNSEL WAIVED APPELLANT'S RIGHT TO BE CONVICTED BASED ONLY ON THE FACTS, THEN THEY WERE INEFFECTIVE.

If, however, this Court finds waiver, then remand is required to address Appellant's claim of ineffective assistance of counsel.

"[T]he Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 558 U.S. 4, 9 (2009) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)). The Appellee's brief offers five facts in support of finding waiver:

> The following facts support waiver: (1) defense counsel had advance notice of The Beast evidence; (2) defense counsel never objected to The Beast at any point prior to or during trial; (3) defense counsel introduced The Beast into evidence; (4) defense counsel affirmatively stated "no objection" to certain evidence the government introduced about The Beast; (5) defense counsel referred to appellant as The Beast multiple times when cross-examining the complaining witness; and (6) defense counsel argued about The Beast in closing.

(Gov't Div. Br. at 8 (emphases added)). The Appellee does not explain how the conduct of Appellant's defense counsel constitutes a knowing and intelligent waiver by Appellant of his fundamental constitutional right to due process.

Nevertheless, if Appellant's counsel waived the issue of the prosecution of Appellant as *The Beast* – an "evil, angry, animal that comes at you," (JA at 365 (testimony of W.A.B.)); something that "takes . . . doesn't reason, and it doesn't care . . . a perfect name because that's exactly what [W.A.B.] described," (JA at 556 (prosecution closing argument); "a pattern of violent, aggressive, abusive behavior; an inability to listen; an inability to care" (JA at 592 (prosecution rebuttal argument)) – then Appellant received ineffective assistance of counsel because it is not an objectively reasonable choice to transform a trial of facts into a character assassination.

Appellant raised the issue of ineffective assistance of counsel in this regard. *Contra Campos*, 67 M.J. at 333 ("Campos has not alleged ineffective assistance of counsel in this regard"). Specifically, Appellant's motion for reconsideration before the Army court explained 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 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. Therefore, reconsideration is warranted at a minimum to permit both sides to address whether appellant's counsel were ineffective for failing to object.

(JA at 25). The record provides evidence to support Appellant's claim.

Included in Appellant's post-trial matters is a letter from Appellant's civilian defense counsel. (Encl. 5 to Post-Trial Matters of Aug. 10, 2015) (redacted copy provided as Appendix E). In it, the civilian defense counsel wrote:

> I have racked my head to try and figure out how this happened. I have second guessed every single decision we as the defense team made. And I still don't know.

(Appendix E at 1, ¶ 4). He concluded:

> This has affected me on a very personal level. After 25 years of defending service members, I have decided that it might be time for me to move on, or at least no longer represent service members at courts-martial.

(Appendix E at 2, ¶ 7).

This Court does not "assess counsel's actions through the distortion of hindsight." *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009). Instead, the question is whether "under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 475 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955))). Yet when an experienced military justice practitioner is befuddled by the result of trial and considers shuttering a quarter-century-old practice as a result, and affirmation of Appellant's conviction and 20-year sentence to confinement hinges on whether that practitioner's conduct amounts to waiver of an error, it can hardly be said that Appellant necessarily received the constitutional guarantee of sound trial strategy.

Accordingly, if this Court finds waiver, remand is required to properly evaluate Appellant's claim of ineffective assistance of counsel.

THE BEAST IS PLAIN ERROR THAT PREJUDICED APPELLANT

The prosecution introduced, proved, and argued *The Beast* as a personality, not merely a nickname. Its case against Appellant was primarily and extensively based on the evil disposition of *The Beast* rather than on legal and competent evidence that appellant committed the charged offenses. Allowing this inflammatory theme is a plain error that prejudiced Appellant's right to due process; to be convicted only because of what he did, not who he is. Then, inflamed by the prosecution's use of *The Beast*, the members adjudged a sentence including confinement for 20 years when the prosecution requested only 16. (*Compare* R. at 2129 (redacted copy provided as Appendix F) *with* JA at 605).

In its opening statement the prosecution told the members that:

> this abuse and violence suffered by [W.A.B.] just 1 month – began just 1 week after they were married in March 2010. It was a night that pregnant [W.A.B.] first met *The Beast*. Let me say that again: *The Beast*. And this is not a government characterization of the accused. That 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 prosecution did not introduce *The Beast* as a mere nickname. (*See* Gov't Div. Br. at 13). Rather, it was "the alter ego that sexually assaults W.A.B.

time and time again." (JA at 186). Elaborating on this theme during presentation of its case-in-chief, the prosecution elicited from W.A.B. that:

> *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 ----
>
> . . .
>
> ---- 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.

(JA at 365-366). W.A.B. also testified that the personality of *The Beast* belongs:

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

(JA at 366). That's no nickname.

The prosecution also told the members during opening statement:

> Privacy is innate to any marriage, but we're going to have to invade this privacy because the accused uses this privacy as a shield to hide his many faces. . . .
>
> We're going to delve into the private lives of [W.A.B.] and her now-5-year-old daughter [M]. We're going to have to delve into the lives of Major Burris' ex-wife [R.E.] and their 11-year-old daughter [D]. And we are going to have to dig into these people's lives because they were hurt by Major Burris. And again we have to do this because Major Burris uses this privacy as a shield, hiding the true Major Burris -- the Major Burris his family has to endure for years -- from the rest of the world. We're going to slowly chip away at that shield. We are going to uncover who the accused truly is.

(JA at 186-187). The prosecution did not show the members that *The Beast* was

what people call Appellant or what he called himself. Instead, it revealed *The Beast* as "who [Appellant] truly is." (JA at 187). That's an impermissible, propensity-based theme.

In closing argument, the prosecution told the members:

> sometimes he would sexually assault her, but not all the time. [W.A.B.] sat here and told all of us about times when it was nice even after that, when it was loving and it was sweet and it was good and how she clung to those times .
>
> 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). Then, in rebuttal argument, the prosecution elaborated:

> It's a pattern of violent, aggressive, abusive behavior; an inability to listen; an inability to care; and criminal conduct.

(JA at 592). Those arguments completed the prosecution's character assassination of Appellant and encouraged the members to convict him not because of what the evidence proved he did, but because of who it suggested he is.

"Because the [members] will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, improper insinuations or

suggestions are apt to carry more weight against a defendant than such statements by witnesses." *United States v. Solivan*, 937 F.2d 1146, 1150 (6th Cir. 1991). The prosecution's impermissible, propensity-based theme carried great weight in this case. The evidence of Appellant's guilt was weak. The sexual allegations made by W.A.B. were uncorroborated and tainted by her clear motive to fabricate. The assault allegations were similarly weak and contaminated. The defense case, in contrast, was strong, highlighting Appellant's good character and the many inconsistencies, contradictions, and improper motives in the testimony of the prosecution witnesses.

Presentation of *The Beast* as "the alter ego that sexually assaults [W.A.B.] time and time again," (JA at 186), as "this complete[ly] different person, this evil, angry, animal that comes at you," (JA at 365), as "who the accused truly is," (JA at 187), as "a perfect name [for Appellant] because that's exactly what [W.A.B.] described," (JA at 556), and as the manifestation of "a pattern of violent, aggressive, abusive behavior; an inability to listen; an inability to care; and criminal conduct," (JA at 592), was immaterial to any legitimate issue in the case. It did not tend to prove that Appellant did a certain thing at a certain time in a certain place to a certain person. It was not rebuttal to a defense. It was not merely a nickname. *The Beast* was a substitute for weak evidence of guilt, and there is at least a reasonable possibility that *The Beast* contributed to Appellant's convictions.

See United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007); *Chapman v. California*, 386 U.S. 18, 24 (1967).

Appellant acknowledges that he bears the burden of demonstrating plain error because of the failure of his defense counsel to object to *The Beast*. But considering the general weakness of the prosecution's case, the strength of the defense case, the inflammatory nature of *The Beast*, and the immateriality of *The Beast* to any legitimate issue, Appellant meets his burden. The prosecution's improper use of character evidence, numerous references to Appellant as *The Beast* during trial, and argument that Appellant is guilty because he is "a beast" that "doesn't reason" and "doesn't care," (JA at 556), is plain error that undermines confidence that the members convicted Appellant on the basis of the evidence alone.

Appellant also acknowledges that this Court did not grant review to determine whether *The Beast* is plain error, and so it need not reach that issue. *See* Article 67(c). Unlike the Appellee's newfound waiver argument, however, Appellant has consistently demanded speedy appellate review. The Army court granted Appellant's motion for expedited review on February 23, 2016. (JA at 72-76).[5] But more than 14 months passed before the Army court issued a decision in

[5] The Army court denied Appellant's motion requesting no further Government extensions (filed on 19 May 2016), denied Appellant's opposition to the

Appellant's case. Then, that long-awaited decision applied a procedural waiver that neither party raised, neither party defends, the law contradicts, and this Court now reviews. Accordingly, in the interests of judicial economy and to preserve Appellant's right to speedy appellate review, if this Court agrees that the error is plain and prejudicial then Appellant respectfully requests that this Court take appropriate action now rather than remand for the inevitable.

