IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Sergeant (E-5) **Brian G. Short** United States Army, Appellant	) BRIEF ON BEHALF OF) APPELLANT))))) Crim. App. Dkt. No. 20150320)) USCA Dkt. No. 17-0187/AR)

RYAN T. YODER
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0666
USCAAF No. 36337

BRYAN A. OSTERHAGE
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF No. Pending

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Chief, Complex and Capital Litigation
Defense Appellate Division
USCAAF No. 32172

MARY J. BRADLEY
Colonel, Judge Advocate
Chief,
Defense Appellate Division
USACAAF No.

Issue Presented

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UNITED STATES,	)	BRIEF ON BEHALF OF APPELLANT
	)	
Appellee	)	
v.	)	
	)	
Sergeant (E-5)	)	Crim. App. Dkt. No. 20150320
Brian G. Short	)	
United States Army,	)	USCA Dkt. No. 17-0187/AR
Appellant	)	

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

Issue Presented

WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY MADE IMPROPER ARGUMENT AFTER REPEATEDLY ELICITING INADMISSIBLE TESTIMONY.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, [hereinafter UCMJ] 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On February 10, April 1, 10, and 27, and May 4-6, 2015, a panel sitting as a general court-martial tried Sergeant (SGT) Brian G. Short at Fort Stewart, Georgia. The panel convicted SGT Short, contrary to his pleas, of simple assault and assault

consummated by a battery, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2012). The panel sentenced SGT Short to a bad-conduct discharge. The convening authority approved the sentence as adjudged. On November 17, 2016, the Army Court affirmed the sentence.[1] On March 21, 2017, this Court granted review of the Army Court's decision.

Statement of Facts

1. Pre-trial Motions.

Sergeant Short was charged with forcible sodomy and multiple assaults against his wife. (JA 9). Before trial, the government moved to admit evidence under Military Rule of Evidence (Mil. R. Evid.) 404(b). (JA 515). The government asserted, "The evidence of uncharged misconduct includes numerous incidents of verbal, physical and sexual abuse that explains the history of their marriage and sequence of events that led to the victim reporting the abuse by the accused." (JA 515). The defense objected to the government's motion. (JA 528). The military judge granted in part and denied in part the government's motion. (JA 533).

The military judge ruled that the following evidence was admissible: the neighbor frequently saw bruises on Mrs. NS; Mrs. NS told the neighbor the accused grabbed her; and the neighbors were often called to intervene and calm

[1] The Army Court's opinion was silent as to the findings. *See United States v. Short*, ARMY 20150320, slip. op. at *5 (Army Ct. Crim. App. 17 Nov. 2016)(JA at 5).

down arguments. (JA 533). The military judge ruled that any evidence of SGT Short asserting financial control over Mrs. NS was not admissible, nor was the other various evidence the neighbors offered in their sworn statements. (JA 533).

The day before trial, on May 3, 2015, the government again provided notice of its intent to offer evidence under Mil. R. Evid. 404(b). (JA 535). The majority of the evidence on notice was identical to the evidence already ruled inadmissible by the military judge. (JA 535). On May 4, 2015, in an Article 39(a) session, the military judge noted that all but one of the paragraphs in the government's notice ran afoul of his previous ruling and reminded the government of his previous ruling. (JA 44).

The defense articulated a concern that while most of the paragraphs in the second notice were similar, it was not a "copy and paste job" and the defense had concerns the government was not clear on the military judge's ruling. (JA 48). Specifically, the defense stated, "We are concerned that Ms. [NS] is going to get up there and start talking about every bad thing that our client has allegedly done to her, which would run afoul of your ruling." (JA 48). The military judge stated, "Government, you are cautioned not to do that. You understand the court's ruling. You indicated you understood the court's ruling." (JA 48).

2. Opening Statements.

During opening statements, the government stated:

> I'm not asking you to take Mrs. [NS's] word for it when she takes the witness stand in this case, but I want to be clear. I am asking for one thing, that you be fair to her. It will not be easy to come into this courtroom, face the accused, and have to tell very personal sad events in her life, and literally have to relive it. She is going to have to relive this violence. It will not be easy for her. I'm not asking you take anything she says for granted, but I am asking you to be fair to her. And I'm asking you to try to understand her as she went through this relationship, as she - - -

(JA 76).

The military judge interjected and told counsel to "stay away from that." (JA 76). The military judge then instructed the panel that it is not supposed to "put [themselves] into the shoes of an alleged victim and try to imagine what they are feeling." (JA 76).