CONCLUSION

The briefs of the parties and this Court's precedent are in harmony on the granted issue. The Army court was wrong; the failure to object to improper character evidence and improper argument is not waiver.

Remand is required, notwithstanding this Court's decision on the granted issue, in order to afford Appellant a proper Article 66 review (untainted by the erroneous application of waiver) or to determine whether Appellant received ineffective assistance of counsel (if waiver applies).

If, however, this Court agrees that the prosecution's use of *The Beast* is plain error that materially prejudiced Appellant's substantial rights, then the interests of

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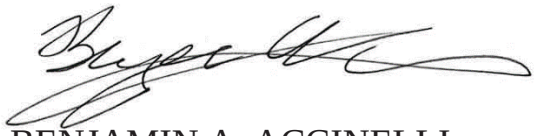
Appellee's motion for an additional extension time (filed on May 23, 2016), and denied Appellant's motion for oral argument on the Appellee's motion for an additional extension of time (filed on May 23, 2016).

justice support this Court taking appropriate action now rather than remanding for the inevitable reversal.

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

ZACHARY SPILMAN
Civilian Defense Counsel
29 North Main Street #97
Sherborn, MA 01770-0097
Phone/Fax: 844-SPILMAN
Zack@ZacharySpilman.com
U.S.C.A.A.F. Bar No. 35428

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
703-695-9853
U.S.C.A.A.F. Bar No. 32172



BENJAMIN A. ACCINELLI
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road, Suite 3200
Fort Belvoir, Virginia 22060
(703) 693-0682
USCAAF Bar Number 36899

CERTIFICATE OF FILING AND SERVICE

I certify that on March 1, 2018, the foregoing was electronically filed with the Court and delivered to Government Appellate Division.

ZACHARY SPILMAN
Civilian Defense Counsel
29 North Main Street #97
Sherborn, MA 01770-0097
Phone/Fax: 844-SPILMAN
Zack@ZacharySpilman.com
U.S.C.A.A.F. Bar No. 35428

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 24(c) because it contains no more than 7,000 words. This brief, including headings, footnotes, and quotations, but excluding the index, table of cases, statutes and other authorities, the appendices, and certificates of counsel, contains 5,077 words.

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.

ZACHARY SPILMAN
Civilian Defense Counsel
29 North Main Street #97
Sherborn, MA 01770-0097
Phone/Fax: 844-SPILMAN
Zack@ZacharySpilman.com
U.S.C.A.A.F. Bar No. 35428

APPENDIX A

United States v. Motsenbocker, No. 201600285, 2017 CCA LEXIS 651 (N.M. Ct. Crim. App. Oct. 17, 2017).

UNITED STATES NAVY–MARINE CORPS
COURT OF CRIMINAL APPEALS

No. 201600285

UNITED STATES OF AMERICA
Appellee

v.

SEAN L. MOTSENBOCKER
Operations Specialist Second Class (E-5), U.S. Navy
Appellant

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge: Commander Heather D. Partridge, JAGC, USN.
Convening Authority: Commander, Navy Region Mid-Atlantic, Norfolk, VA.
Staff Judge Advocate's Recommendation: Commander Andrew R. House, JAGC, USN.
For Appellant: Commander Donald R. Ostrom, JAGC, USN.
For Appellee: Major Kelli A. O'Neil, USMC; Lieutenant Robert J. Miller, JAGC, USN.

Decided 17 October 2017

Before HUTCHISON, FULTON, and SAYEGH, *Appellate Military Judges*

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Practice and Procedure 18.2.

HUTCHISON, Senior Judge:

In a decision issued on 10 August 2017, *United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 539, unpublished op. (N-M. Ct. Crim. App. 10 Aug 2017), we completed our Article 66, Uniform Code of Military Justice (UCMJ), review of the appellant's court-martial affirming the findings and sentence. On 8 September 2017, the appellant moved for *en banc* reconsideration, citing five bases. The government opposed the motion, in

part, on 15 September 2017. The court denied *en banc* reconsideration, but granted panel reconsideration for the appellant's fifth basis for reconsideration—that we "misapplied waiver" to trial defense counsel's failure to object to a portion of trial counsel's (TC's) closing argument.[1]

In our previous opinion we concluded that our superior court's decision in *United States v. Ahern,* 76 M.J. 194 (C.A.A.F. 2017), mandated the application of waiver—vice forfeiture—to the appellant's claim that the trial counsel "made inaccurate references to law" when he "told the members that they were allowed to use their Navy sexual assault and bystander training in determining the case" contrary to a preliminary instruction from the military judge to disregard such training. *Motsenbocker*, 2017 CCA LEXIS at *30-31 (citation and internal quotation marks omitted) (alterations omitted). Upon reconsideration, we conclude that *Ahern* does not control our analysis with respect to allegations of improper argument, and after conducting a plain error review—appropriate when forfeiture vice waiver applies—we once again affirm the findings and sentence. Accordingly, Part II-B-1 and 1a of our 10 August 2017 decision are hereby withdrawn and the following substituted therefor.

B. Prosecutorial misconduct

1. Legal error

The appellant alleges that the TC committed prosecutorial misconduct during closing arguments by (1) improperly introducing Navy sexual assault and bystander intervention training; (2) repeatedly calling the appellant a liar; (3) improperly bolstering the victim's testimony; (4) mischaracterizing evidence; (5) inserting the TC's opinion; and (6) shifting the burden of proof to the defense.[2]

"Prosecutorial misconduct occurs when trial counsel overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (citations and internal quotation marks omitted) (alteration in original). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

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[1] Appellant's Motion to Reconsider *En Banc* of 8 Sep 17 at 11.

[2] Appellant's Brief of 25 Jan 2017 at 21.

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1, 7-11 (1985)). Prosecutorial misconduct in the form of improper argument is a question of law we review *de novo*. *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (citing *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011)). "The legal test for improper argument is [(1)] whether the argument was erroneous and [(2)] whether it materially prejudiced the substantial rights of the accused." *Id.* (citation and internal quotation marks omitted). In application, "the argument by a trial counsel must be viewed within the context of the entire court-martial[,]" and as a result, "our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *Young*, 470 U.S. at 16) (additional citation omitted). This inquiry, however, remains objective, "requiring no showing of malicious intent on behalf of the prosecutor" and unyielding to inexperience or ill preparation. *Hornback*, 73 M.J. at 160.

When a proper objection to a comment is made at trial, the issue is preserved and we review for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing Art. 59, UCMJ). We find the TC's comments, where preserved by objection, do not constitute prosecutorial misconduct.[3] Even assuming, *arguendo*, the TC's actions amounted to prosecutorial misconduct, the errors did not materially prejudice a substantial right of the appellant and therefore do not warrant relief.

If there is no objection to improper argument, we review for plain error. *See United States v. Pabelona*, 76 M.J. 9, 11 (C.A.A.F. 2017); *Fletcher*, 62 M.J. at 179 (citing *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004)); *see also United States v. Diffoot*, 54 M.J. 149, 151 n.1 (C.A.A.F. 2000) ("Despite the language of 'waiver' in RCM 919(c) . . . we have repeatedly held that where there is no defense objection to the prosecution's argument, we review for plain error") (citing *United States v. Carpenter*, 51 M.J. 393, 396 (1999); *United States v. Sweeney*, 48 M.J. 117, 121 (C.M.A. 1998); *cf. United States v. Causey*, 37 M.J. 308, 312 (CMA 1993) (Sullivan, J., concurring)). To succeed under that plain error analysis, the appellant must demonstrate: "'(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the accused.'" *United States v. Tunstall*, 72

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[3] *See*, *e.g.*, *Donnelly v. DeChristoforo*, 416 U.S. 637, 647-48 (1974) (reversing the First Circuit's finding of prosecutorial misconduct because the "distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct . . . should continue to be observed.").

M.J. 191, 193-94 (C.A.A.F. 2013) (quoting *United States v. Girouard*, 70 M.J. 5, 11 (C.A.A.F. 2011)).

However, a recent decision by our superior court has called into question the continued applicability of plain error analysis to improper argument, not objected to at trial. In *Ahern,* the Court of Appeals for the Armed Forces (CAAF) analyzed the difference between "forfeiture" and "waiver," recognizing that courts "review[] forfeited issues for plain error" but cannot "review waived issues because a valid waiver leaves no error to correct on appeal." 76 M.J. at 197 (citations and internal quotation marks omitted). "[F]orfeiture is the failure to make the timely assertion of a right," while "waiver is the intentional relinquishment or abandonment of a known right." *Id*. (citations and internal quotation marks omitted). The right at issue in *Ahern* was contained in MILITARY RULE OF EVIDENCE (MIL. R. EVID.) 304, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) and specifically provided that failure to object constitutes waiver.[4] The CAAF held that the absence of any mention of "plain error review"—when those words appear elsewhere in the Manual for Courts-Martial[5]—indicates an unambiguous waiver, leaving the court nothing to review on appeal. *Id.*

The government avers that *Ahern* also applies to RULE FOR COURTS-MARTIAL (R.C.M.) 919(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.), which states, "[f]ailure to object to improper argument before the military judge begins to instruct the members on findings shall constitute waiver of the objection." Analyzing R.C.M. 919(c) in light of *Ahern*, our sister court came to the same conclusion. Finding that the "plain language of the rule, and our superior court's decision in *Ahern*" compelled their result, the Army Court of Criminal Appeals held that the failure to object to government counsel's closing argument constituted waiver, leaving nothing to review on appeal. *United States v. Kelly*, No. 20150725, 2017 CCA LEXIS 453, at *9 (A. Ct. Crim. App. 5 Jul 2017). Indeed, like MIL. R. EVID. 304, R.C.M. 919(c)

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[4] *See* MIL. R. EVID. 304(f)(1) ("Motions to suppress or objections under this rule, or MIL. R. EVID. 302 or 305, to any statement or derivative evidence that has been disclosed must be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. *Failure to so move or object constitutes a waiver of the objection*.") (emphasis added).