3. Government Case: Ms. NS.

The government called Mrs. NS as its first witness. During the government's examination of Mrs. NS there were twenty sustained objections. (JA 82-159, 221-234). Nine of those sustained objections dealt with the government's attempt to offer Mil. R. Evid. 404(b) evidence which ran afoul of the military judge's previous ruling. (JA 100, 102, 103, 106, 107, 111, 123, 148, and 229).

After the government's third attempt at offering inadmissible Mil. R. Evid. 404(b) evidence, the military judge *sua sponte* called an Article 39(a) session and asked the government counsel why they were asking questions contrary to the

judge's ruling and whether the government had questions about the ruling. (JA 103). Government counsel indicated that the answers were "going in a slightly different direction than they had previously." (JA 104). Government counsel also admitted that they had only briefly spoken to the witness about the judge's ruling, and asked the judge if they could prep the witness in the middle of the examination. (JA 104). The military judge denied the request as inappropriate. (JA 104).

The government elicited inadmissible Mil. R. Evid. 404(b) evidence three more times, and the defense asked for and received an Article 39(a) session. (JA 112). During this Article 39(a) session the defense moved for a mistrial. (JA 112). The defense asserted that there had been at least five if not more instances of inadmissible Mil. R. Evid. 404(b) evidence presented to the panel and that defense's previously expressed concerns of Mrs. NS's testimony "going off the rails" had come to fruition. (JA 114). The military judge ruled the inadmissible evidence was not of the nature as to be so prejudicial that a curative instruction would be inadequate. (JA 115). The military judge then harshly admonished *both* the government counsel and Mrs. NS with regards to what was admissible and what ran afoul of his previous ruling.[2] (JA 117-18).

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[2] The military judge stated:

> Now, what the court did rule with respect to the 404(b) evidence, and *I'm going to say this very loud and very clear.* This is--the following

Shortly thereafter, the government elicited testimony of an uncharged alleged choking incident[3] in direct violation of the military judge's stern admonishment. (JA 123). The defense again asked for an Article 39(a) session and renewed their motion for a mistrial. (JA 124). The government inexplicably argued the uncharged choking was both "not actually misconduct we would have charged," (JA 124), and part of the charged incident.[4] (JA 125). The military judge denied the motion and stated he would provide another curative instruction. (JA 128). The military judge then stated, "[i]f I have to readdress this again—well, I'm not going to tell you what—but I'm just giving you one—this is your last warning, Government?" (JA 128).

> evidence is admissible, okay, evidence that [Ms. KP] would often notice bruises on [Ms. NS]'s arms and legs, evidence that [Ms. NS] told [Ms. KP] that the accused had grabbed her, evidence that the [neighbors] were often called to intervene and calm down arguments of the accused and his spouse. *And that is all.*

(R. at 393)(emphasis added).

[3] After eliciting testimony regarding the charged assault the trial counsel asked, "What happened *after the fight was over*?" Ms. NS stated, "he took me back inside the house, pushed the couches together, made me lay down, and just held me by the throat and – till I went to sleep [putting both hands around her throat.]" (R. at 398)(emphasis added).

[4] Other discrete acts such as slapping Ms. NS's face and dragging her by the hair appeared separately on the charge sheet as part of the same event. (Charge Sheet).

The government then elicited that the appellant forbade his wife from attending a party, which was outside the Section III disclosures (JA 135). The government then elicited evidence that appellant sent a "gag and rope" to his wife after she filed an unrestricted report. (JA 148). The military judge found it violated his Mil. R. Evid. 412 ruling. (JA 148).[5]

At the end of the government's direct examination of Mrs. NS, the defense in an Article 39(a) session renewed their request for a mistrial. (JA 160). Specifically, counsel argued:

> We would like to renew our motion for a mistrial based on the multiple instances of the witness discussing uncharged misconduct outside the court's ruling, M.R.E. 412 evidence outside the court's ruling, statements by the accused that were not—that we were not given notice of. And based on that, Your Honor, we think that it is so prejudicial that our client cannot receive a fair trial. We move for a mistrial.

(JA 160). The military judge again denied the motion for mistrial and stated he was "satisfied that the curative instructions did resolve that situation." (JA 161).

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[5] The defense also believed this also violated the Mil. R. Evid. 404(b) ruling as well because the panel could believe it was evidence of a threat to do harm in light of Ms. NS filing an unrestricted report. This is supported by how the testimony came out at trial. The government asked, "So [SGT Short] is supposed to be corning back in November, and here it is in early November and you are filing a restricted report--or an unrestricted report. Can you tell us a little bit about why that timing worked out?" response: "He sent home a gag and rope."