[5] *See, e.g.,* RULE FOR COURTS-MARTIAL 920(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) (providing for "waiver" but only "in the absence of plain error"); *see also United States v. Payne*, 73 M.J. 19, 23, n.3 (C.A.A.F. 2014) (applying a plain error analysis to R.C.M. 920(f), which states that the failure to object constitutes "'waiver of the objection in the absence of plain error'").

provides no provision for plain error review. However, application of waiver—as opposed to forfeiture—when a defense counsel fails to object to improper argument of government counsel, would significantly depart from the CAAF's improper argument jurisprudence.

We also recognize that "[o]verruling by implication is disfavored and the service courts of criminal appeals must adhere to [the CAAF's] precedent even when they believe that subsequent decisions call earlier decisions into question." *United States v. Davis*, 76 M.J. 224, 228 n.2 (C.A.A.F. 2017) (citing *United States v. Pack*, 65 M.J. 381, 383–84 (C.A.A.F. 2007) (additional citation omitted)). We conclude that *Ahern* is distinguishable for the following reasons:

First, *Ahern* was not a case that involved allegations of improper argument under R.C.M. 919(c); rather, it dealt specifically with waiver as it applied to MIL. R. EVID. 304. As such, the defense counsel in *Ahern* had numerous opportunities to object to the admission of the evidence at issue both before and during the trial. *Ahern*, 76 M.J. at 198. Yet, Ahern's defense counsel did not contest a government motion in limine to admit the evidence, and later affirmatively stated he had no objection to the admission of that evidence. *Id*.[6]

Second, the CAAF decided *Ahern* less than three months after deciding *Pabelona*, but did not cite or otherwise reference *Pabelona*, much less explicitly discuss any impact of its holding in *Ahern* on review of allegations of improper arguments—unobjected to at trial. *See Pabelona*, 76 M.J. at 11 ("Because defense counsel failed to object to the arguments at the time of trial, we review for plain error.") (citation omitted).

Consequently, upon reconsideration, we conclude *Ahern* is distinguishable from the case at bar and does not mandate the application of waiver.[7] Instead, we adhere to the longstanding precedent reaffirmed in *Pabelona, Fletcher,* and *Diffoott* and apply a plain error analysis to those allegations of improper argument not preserved by objection.

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[6] MIL. R. EVID. 105 places "full responsibility upon counsel for objecting to or limiting evidence." *Ahern*, 76 M.J. at 198 (citation omitted).

[7] We note a significant difference between applying waiver under MIL. R. EVID. 304 after an accused fails to object to evidence of a confession or admission prior to the entry of pleas, and R.C.M. 919(c) which requires objections be immediately recognized and made during closing argument.

a. Introducing Navy training against military judge's instruction

"An accused is supposed to be tried . . . [on] the legally and logically relevant evidence presented." *United States v. Schroder*, 65 M.J. 49, 57 (C.A.A.F. 2007). Thus, "[t]he prosecutor should make only those arguments that are consistent with the trier's duty to decide the case *on the evidence*, and should not seek to divert the trier from that duty." ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-6.8(c) (4th ed. 2015) (emphasis added). As a result, a court of appeals may find prosecutorial misconduct where the TC "repeatedly and persistently" violates the RULES FOR COURTS-MARTIAL and MILITARY RULES OF EVIDENCE contrary to instructions, sustained objections, or admonition from the military judge. *Hornback*, 73 M.J. at 160.[8]

Here, the appellant contends the TC "ma[de] inaccurate references to law"[9] when he "told the members that they were allowed to use their [Navy sexual assault and bystander] training in determining the case"[10] contrary to a preliminary instruction from the military judge to disregard such training.[11]

Throughout the course of the entire proceeding, the TC mentioned the Navy sexual assault and bystander training on three occasions—the first during cross-examination of a character witness for the defense, Petty Officer First Class J.D.:

> Q: Now, OS2 Motsenbocker – did he receive any training regarding bystander awareness?
>
> A: Yes, we all have.
>
> Q: Can you summarize briefly what is that? What does that training entails (sic)?

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[8] *See*, *e.g.*, *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994) (finding prosecutorial misconduct in repeated violation of Federal Rules of Evidence 404, 608, and 609, where such violations "continued even after the court instructed the prosecutor as to their impropriety").

[9] Appellant's Brief at 23.

[10] *Id*. at 26 (footnote omitted).

[11] Record at 146. ("As members, in the naval service, we have all received extensive training during recent years on the issue of sexual assault in the military. During that training, we are provided definitions and policies regarding sexual assault. Any definitions, explanations or policies provided during that training must be completely disregarded by you in this criminal trial.").

> A: Bystander Intervention would be basically if you see something wrong happening. It's our duty to step in and stop it before it gets out of hand.
>
> Q: And that pertains specifically to sexual assaults, right?
>
> A: Yes.
>
> Q: When you see somebody drunk who's maybe in a compromised position we're supposed to protect them, right?
>
> A: Yes, sir.
>
> Q: We're not supposed to have sex with people in compromised positions, right?
>
> A: Yes, sir.[12]

Later in closing argument, the TC argued that "[s]omething overcame his discipline, his self-control, *training* that he's undergone with the Navy." He further argued that in addition to using common sense, the members were "allowed to use your *training*. . . . your knowledge and experience in determining this case."[13] Immediately following this statement, however, the TC warned the members that any sexual assault prevention and response (SAPR) training "is out the window" and to only apply the law as read and provided to them by the military judge.[14]

Concluding his closing argument, the TC arguably reintroduced bystander intervention training when he argued the appellant "was not looking out for a shipmate in need, at all."[15] He again emphasized the appellant's sexual desires "trumped all the *training* that everyone in the Navy gets about sexual assault" before asking the members to return a guilty verdict.[16]

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[12] *Id*. at 671-72.

[13] *Id*. at 766, 768.

[14] *Id.* at 768 ("Now, the judge just read you the instructions, that is, the law. That is what sexual assault is. That is what abusive sexual contact is. I'm sure that you all have preconceived notions about what consent means, what sexual assault means, what abusive sexual contact means. We've all been through different SAPR Trainings. You've heard people saying things like, one drink and you can consent. *All that stuff is out the window*. That piece of paper that you, have in front of you those pages, that's the law that you need to apply, here, today.") (emphasis added).

[15] *Id*. at 794.

[16] *Id*. at 795 (emphasis added).

In conducting our plain error review, "we need only address the third element of plain error because, even were we to assume error, we see no evidence that the trial counsel's arguments" regarding Navy sexual assault and bystander training resulted in material prejudice to any of the appellant's substantial rights. *Pabelona*, 76 M.J. at 12. Although we do not condone a TC's references to Navy Sexual Assault Prevention and Response SAPR training during courts-martial, the military judge correctly issued the instruction for the members to disregard this training, and the TC reiterated that message during his closing argument. Not only do we presume the members follow the instructions of the military judge, *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000), but the appellant's repeated failure to object also indicates "that either no error was perceived or any error committed was inconsequential[,]" *United States v. Sittingbear*, 54 M.J. 737, 740 (N-M. Ct. Crim. App. 2001) (citation omitted).[17]

For the reasons stated in our 10 August 2017 decision and in this reconsideration, of Part II-B-1 and 1a of that decision, we again affirm the findings and sentence.

Judge FULTON and Judge SAYEGH concur.

For the Court

R. H. TROIDL
Clerk of Court

[17] We conducted a similar plain error analysis in our prior decision as an alternate resolution even if waiver did not apply. *Motsenbocker*, 2017 CCA LEXIS 539, at *33 n.63.

APPENDIX B

United States v. Koch, No. ARMY 20160107, 2018 CCA LEXIS 34 (A. Ct. Crim. App. Jan. 29, 2018).

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
MULLIGAN, FEBBO, and WOLFE
Appellate Military Judges

UNITED STATES, Appellee
v.
Specialist SCOTT W. KOCH
United States Army, Appellant

ARMY 20160107

Headquarters, Fort Hood
Wade N. Faulkner and Rebecca K. Connally, Military Judges
Lieutenant Colonel Travis L. Rogers, Acting Staff Judge Advocate

For Appellant: Colonel Mary J. Bradley, JA; Major Christopher Coleman, JA; Captain Patrick J. Scudieri, JA (on brief).

For Appellee: Colonel Tania M. Martin, JA; Lieutenant Colonel Erik K. Stafford, JA; Major Michael E. Korte, JA; Captain Tara O'Brien Goble, JA (on brief).

29 January 2018

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WOLFE, Judge:

We address several issues in this appeal. After appellant was acquitted of more serious offenses, a court-martial panel sentenced appellant to a dishonorable discharge, eight years of confinement, total forfeiture of all pay and allowances, and reduction to the grade of E-1 for three specifications of providing alcohol to minors and two specifications of touching or grabbing his daughter's buttocks.[1]

[1] The panel found appellant guilty of three specifications of violating a Fort Hood regulation prohibiting appellant from giving alcoholic beverages to a person under the age of twenty-one, and two specifications of abusive sexual contact with a child in violation of Article 92, 120, and 120b, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 892, 920, 920b (2006 & Supp. IV 2010; 2012).

We initially address two errors assigned by appellant. The first is whether there was sufficient evidence to support appellant's convictions for abusive sexual contact when he grabbed his daughter's buttocks. Our conclusion that there is sufficient evidence of appellant's intent is a close one and relies on a close evidentiary call, which we explain below. Second, we address appellant's claim that the government's sentencing argument was improper. We find no plain error.

Although not raised by appellant as assigned errors, we also address several issues which merit relief. First, the military judge gave a *Hills* propensity instruction which implicates one of the two sexual offenses of which appellant was convicted. *See United States v. Hills*, 75 M.J. 350 (C.A.A.F. 2016). Second, we address the appropriateness of the sentence. Independent of our setting aside the findings for one specification, we find the sentence to be too severe. In determining the sentence that "should be approved," each of us arrives at a different conclusion. Senior Judge Mulligan would approve a sentence to confinement of six years. Judge Febbo would approve a sentence of five years and six months. I would approve a sentence of two years and six months. We reconcile these differences and, reassessing the sentence after dismissing one specification, provide appellant relief in our decretal paragraph.

BACKGROUND[2]

In the fall of 2013, SS and AK were thirteen-year-old girls living on Fort Hood. Miss AK was appellant's stepdaughter. Around the time of Halloween, SS and AK had a slumber party at appellant's house. Both girls alleged that appellant provided them with alcohol. The two girls decided to go for a walk. Appellant insisted on joining them, and brought more alcohol. Once in the woods appellant and the two girls played drinking games. The girls alleged that the behavior turned sexual. They testified that appellant rubbed their genitals and had oral and vaginal sex with them.

Both girls also testified that appellant sometimes slapped AK's buttocks. Miss SS described it as being like a husband would slap his wife.

[2] Our recitation of facts in this section is for purposes of assisting the reader in understanding the facts that were alleged at trial so that the rest of the opinion can be understood in context. In doing so, here we are not exercising our fact-finding power under Article 66(c), UCMJ. As we explain more fully below, appellant was acquitted of most of the sexual offenses.

LAW AND DISCUSSION

A. Legal and Factual Sufficiency of the Evidence

Appellant was charged and convicted of two specifications of touching the buttocks of his step-daughter, AK. Each offense alleged that the touching was a "sexual contact" which required the government to prove that the touch was made with an intent to "abuse humiliate, or degrade any person" or to "arouse or gratify the sexual desire of any person." *See Manual for Courts-Martial, United States* (2012 ed.) [*MCM*], App. 28, ¶ 45.a.(t)(2), A28-3; *MCM*, ¶¶ 45b.a.(h)(1), 45.a.(g)(2).[3] Appellant alleges that there was insufficient evidence to support the convictions.

In a submission pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), that parallels the assigned error, appellant notes numerous non-criminal circumstances "in which a parent would use his or her hand to slap/spank the buttocks of a child."

At trial, the government focused its evidence on the sexual offenses of which appellant was ultimately acquitted.[4] The two abusive sexual contact offenses received passing attention. As a result, appellant's assignment of error is not without some merit and requires attention.

1. Legal sufficiency of the sexual contact offenses

We review questions of legal sufficiency de novo. *United States v. Ashby*, 68 M.J. 108, 115 (C.A.A.F. 2009) (citation omitted). In conducting this legal sufficiency review, "the relevant question an appellate court must answer is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) (internal quotation marks omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also United States v. Herrmann*, 76 M.J. 304, 307 (C.A.A.F. 2017).

Miss AK testified that appellant would "touch my butt sometimes" and that appellant "would slap or grab my butt" with "his hand." Miss AK further testified that appellant would hug her and kiss her while placing his tongue in her mouth.

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[3] One specification alleged a violation of Article 120, UCMJ (2006). The second specification alleged a violation of Article 120b, UCMJ (2012). For the purposes of this discussion there is no substantive difference between the two statutes.

[4] Appellant was acquitted of one specification of indecent liberties with a child, three specifications of rape of a child, one specification of abusive sexual contact with a child, and assault, charged under Articles 120, 120b, and 128, UCMJ.

Miss AK did not offer direct evidence as to appellant's intent when touching her buttocks.

Miss SS testified as follows:

> Q. How would you describe the way [appellant] was touching his stepdaughter?
>
> A. He would slap it. Like a quick slap.
>
> Q. Can you compare it to the way he would touch someone else?
>
> A. He would touch his wife like that.

Miss SS also agreed that the touching was inappropriate and that it was "not any normal way that a father would touch their daughter."

Given the low threshold for establishing legal sufficiency, a reasonable factfinder could infer from this testimony that appellant's slapping of his stepdaughter's buttocks was with the required intent. Accordingly, we turn our attention to the closer question of whether the evidence is factually sufficient.

2. Factual sufficiency of the sexual contact offenses

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we ourselves] are convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987).

While sufficient to survive a legal sufficiency review, the testimony of SS and AK quoted directly above is, alone, *insufficient* to convince us beyond a reasonable doubt that appellant touched AK's buttocks with the required intent.

However, there was substantial evidence in the record that appellant had a sexual interest in his stepdaughter AK. AK testified that appellant masturbated in her presence and had oral and vaginal intercourse with her. From this evidence, one can infer that the touching of her buttocks was done with a sexual intent. Concerning, however, is that this evidence formed the basis of the offenses for which appellant was acquitted. Only if allowed to consider this evidence would we find factually sufficient evidence to establish appellant's intent.[5] But may we?

[5] We state this plainly for reasons of judicial economy in case we have erred in our reasoning.

We believe the Court of Appeals for the Armed Forces' (CAAF) decision in *United States v. Rosario* answered this question in the affirmative when the court held that:

> When the same evidence is offered at trial to support two different offenses, a Court of Criminal Appeals is not necessarily precluded from considering the evidence that was introduced in support of the charge for which the appellant was acquitted when conducting its Article 66(c), UCMJ, legal and factual sufficiency review of the charge for which the appellant was convicted. Defendants are generally acquitted of offenses, not of specific facts, and thus to the extent facts form the basis for other offenses, they remain permissible for appellate review.

76 M.J. 114, 117 (C.A.A.F. 2017).

We conclude that we may consider the evidence in the record, to include credible evidence of offenses of which appellant was acquitted, in reviewing the factual sufficiency of the offenses for which appellant was convicted. The evidence was admitted without limitation. *See* Military Rule of Evidence [Mil. R. Evid.] 105 ("When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope. . . ."); *see also* Mil. R. Evid. 404(b). The military judge instructed the panel, without objection, that if "evidence has been presented which is relevant to more than one offense, you may consider that evidence with respect to each offense to which it is relevant."

The CAAF "has repeatedly concluded that a pattern of lustful intent, established in one set of specifications, could be used by factfinders as proof of lustful intent in a different set of specifications." *United States v. Tanksley*, 54 M.J. 169, 175 (C.A.A.F. 2000) (citations omitted) (*overruled in part on other grounds by United States v. Inong*, 58 M.J. 460, 461 (C.A.A.F. 2003)).

"The nub of the matter is whether the evidence is offered for a purpose other than to show an accused's predisposition to commit an offense." *Id.* Here, (with a fatal exception we discuss next), the military judge made clear that the panel could not use propensity evidence when determining appellant's guilt to the sexual contact offenses for touching AK's buttocks.

In *Tanksley*, the CAAF rejected the accused's suggestion that using evidence of one offense to prove the accused's intent as to another offense "diluted the presumption of innocence." *Id.* at 175. In *United States v. Guardado*, we similarly ruled that the CAAF's decision in *Hills* prohibiting the use of evidence from charged

sex offenses did not extend to prohibiting intent evidence allowed by Mil. R. Evid. 404(b). *United States v. Guardado*, 75 M.J. 889, 895-96 (Army Ct. Crim. App. 2016), *rev'd on other grounds*, 77 M.J. __, 2017 CAAF LEXIS 1142 (C.A.A.F. 12 Dec. 2017).[6]

Given our understanding of *Rosario* and *Tanksley* we find the evidence sufficient in all regards.