During the government's redirect examination of Mrs. NS, the government again elicited testimony, outside the military judge's Mil. R. Evid. 404(b) ruling, that SGT Short tracked Ms. NS's cell phone. (JA 229). However, the military judge did not instruct the panel to disregard this testimony. (JA 229).

In total, during Ms. NS's testimony alone there were six sustained hearsay objections, three sustained leading objections, one violation of the Section III disclosures, one violation of the Mil. R. Evid. 412 ruling, and nine violations of the Mil R. Evid. 404 ruling. Specifically, during the course of NS's testimony, trial counsel elicited the following from Ms. NS in violation of the judge's Mil. R. Evid. 404(b) ruling:

> 1) that Ms. NS didn't remember if the sex in the garage was consensual (JA 100.);
>
> 2) that appellant would supposedly "yell at [Ms. NS] for hours."[6] (JA 103)
>
> 3) that SGT Short wouldn't let her go anywhere or do anything (JA at 102);
>
> 4) that their sex life wasn't good because SGT Short "would always watch porn and make comments [to Ms. NS]," (JA 106);[7]
>
> 5) that SGT Short allegedly broke into their neighbor's house in order to find her (JA 107);
>
> 6) that SGT Short supposedly poured a beer on Ms. NS and then threw a full beer can at Ms. NS and hit her in the head (JA 111);

[6] The military judge did not provide any curative instruction for this violation.
[7] The military judge did not provide any curative instruction for this violation.

7) that SGT Short allegedly "held [Ms. NS] by the throat and – till I went to sleep. [putting her hands around her throat]." (JA 123).

8) that SGT Short supposedly sent a gag and rope to Ms. NS after she filed an unrestricted report. (JA 148).[8]

9) that SGT Short "would track [Ms. NS] on her phone." (JA 229).

At the time of objections, the military judge gave short, non-specific curative instructions asking the panel to generally disregard the "answer" or none at all. (JA at 100, 107, 112, 148). The military judge provided additional curative instructions only after the motions for mistrial. (JA 119, 129).

4. Remainder of Government Case: Ms. KP and Ms. AH.

Government counsel continued to elicit inadmissible testimony from each of the two other government witnesses. (JA 248, 249, 251, 252, 261, 270, 279, 306, 308, 314, 316, 325, 329). The government elicited at least three more violations of the judge's Mil. R. Evid. 404(b) ruling. (JA 251, 270, 279, 314, 329).

Namely, the government 1) attempted to elicit appellant allegedly stole Ms. NS's phone and texted responses in order to conceal domestic disputes (JA 251); 2) elicited that Ms. KP, Ms. NS's best friend, told Ms. NS to leave her husband "if it is going to save [her] life," (JA 279); and 3) elicited that Ms. AH, a neighbor,

[8] The military judge found this violated only his Mil. R. Evid. 412 ruling (JA at 148); however, under the context under which it was elicited it was clearly presented as if it were meant to be a threat. Thus no curative instruction was provided for potential uncharged misconduct.

considered calling the police after hearing "ow, ow, ow" from next door (JA 314, 329).

5. Defense Case.

The military judge sustained eight more objections during the cross examination of the defense's witnesses. (JA 340-424). In particular, the government divulged a statement not included in the Section III disclosures in a leading question: that SGT Short allegedly told his neighbor he invited him over because he didn't want the MPs to get called. (JA 342). In addition, the government attempted to elicit hearsay statements[9] (JA 349, 351) and irrelevant testimony (JA 353, 415).

At one point, the military judge grew so frustrated he yelled at counsel, "Everybody back in my chambers!" (JA 357). The military judge did not put on the record what occurred or was discussed in his chambers following the incident. The military judge simply called the court to order and sustained the defense's objection. (JA 357).

Even after that, the assistant trial counsel became argumentative with the appellant's stepmother on an irrelevant issue, causing her to divulge her own private experiences with domestic violence and to cry in open court. (JA 422).

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[9] These hearsay statements were made by Ms. NS to friends about the alleged abuse after she had a motive to fabricate. (JA 349-357). The government persistently attempted to admit these as prior consistent statements over multiple sustained objections. (JA 349-357).

6. Closing Argument.

During government counsel's closing argument, counsel commented to the panel that SGT Short "stared at [Mrs. NS] for the entire afternoon while she gave that testimony." (JA 446). Counsel then asked the panel to "[i]magine how uncomfortable and how terrifying it was to sit on that stand." (JA 502).