B. The Hills Instruction

Although not an assigned error we identify an issue in the case that requires relief. Over defense objection, the military judge announced her intention to instruct the members of appellant's propensity to commit sexual offenses based on charged misconduct. *See* Mil. R. Evid. 414; *Hills*, 75 M.J. at 353. During an Article 39(a) session the military judge explained the offenses to which her ruling would apply.

Appellant was acquitted of each offense that would have been implicated by the military judge's ruling. This ordinarily would have mooted any prejudice from the erroneous *Hills* instruction.[7]

However, the military judge did not instruct the panel as she intended. Although the first half of the instruction correctly listed the specifications to which the *Hills* instruction would apply, during the second half of the instruction the military judge misspoke. Instead of applying the *Hills* instruction to Additional Charge III, Specification 1 as intended, the military judge instructed the panel that they could consider the accused's propensity to commit sexual offenses as to Additional Charge II, Specification 1.[8]

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[6] The CAAF declined to address whether the Mil. R. Evid. 404(b) instruction in *Guardado* violated that court's holding in *Hills* as the issue fell outside of the scope of the issues granted by the court. 77 MJ __, 2017 CAAF LEXIS 1142 at *12 n.1.

[7] Although Specification 2 of Additional Charge III was included in the propensity instruction, the panel was never instructed that they were allowed to consider the appellant's propensity to commit sex offenses when determining appellant's guilt as to this specification.

[8] As Additional Charge II had only one specification, it was listed in the Flyer as "The Specification." This specification, of which appellant was convicted, alleged abusive sexual contact with a child, AK, in violation of Article 120, UCMJ.

Within the context of the entire trial it is clear that the military judge did not intend to give a *Hills* instruction to The Specification of Additional Charge II.[9] However, the panel was not privy to the military judge's ruling at the Article 39(a) session. Thus, in determining whether the instructions given to the panel were clear we must review any confusion from the viewpoint of the panel.

The panel was instructed, in part, that they could consider propensity evidence when determining guilt as to Additional Charge II, Specification 1. Although this was inconsistent with the earlier part of the military judge's instructions, we cannot discount the possibility that the panel misunderstood the instruction. As we look at a *Hills* error of constitutional dimension we are unable to find the error to be harmless. Accordingly, we set aside the affected specification.

C. Improper Argument

Appellant alleges that the trial counsel made improper argument by commenting on appellant's pretrial silence, by imputing his own personal beliefs into the trial, and by arguing evidence not admitted.

We find that any error did not amount to plain error.

1. Standard of Review

In *United States v. Kelly* we found that an appellant who fails to object to improper argument waives, not forfeits, the error. 76 M.J. 793, 797-98 (Army Ct. Crim. App. 2017). In doing so we applied the plain language of the rule, as well as our superior court's interpretation of identical language in a different rule. In *United States v. Ahern,* the CAAF described identical language in Mil. R. Evid. 304 ("Confessions and admission") as "unambiguously" prescribing waiver. 76 M.J. 194, 197 (C.A.A.F. 2017). Indeed, we noted that the CAAF found that this court had committed error by testing for plain error when *Ahern* was before our court. *Kelly*, 76 M.J. at 797 (citing *Ahern*, 76 M.J. at 198).

Our sister court in the Department of the Navy initially followed our lead. *See United States v. Motsenbocker*, No. 201600285, 2017 CCA LEXIS 539, *30 (N.M. Ct. Crim. App. 10 Aug. 2017). But then on reconsideration, that court thought better of it. *United States v. Motsenbocker*, No.201600285, 2017 CCA LEXIS 651, *7 (N.M. Ct. Crim. App. 17 Oct. 2017) (citing *United States v. Pabelona,* 76 M.J. 9, 11 (C.A.A.F. 2017); *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005); and *United States v. Diffoot*, 54 M.J. 149, 151 (C.A.A.F.

[9] The error was repeated in both the written and oral instructions provided to the panel.

2000), in distinguishing *Ahern* and applying a plain error analysis to allegations of improper argument not preserved by an objection).

Regardless of how persuasive our sister court's discussion of *Ahern* as applied to unpreserved error may be (see concurring and dissenting opinions below) we are obligated to follow the precedent of this Court.[10]

Our superior court has granted a petition to decide this issue. *United States v. Kelly*, No. 17-0559/AR (C.A.A.F. 20 Dec 2017) (order). As we find any error in this case does not amount to plain error, for purpose of judicial economy we apply waiver but will also test for plain error.[11]

2. Commenting on appellant's silence

Appellant alleges that the italicized language below in the government's argument was an improper comment on appellant's right to silence.

> That night during a sleepover the accused, Specialist Koch, gave them alcohol, walked with them into the woods, and raped them both.
>
> Now, keeping secrets is hard. There are three people who knew the secret. The two girls and the accused. *It is fair to say that he wasn't talking.* As far as he knew, neither were these two girls. Fortunately, that secret was too much to bear for one of those girls, [SS]. So, now over two years later on New Year 's [Eve] 2014 going into '15, she had to tell her tale.

(emphasis added).

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[10] In any event, we see a tension in the law. If the logic of *Ahern* applies to Rule for Court-Martial [R.C.M.] 919 ("Argument by counsel on findings"), then an accused waives unpreserved error in argument, arguably contrary to a large volume of case law. If *Ahern* does not apply to R.C.M. 919, it means that identical language in the Manual for Courts-Martial "unambiguously" means waiver in one instance but forfeiture in the other.

[11] If we faulted in *Kelly*, it was trying to resolve this conflict too early instead of leaving it to when it was squarely presented for our superior court to resolve. The difference between the two standards of review will only matter when an accused would be entitled to relief under a plain error standard but not entitled to relief upon a finding of waiver. That was not the case in *Kelly*. Nor is it the case here.

Appellant alleges that the language above was "a direct comment on appellant's right to remain silent" and it "encouraged the panel to draw a negative inference on appellant not speaking to law enforcement."

"A constitutional violation occurs only if either the defendant alone has information to contradict the government evidence referred to or the jury 'naturally and necessarily' would interpret the summation as comment on the failure of the accused to testify." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (quoting entirely *United States v. Coven*, 662 F.2d 162, 171 (2d Cir. 1981)). Taken in context of the entire argument, in a case where the accused testified, we do not find plain error. The comment does not "clearly" or "obviously," or "naturally and necessarily" improperly comment on appellant's right to silence during the pre-investigative stage of the case to which the trial counsel was referring.

3. *Inserting personal beliefs into argument*

Appellant alleges that the italicized language below improperly inserted the prosecutor's beliefs into the trial.

> They [SS and AK] are in seventh grade, middle school, and they are drinking rum and vodka in the presence of one of their parental figures at night. And contrary to discouraging them, he [appellant] is actually encouraging them. They are passing the bottle around. They are all having a good time.
>
> And since the accused testified that he drinks pretty regularly on Friday nights, his tolerance is reasonable to infer is pretty high. *I don't think those 13 year old's* [sic] *tolerance is very high.* And that is what he was counting on. Because even though had [sic] groomed [AK] for years and crossed that line every step of the way, he had never done it with [SS] before. He didn't know how she was going to react. So, a little liquid courage maybe. A little liquid consent could help.

(emphasis added).

Appellant correctly notes that the trial counsel may not give his opinion as to the weight of the evidence in the manner that he did. *See Fletcher*, 62 M.J. at 179-80. While the trial counsel could have argued, as he did with his argument regarding the accused's tolerance of alcohol, that it is fair inference from the evidence that AK's and SS's tolerance to alcohol was low, his personal opinion on the matter was irrelevant. We do not, however, find plain error. The argument above was addressing the sexual offenses of which the panel acquitted appellant. Accordingly,

we do not find appellant has met his burden of establishing material prejudice to a substantial right.

4. Improper use of statistics and expert testimony

During their case in chief the government qualified Dr. Turner as an expert witness to explain counter-intuitive behavior of child sex victims. Dr. Turner testified that the rate at which victims of child sexual assault report the offense was "sometimes" "as []low as 2-6 percent." During cross-examination Dr. Turner was asked if when an alleged victim tells inconsistent stories it could be because she had fabricated the allegation. Dr. Turner testified "[i]t is possible."

In appellant's closing argument appellant argued that a government expert witness had testified that it was possible that AK and SS had fabricated the allegations. On appeal, appellant objects to a portion of the government argument made in rebuttal:

> Dr. Turner testified that there are some studies showing that reporting of sexual abuse by girls is as low as 2 to 6 percent. 2 to 6 percent of society. *Yet, somehow this small fraction are both liars who made this story up whole cloth.*
>
> Now, the defense made a big deal about [how Dr. Turner] said that it is possible that [AK] and [SS] made this up. Anything is possible folks. And Dr. Turner would not be much of an expert if she said, "No, absolutely not. I am a human lie detector. I can look in their eyes and can see by your [sic] pupils that you are telling the truth." That is not what she is here to do. She is here to educate you on how victims of trauma, adolescent victims, react. Anything is possible, *but is it probable is your question?* And the fact that something is possible and possible means that it is half of one percent likelihood doesn't create reasonable doubt.