Similarly to opening argument, Counsel then repeated the request for the panel to step into Mrs. NS's shoes and stated, "[i]magine how hard it is to say he beat me and he forced me to give him oral sex in a public place and I had to bite my husband to get away. Think about how humiliating that is when she's just coming to terms with the idea that there is abuse in that relationship at all." (JA 512).

7. The Army Court Decision.

The Army Court refused to apply applicable case law from the Supreme Court and this Court on government prosecutorial misconduct because "[a]s a court of criminal appeals we grade the homework of the trial court, not the trial counsel." (JA 3). The Army Court did not cite any case law to support this statement. Thus, the Army Court did not review whether the conduct of the trial counsel constituted prosecutorial misconduct, only whether the military judge erred in denying three separate motions for mistrial. (JA 1-5).

Summary of Argument

The government counsel[10] committed prosecutorial misconduct by "repeatedly and persistently" eliciting prohibited testimony and making improper argument which invited the panel to convict the appellant because he was verbally, physically, and financially controlling – not based on the evidence alone. *See United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014). The prosecution elicited this improper testimony in violation of the military judge's rulings, Military Rules of Evidence, and Rules for Courts-Martial approximately forty (40) times during the merits phase. Approximately sixteen (16) of these sustained objections violated the military judge's Mil. R. Evid. 404(b) ruling.

Further, the government counsel made improper argument in both opening and closing by arguing the "Golden Rule" and in closing argument by inviting the panel to draw negative inferences from appellant's right to confront witnesses. Finally, the *Fletcher* test weighs in favor of finding prejudice because the conduct was severe and pervasive, curative measures were insufficient, the evidence was not overwhelming, and there was no rhyme or reason to the split findings by the panel. *See United States v. Fletcher*, 62 M.J. 175, 179-184 (C.A.A.F. 2005). Thus

[10] The term government counsel is used to refer to both the trial counsel and assistant trial counsel collectively.

this Court cannot be confident the improper testimony or argument did not affect the findings.

Error and Argument

WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY MADE IMPROPER ARGUMENT AFTER REPEATEDLY ELICITING INADMISSIBLE TESTIMONY.

Law

"[P]rosecutorial misconduct is behavior by the prosecuting attorney that oversteps 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. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935) (internal quotation marks omitted)). Repeated and persistent violations of the Rules for Courts-Martial and Military Rules of Evidence may constitute prosecutorial misconduct. *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014).

Further, improper argument may also constitute prosecutorial misconduct when it is intended to inflame the passions of the panel or constitutes improper comment on an appellant's constitutional rights. *See United States v. Sewell*, 76 MJ. 14, 18 (C.A.A.F. 2017). To determine the impact of prosecutorial misconduct the court should balance three factors: (1) the severity of the misconduct, (2) the measures

adopted to cure the misconduct, and (3) the weight of the evidence supporting the convictions. *Id.* at 18.

When preserved by objection, appellate courts review allegations of prosecutorial misconduct *de novo*. *See Sewell*, 76 M.J. at 18 (citing *Hornback*, 73 M.J. at 159). Where there is no objection to prosecutorial misconduct, this Court reviews for plain error. *Id.* There is plain error when "(1) there was error; (2) the error was clear or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). Further, "error is clear if 'the trial judge and prosecutor [would be] derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *United States v. Gomez*, ___ M.J. at slip op. at *8 (*citing United States v. Frady*, 456 U.S. 152, 163 (1982)). Finally, "[P]rosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Hornback*, 73 M.J. at 160.

Argument

The government counsel committed prosecutorial misconduct by improperly eliciting testimony which invited the panel to convict the appellant because he was portrayed as a controlling spouse rather than based on the evidence alone. To that end, government counsel repeatedly and persistently violated the Mil. R. Evid. and

military judge's rulings over forty (40) times throughout the merits phase. In particular, the government violated the Mil. R. Evid. 404(b) ruling approximately sixteen (16) times during the merits phase, nine (9) of which were during the victim's testimony alone.

The trial counsel also committed prosecutorial misconduct by making improper arguments by commenting on the appellant's right to confront witnesses and in opening and closing by asking the panel to place themselves in the shoes of the victim.

Each prong of the *Fletcher* test weighs in favor of finding prejudice. First, the conduct was severe because there were at least forty (40) violations from opening to closing arguments on the merits during the short three-day trial. Second, of the approximately sixteen (16) curative instructions by the military judge at least half were imprecise or generalized and the sheer amount of impermissible testimony was too much to overcome by instruction. *See United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994). Third, the evidence of the remaining offenses was weak, relying on the victim's testimony with little corroboration. Critically, and unlike in *Hornback* and *Sewell*, there is no rhyme or reason to the convictions because SGT Short was acquitted of the offense with the strongest independent corroboration but convicted of weaker offenses.