(emphasis added).

Appellant claims the government, by this argument, conveyed the message that "because so few children report sexual abuse, then SS and AK, must be telling the truth." To the extent that appellant argues that the first italicized sentence is illogical and therefore improper, we agree. Dr. Turner testified about child victim rates of reporting. She did not offer testimony about rates of false reports, nor did she testify that children honestly report child sex abuse. We see the trial counsel's

argument as being nonsense—in that it has no logical sense. We do not however see, as appellant argues, that "the government vouched for the witnesses." As the lack of coherence in the trial counsel's argument was as apparent to the panel as it is to us, appellant has not established his burden of demonstrating material prejudice to a substantial right.

Appellant also argues that the second italicized question was "misleading argument regarding probable cause." Appellant further argues that the argument "increased the defense burden." We understand appellant's argument to be that the trial counsel improperly assigned a burden to the defense and mischaracterized the definition of reasonable doubt. Any error was corrected by the military judge who correctly defined reasonable doubt and instructed the panel that "any inconsistency between what counsel have said about the instructions and the instructions which I give you, you must accept my statement as being correct." Accordingly, we find no prejudice and no plain error.

5. Arguing facts not in evidence

During the defense case appellant's wife was called as a witness. The defense laid a foundation for an opinion of AK's truthfulness. However, before giving the opinion, the government asked to voir dire the witness. The record contains the following:

> Q. [CDC] You feel like you have known [AK] long enough to assess her character for truthfulness?
>
> A. Yes.
>
> Q. [CDC] What is that assessment?
>
> ATC: Objection
>
> MJ: Basis.
>
> ATC: Lack of foundation. I request to *voir dire* the witness.
>
> . . . .
>
> Q [ATC]. Mrs. Koch, you remember that I called you on 15 February 2015?
>
> A. Yes.

> Q. To talk about your testimony today?
>
> A. Yes.
> . . . .
>
> Q. And you remember during that conversation I asked you, you know, "In terms of the honesty of your daughter, do you think that she is generally an honest person?"
>
> A. Mm-hmm.
>
> Q. And you said, "Yes."
>
> A. At the time, yes.

During a subsequent Article 39(a) session, outside the presence of the panel members, Mrs. Koch was asked by the military judge whether her opinion of her daughter was "[t]ruthful or untruthful, would you testify that she is untruthful?" Mrs. Koch answered "In this particular case, I believe that she is being untruthful. Generally not."

The military judge then clarified the nature of Mrs. Koch's expected character testimony. We find that looking at the testimony as a whole, Mrs. Koch's offered opinion of her daughter's character for truthfulness was based on her assessment that her daughter's allegations against appellant were false. In short, Mrs. Koch was of the opinion that her daughter was generally truthful but was not being truthful in regard to the pending charges.

The military judge then sustained a government objection to Mrs. Koch providing an opinion as to her daughter's truthfulness.[12]

In rebuttal argument the government argued that Mrs. Koch had testified that AK is a "[g]enerally honest person."

Appellant correctly argues on appeal that the trial counsel's argument mischaracterized what had happened. Mrs. Koch never gave an opinion as to AK's character for truthfulness. Rather, the military judge sustained the government's objection before she could answer the defense counsel's question. Instead what had happened was that the government–while voir diring the witness–elicited an out of

[12] In an assignment of error we do not directly address, appellant alleges that the exclusion of Mrs. Koch's testimony was prejudicial error. We disagree. Given that, at least initially, her "opinion" testimony was essentially an opinion on whether she believed her daughter's allegations (i.e. lie detector testimony) the military judge was well within her discretion to exclude the testimony.

court statement by Ms. Koch that she had *previously* assessed her daughter as generally being honest.

On appeal, appellant argues that Ms. Koch's answer to the trial counsel's voir dire questions were not substantive evidence. Accordingly, appellant argues, the trial counsel erred when he argued that the testimony had come in substantively.

We see the issue differently. Appellant did not object or request a limiting instruction for the testimony elicited by the trial counsel. Accordingly, we see the issue as whether the military judge plainly erred by not sua sponte issuing a limiting instruction. Without an objection or limiting instruction the panel was not instructed on how they could consider the testimony.

When "evidence that is admissible against a party or for a purpose–but not against another party or for another purpose–the military judge, *on timely request*, must restrict the evidence to its proper scope and instruct the members accordingly." Mil. R. Evid. 105 (emphasis added). As our sister court said in *United States v. Borland,* "[t]he trial defense counsel did not ask the military judge to restrict the evidence to its proper scope and to instruct the members accordingly. Since no limiting instruction was requested, none was required." 12 M.J. 855, 857 (A.F.C.M.R. 1981) (citing Mil. R. Evid. 105; *United States v. Washington,* 592 F.2d 680 (2d Cir. 1979)); *see also United States v. Lewis*, 693 F.2d 189, 197 (D.C. Cir. 1982) (no obligation on part of trial judge to give limiting instruction as to uncharged acts used to prove a scheme where no request was made). Nonetheless, "as a general matter instructions on limited use are provided upon request under M.R.E. 105, the rule does not preclude a military judge from offering such instructions on his or her own motion, [] and failure to do so in an appropriate case will constitute plain error." *United States v. Kasper*, 58 M.J. 314, 320, 21 (C.A.A.F. 2003) (citations omitted).

However, in the context of the entire case we do not find any clear or obvious error. *United States v. Gomez*, 76 M.J. 76, 81 (C.A.A.F. 2017). This is not the case where "in the context of the entire trial . . . the military judge should be 'faulted for taking no action' even without an objection." *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009) (quoting *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)). As the drafter's analysis to Mil. R. Evid. 105 clarifies, when adopted the rule "overrule[d]" prior cases which had placed the burden on the military judge and it is "compatible with the general intent of both the Federal and Military Rules in that they place primary if not full responsibility upon counsel for objecting to or limiting evidence." Mil. R. Evid. 105 analysis at A22-4. "Indeed, we have explained that there are occasions when, for tactical reasons, defense counsel may wish to forego such a limiting instruction because it might focus the jury's attention on the damaging evidence." *United States v. Rhodes*, 314 U.S. App. D.C. 117, 62 F.3d 1449, 1453 (1995) (*vacated on other grounds*, 517 U.S. 1164 (1996)).

We do not find the military judge plainly erred by either: 1) failing to sua sponte issue a limiting instruction; or 2) failing to sua sponte correct the trial counsel's argument.

D. Sentence Appropriateness

1. The Sentence

In a personal submission made pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant asks us to review the appropriateness of his sentence. All three judges on this panel find appellant's submission to have merit, albeit to different degrees. Our analysis here is initially separate from our reassessment of the sentence after setting aside one finding for a *Hills* error.

Appellant was convicted of three violations of a general order for providing alcohol to minors as well as two specifications of abusive sexual contact for touching his stepdaughter's buttocks. For this conduct, appellant was sentenced to be dishonorably discharged from the Army, eight years confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1.

Appellant describes his sentence as "too severe in contrast to [the] offense[s]." Appellant specifically asks that we "grant [him] clemency in the form of Time Served (7 years to be taken off my 8 year sentence)."

We are not authorized to grant clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010) "Clemency is a highly discretionary command function of a convening authority." *United States v. Travis*, 66 M.J. 301, 303 (C.A.A.F. 2008) (citations omitted).

However, we must nonetheless determine whether the sentence is "appropriate." In doing so we "bring to bear [our] wisdom, experience, and expertise" in "consideration of sentence appropriateness." *United States v. Hutchison*, 57 M.J. 231, 234 (C.A.A.F. 2002). "The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the Uniform Code of Military Justice." *Id.* at 233. Our review includes, but is not limited to "consideration of uniformity and evenhandedness of sentencing decisions." *Id.* at 234 (quoting *United States v. Sothen*, 54 M.J. 294, 296-97 (C.A.A.F. 2001).

The offenses of which appellant stands convicted, especially when one considers the totality of the circumstances in which they were committed, are not minor offenses. They are serious offenses which warrant serious punishment.

Nonetheless, we may not approve a sentence that is grossly disproportionate to appellant's crimes, substantially more than is retributively necessary, exceeds the requirements of general and specific deterrence, and ultimately may undermine confidence in military justice if appellant is seen as being punished more than his "just deserts." Although each of us disagrees as to the appropriate amount, we find in this case that the sentence as approved by the convening authority is too severe and, accordingly, we provide appellant relief in the decretal paragraph.

2. R.C.M. 1006(d)(1)

Rule for Court-Martial 1006(d)(1) reads as follows: "*Duty of members.* Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, *regardless of the member's vote or opinion as to the guilt of the accused.*" (emphasis added). The sentencing instructions given by the military judge in this case did not include the second clause of the rule (the italicized language above) that the sentence must be determined "regardless of the member's vote or opinion as to the guilt of the accused." The instructions did, however, follow the standard instructions in the Military Judges' Benchbook. *See* Dep't of Army Pam. 27-9, Legal Services: Military Judges' Benchbook [Benchbook], para. 8-30-20 (10 Sept. 14) ("It is the duty of each member to vote for a proper sentence for the offense(s) of which the accused has been found guilty.").

While we have researched the issue, we have not found any case or analysis which explains why the standard Benchbook instructions omit instructing the members on their duties in full accordance with the rule.

However, we cannot attribute appellant's sentence in this case to the failure to fully instruct the panel on the duties prescribed by R.C.M. 1006(d)(1). It is nigh impossible to know how or why a panel sentenced an accused to a particular sentence. We do not find prejudicial error, let alone (as there was no objection) plain error, in the instructions given in this case.

Appellant's relatively high sentence to confinement could be attributable to his mendacious testimony, his record of nonjudicial punishment for using cocaine, and the other evidence in the record. Or, appellant's sentence could simply reflect that court-martial sentences are left to the discretion of the court-martial and that in any system with such discretion, it will be exercised within a range of permissible outcomes. In any event, our sentence appropriateness review under Article 66(c) serves as a check on unnecessarily severe sentences.

Rule for Court-Martial 1006(d)(1) properly tells a panel member that they must vote for the appropriate sentence without regard to how they voted or viewed the evidence during the findings portion of the trial. In other words, it is the "duty"

of the member to set aside their *personal* belief on the accused's guilt during sentencing and instead vote on a sentence based on *the court-martial's* findings.

We can discern no reason not to fully instruct the panel in accordance with its duties as prescribed by R.C.M. 1006(d)(1). Indeed, because the UCMJ does not require unanimous verdicts, such an instruction may be more necessary in the military justice system than in comparable civilian courts.

Non-unanimous verdicts require that panel members, on occasion, are required to vote for a sentence based on court-martial findings with which they do not agree. The instruction that the sentence must be determined "regardless of the member's vote or opinion as to the guilt of the accused," in combination with the other instructions, further reduces the danger that a panel member will improperly bring his or her opinion from findings into their sentence deliberation.

Take, for example, an eight member panel where five panel members vote to find an accused guilty of a serious offense. As it takes the agreement of six members to convict the accused, the accused will be acquitted of the serious offense. If such a case proceeds to sentencing because of other less serious offenses it will again require six of the eight members to agree on the sentence. In this hypothetical, *at least* three panel members who believed the accused was guilty of the serious offenses must nonetheless agree on the punishment for the less serious offense.

The possible danger is that, absent instructing the panel in accordance with R.C.M. 1006(d)(1), a panel member who believed the accused guilty of more serious offenses will import that belief into his or her determination of the appropriate sentence. While the standard instruction, Benchbook, para. 8-3-20, tells the members they have a duty to determine proper sentence only for the offenses of which the court-martial found the accused guilty, they are not specifically told that the "proper sentence" is made without reference to their vote or opinion during findings.

CONCLUSION

Additional Charge II and its specification are SET ASIDE and DISMISSED. The remaining findings are AFFIRMED.

A majority of the court finds that a dishonorable discharge, five years and six months confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1 should be approved for appellant's offenses.

However, given that we set aside Additional Charge II and its specification, we must also reassess the sentence. Reassessing the sentence on the basis of the

error noted, the entire record, and in accordance with the principles of *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), we AFFIRM only so much of the sentence as provides for a dishonorable discharge, five years confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. All rights, privileges, and property, of which appellant has been deprived by virtue of that portion of the findings set aside by this decision, are ordered restored.

WOLFE, Judge, concurring.

All three judges on the panel arrive at different conclusions as to the appropriate sentence in this case. In my assessment after reviewing the entire record I would initially approve a dishonorable discharge, confinement for two years and six months, total forfeiture of all pay and allowances, and reduction to the grade of E-1. In my view this sentence adequately punishes appellant for the offenses of which he was ultimately convicted. However, I also agree with Judge Febbo that–in any event –we should not approve a sentence of more than five years of confinement. Accordingly I concur with the sentence.

I would also revisit our holding in *Kelly* that the failure to object to errors in argument waives, rather than forfeits, the error.[13]

MULLIGAN, Senior Judge, dissenting, in part.

I agree with all parts of the opinion except for our assessment of the sentence. I would initially approve only so much of the sentence as extends to a dishonorable discharge, confinement for six years, total forfeiture of all pay and allowances, and reduction to the grade of E-1. In light of the dismissed specification, I would only affirm a dishonorable discharge, confinement for five years and six months, total forfeiture of all pay and allowances, and reduction to the grade of E-1.

For the reasons stated by Judge Febbo I would likewise not revisit our decision in *United States v.* Kelly, 76 M.J. 793 (Army Ct. Crim. App. 2017).

FEBBO, Judge, concurring.

A. Sentence Appropriateness

In giving individualized consideration to this particular appellant, the nature and seriousness of the offenses, appellant's record of service, the record of trial, and

[13] I was the author of this Court's opinion in *Kelly*. Nonetheless, I am persuaded by our sister court's treatment of the issue in *Motsenbocker* that we (or at least I) overstepped. While I recognize that the issue is now squarely before the CAAF, I would not wait to revisit the issue.

other matters presented by appellant in extenuation and mitigation (to include R.C.M. 1105 and 1106 matters), I would initially approve only so much of the sentence as extends to a dishonorable discharge, confinement for five years and six months, total forfeiture of all pay and allowances, and reduction to the grade of E-1. I am mindful that the panel had the benefit of seeing and hearing the evidence and demeanor of the government and defenses witnesses which may explain the panel's sentence to confinement.

Trial court judges and panel members are responsible for determining a proper sentence. Article 66(c), UCMJ, requires us to take into account that the trial court saw and heard the evidence. In conducting our sentence appropriateness review, we review the factors presented and considered by the panel in sentencing "to include: the sentence severity; the entire record of trial; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct." *United States v. Martinez*, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 5 Sep. 2017). The panel was presented evidence in extenuation and mitigation, to include appellant's combat duty from his deployment to Iraq and his receiving a Combat Action Badge (CAB). The panel was also presented with evidence in aggravation, evidence of appellant's lack of rehabilitative potential, and negative personnel records of the appellant.

The Article 92 offenses for violating a general order by providing alcohol to minors, the Article 120 abusive sexual contact, and the Article 120b lewd act with a minor were serious offenses and undermined appellant's status as a former noncommissioned officer (NCO). The panel was instructed that the maximum punishment for which appellant was found guilty included a dishonorable discharge, forty-one years confinement, total forfeitures and reduction to E-1. The panel sentenced appellant to less than 20% of the total maximum confinement.

During sentencing, in considering appellant's rehabilitative potential, the panel was given a mendacity instruction if they concluded appellant willfully and materially lied under oath to the court about the violation of the general order and abusive sexual contact offenses. In considering appellant's character and military service, the panel was presented evidence about appellant's disciplinary history. Appellant received nonjudicial punishment under Article 15, UCMJ, and reduced from Sergeant to Specialist for use of cocaine while he was pending these court-martial charges. At the time appellant provided alcohol to minors and used cocaine, he was a trained Unit Prevention Leader (UPL) entrusted with keeping his unit free of drugs and alcohol abuse. When appellant provided alcohol to minors, he was an NCO, in his late 20s, entrusted to follow lawful regulations and entrusted with the safety and welfare of children while they were at his house. Instead, in order to socialize and party with seventh-grade teenage girls, appellant provided thirteen-year-old minors alcohol at his on-post quarters and outside in the woods, to the point where they became intoxicated. In providing the alcohol, appellant knew his actions were wrong and informed one of

the minors, "what happens in Vegas, stays in Vegas, and what happens in this house stays in this house." In addition, appellant slapped, touched, and grabbed his thirteen-year-old stepdaughter's buttocks in a sexual manner. Appellant's lewd acts had an adverse impact on her, made her feel like just an object, caused her to feel like less of a person, and undermined her trust in people.

Consistent with following and applying the plain language of the rules, I likewise see no harm in instructing panels with the full provisions of R.C.M. 1006. Even if not part of the Benchbook instructions, if an accused thought it was beneficial for sentencing, his defense counsel could request the military judge to instruct the panel with this additional language. Since instructions are not read in isolation, I do not find any error or prejudice in appellant's sentencing instructions.

The panel instructions before findings and court-martial procedure reinforce the presumption of innocence and the distinction between sentencing the guilty from the innocent. The evidence presented at sentencing, the arguments made by counsel, and instructions are limited to sentencing an accused for only findings of guilty. The military judge instructed the panel members to sentence appellant only for the offenses for which he was found guilty. R.C.M. 1006(d)(1) also clearly states that the members have a "duty to vote for a proper sentence for the offenses of which the court-martial *found the accused guilty*." (emphasis added).

Although I concur with the opinion's treatment of R.C.M. 1006, I read the second clause of R.C.M. 1006(d)(1) as directed more at members who voted for findings of not guilty and explaining their duty to vote for a proper sentence even if they personally do not believe appellant committed the offense. For those members, they cannot abstain and must vote "regardless of the member's vote or opinion as to the guilt of the accused." *Id.*

B. Sentence Reassessment

In light of the dismissed specification, there has been a change in the penalty landscape from a maximum of 41 years confinement to 26 years confinement. However, the nature of the remaining offenses captures the gravamen of appellant's criminal conduct to include the aggravating circumstances. In considering the totality of the circumstances of the remaining offenses, and applying *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013) and *United States v. Sales*, 22 M.J. 305, 307 (C.A.A.F. 1986), I would affirm a dishonorable discharge, confinement for five years, total forfeiture of all pay and allowances, and reduction to the grade of E-1.

C. United States v. Kelly

Additionally, I see no reason to revisit *United States v. Kelly,* 76 M.J. 793 (Army Ct. Crim. App. 2017), as Judge Wolfe suggests. I would apply the plain language of R.C.M. 919(c). As CAAF stated in *United States v. Reese*, courts "apply the ordinary rules of statutory construction in interpreting the R.C.M." 76 M.J. 297, 301 (C.A.A.F. 2017) (analyzing the plain language of R.C.M. 603(d)). R.C.M. 919(c) clearly states that an appellant who fails to object to an improper argument thereby waives objection.[14] The rule does not discuss forfeiture. R.C.M. 919(c) encourages resolution of potential errors at trial. Just as important, when arguing before a panel, if an objection that an argument is improper is sustained, the military judge can "immediately instruct the members that the argument was improper and that they must disregard it." *See*, R.C.M. 919(c) discussion. In extraordinary cases, the military judge can declare a mistrial. Without objections the parties do not have an opportunity to argue their positions before the military judge, the military judge is precluded from deciding the issue, and the trial court is deprived of establishing a full record of the issue for appeal. As we did in appellant's appeal, as part of our Article 66(c), UCMJ, review the parties can still argue whether the court should leave the appellant's waiver intact, or correct an error alleged for the first time on appeal. *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016). However, in applying and following the R.C.M., the issue is more properly framed and does not ignore the plain language of the rules. The CAAF will clearly decide this issue when they consider *United States v. Kelly*, No. 17-0559/AR (C.A.A.F. 20 Dec 2017) (order).

FOR THE COURT:

MALCOLM H. SQUIRES, JR.
Clerk of Court

[14] The use of the term "waiver" was intentional and the R.C.M. is consistent with applying waiver for failure to objections made during arguments in both findings and sentencing. *See* R.C.M. 919(c) and 1001(g)

APPENDIX C

DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060-5546

REPLY TO ATTENTION OF

JALS-GA

September 26, 2017

MEMORANDUM FOR CLERK OF THE COURT, U.S. COURT OF APPEALS FOR THE ARMED FORCES, 450 E STREET, N.W., WASHINGTON, D.C. 20442-0001

SUBJECT: Major ERIK J. BURRIS, ARMY 20150047; Docket No. 17-0605/AR

1. Pursuant to Rule 21(c)(2)(i), the United States will not submit a formal reply to the supplement to the petition in this case, including on those issues raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

2. The United States opposes the granting of a petition for review and relies on its response filed with the Army Court of Criminal Appeals.

CORMAC M. SMITH
Major, Judge Advocate
Office of The Judge Advocate General, United States Army
Appellate Government Counsel
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
C.A.A.F. Bar No. 36435

CF:

ZACHARY SPILMAN
Civilian Appellate Defense Counsel

APPENDIX D

Okay. Finally, I have Defense Exhibit Alpha, which is a stipulation of fact dated today, signed by Mr. C[redacted], Major D[redacted], and Major Burris.

Major Burris, before signing the stipulation, did you read it thoroughly?

ACC: Yes, sir. I did.

MJ: Do you understand the contents of the stipulation?

ACC: I do.

MJ: And do you agree with the contents of the stipulation?

ACC: I do.

MJ: Before signing this stipulation, did you and your -- did your defense counsel explain the stipulation?

ACC: Yes. We [sic] did.

MJ: And do you understand that you have an absolute right to refuse to stipulate to the contents of this document?

ACC: That's correct.

MJ: And you should enter into the stipulation only if you believe it's in your best interest to do so. Do you understand that?

ACC: Yes.

MJ: Major Burris, I want to ensure that you understand how this stipulation is going to be used. When counsel for both sides and you

agree to a fact or the contents of a writing, the parties are bound by the stipulation and the stipulated matters are facts in evidence to be considered along with all other evidence in the case. Do you understand that?

ACC: Yes. I do.

MJ: Knowing what I have told you and what your defense counsel has told you about this stipulation, do you still desire to enter into the stipulation?

ACC: Yes, sir. I do.

MJ: Do counsel concur with the contents of the stipulation?

ATC: Yes, Your Honor.

CDC: Yes, Your Honor.

MJ: Defense Exhibit Alpha for identification is admitted into evidence as Defense Exhibit Alpha.

Okay. I think that covers everything that we needed to do this afternoon.

DC: Your Honor, just one point on the ruling that you just gave us on the motion to compel Mr. H[redacted]. We do intend to renew our motion should W[redacted] or the J[redacted] testify to something contradictory to what we've heard from Mr. H[redacted].

MJ: To have him produced?

APPENDIX E

[redacted]

17 July 2015

MEMORANDUM FOR Commander, Headquarters, Fort Bragg, Fort Bragg, North Carolina 28310-5000

SUBJECT Letter in Support of MAJ Erik Burris

1. My name is [redacted] and I write this letter on behalf of MAJ Erik Burris.

2. By way of background, I was one of three of MAJ Burris' defense counsel, and the lone civilian. My background is 22 years in the active and reserve Army JAG Corps, and over 25 years of representing military members as a civilian defense counsel. This is the first time, to my recollection, that I have written a clemency letter on behalf of a client. Then again, this is the first time that I have been 100% convinced that an innocent client of mine has gone to prison.

3. Respectfully, this case is everything that is currently wrong with the military justice system. A case that should never have gone to trial in the first place has ended with an innocent man sentenced to 20 years confinement based in large part on the allegations of a vindictive ex wife whose testimony was so outlandish and fanciful as to lead the Article 32 investigating officer (A female Army 0-5 Judge Advocate) to conclude that she was a habitual liar whose testimony should not be believed.

4. I have racked my head to try and figure out how this happened. I have second guessed every single decision we as the defense team made. And I still don't know. I simply don't know how an innocent man goes to jail on allegations so absurd and patently false. I don't know how a convening authority and SJA ignore the well reasoned decision of an Article 32 officer to not refer a case to trial. I don't know how a panel of officers doesn't see through this charade of a trial and come to the only logical conclusion of an acquittal. I don't know how a prosecutor fails to disclose clearly exculpatory evidence until the middle of a trial. I don't know how we, as a defense team, failed. And mostly, I don't know how anybody gets any satisfaction out of this result. While the prosecutors were "high-fiving" themselves an innocent man goes to jail.

5. As if the above weren't awful enough, having gotten to know Erik Burris the man, I can attest that he is a kind, compassionate, and decent man. A man who gave his life to an Army that was so willing to throw him into a trash heap. A man who did everything he was asked to do for his country, and whose country turned its back on him. A man whose family loves him and supports him because they know the truth.

6. I will never forget sitting in a room with MAJ Burris after the panel announced their findings, and watching this grown man in a fetal position crying and proclaiming his innocence. I will never forget the sight of his family in stunned disbelief at this horrible miscarriage of justice. I will never forget the conversations I had with numerous members of the JAG Corps proclaiming that this was the end of their military careers, as they could no longer support a system that would allow this to happen. To say that MAJ Burris did not get a fair trial is the understatement of the century.

7. This has affected me on a very personal level. After 25 years of defending service members, I have decided that it might be time for me to move on, or at least no longer represent service members at courts-martial. Like my many friends in the JAG Corps, I cannot continue to hold up a system that would allow this atrocity.

6. POC is the undersigned at [redacted] Thank you for your time and consideration.

[redacted]

Enclosure 5
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APPENDIX F

happening. And now you've had a glimpse of inside that family; and you can see how Major Burris' crimes have destroyed family for so many people like grandparents and parents, Da[redacted] and D[redacted]; C[redacted] Senior, and A[redacted]; siblings, C[redacted] Junior; parents, R[redacted] and J[redacted] and W[redacted], who you heard piecing her life together bit-by-bit, her self-worth, her dignity, her identity as a woman, as a mother; and the children, Da[redacted], Me[redacted], and Ti[redacted].

The government asks that you sentence Major Burris to at least 16 years and a dismissal.

Ti[redacted] is 2 years old. These children -- these girls, they deserve a chance to not be afraid of going to school, not being afraid of going to sleep, a chance to grow up without fear, a chance to have control. Real harm -- real harm has come to these people because of the crimes of Major Erik Burris.

You heard from Dr. Whitehill that the best predictor of future behavior is past behavior, and you know Major Burris' past behavior. He needs time to fully appreciate what he has done to these people. And they need time to heal, to regain a sense of safety, a sense of family.

You heard W[redacted] say she finally feels like people have listened to her, like people have heard her. This is an opportunity