Thus this Court cannot be confident the improper arguments did not contribute to the result.

A. The prosecution committed prosecutorial misconduct by eliciting or attempting to elicit improper testimony over sustained objections over forty (40) times and in contravention of the military judge's Mil. R. Evid. 404(b) rulings at least (16) times during merits phase.

The government counsel's approximately forty (40) violations of the military judge's rulings, Military Rules of Evidence, and Rules for Courts-Martial were prosecutorial misconduct. *See Hornback*, 73 M.J. at 160 (holding persistent and repeated violations of Military Rules of Evidence may constitute prosecutorial misconduct).

This case is worse than *Hornback*. In *Hornback*, the trial counsel committed prosecutorial misconduct by improperly eliciting testimony eighteen (18) times, twelve (12) of which were improper character evidence, and three (3) relevance objections, two (2) hearsay objections, and a privilege objection were sustained. *Hornback*, 73 M.J. at 162 (Baker, C.J., dissenting). Here, over forty (40) objections were sustained, including sixteen (16) involving improper character evidence, six (6) relevance objections, twelve (12) hearsay objections, three (3) Section III disclosure objections, eight (8) leading objections, and one (1) guilt-assuming hypothetical objection.

Also similar to *Hornback*, the government counsel's violations of the military judge's rulings and Military Rules of Evidence were persistent. In *Hornback*, the

trial counsel consistently violated the military judge's Mil. R. of Evid. 404(b) ruling in spite of numerous Article 39(a) sessions. *Id.* at 156-61. Here, both government counsel struggled time and again with the military judge's character evidence ruling as well as the prior consistent statement ruling. Namely, even after being admonished before trial and during numerous Article 39(a) sessions the government still managed to run afoul of the ruling at least sixteen (16) times. (JA 48, 104, 118, 128, 150). The inability to follow the military judge's instructions regarding prior consistent statements caused the military judge to demand, "[e]verybody back in my chambers!" (JA 357).

B. The government's arguments were improper because 1) they asked the panel to draw a negative inference from appellant's right to confront witnesses and 2) they were aimed at inflaming the passions of the panel by urging the panel to place themselves in the shoes of the victim while reliving the events of the offense.

1. Improperly commenting on the Sixth Amendment right to confront witnesses was error.

The trial counsel improperly commented that during the trial, appellant "stared at [Ms. NS] all afternoon" while she testified. It is impermissible to comment on exercising a constitutional right. *See United States v. Edwards*, 53 M.J. 351, 355 (C.A.A.F. 1992); *United States v. Carr*, 25 M.J. 637, 639 (A.C.M.R. 1987). Further, courts have found that commenting on the accused's staring at a victim during testimony violates his constitutional right to confront witnesses. *See e.g., State v. Jones*, 71 Wn. App. 798 (Wash. Ct. App. 1993)(finding right of

confrontation compromised by prosecutor's remarks in closing argument on defendant staring at victim).

Here, the trial counsel effectively urged the panel to draw a negative inference from appellant's right to be present during the victim's testimony. The trial counsel argued "she had to sit in the same room as . . . the person who beat her. The person who sexually abused her." However, the trial counsel did not stop there, rather the trial counsel added, and "he stared at [Ms. NS] all afternoon" – not he was present – but "he stared." This negative characterization invited the panel to infer that SGT Short did not have the constitutional right to confront his accusers. Thus, this argument was improper.

2. Arguments asking the panel to place themselves in the shoes of the panel were error.

The government erroneously argued the panel should put themselves in the place of the victim while she was reliving and retelling the alleged event. *See United States v. Baer*, 53 M.J. 235, 237-38 (C.A.A.F. 2000). "Golden Rule" arguments that ask the panel to place themselves in the position of the victim are improper and impermissible in the military justice system. *Id.* (internal citations omitted).[11] However, an argument asking members to imagine the victim's fear or

[11] Additionally, the court reviewed multiple cases where the panel was asked to place themselves in the position of a near family member. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976)(trial counsel asked members to place themselves in the position of rape victim's husband, who was restrained and

pain is permissible if "it is simply asking the members to consider victim impact evidence." *Id.* (internal citations omitted).

Here, the trial counsel urged the panel to place themselves in the shoes of the victim during the time of the charged offenses. First, during opening, the government counsel argued, "I'm asking you to try to understand her *as she went through this relationship*." (JA 76)(emphasis added). This asked the panel to relive the events as they happened during the time of the offenses, clearly fall into the prohibited statements in *Baer*. *See* 53 M.J. at 237-38.

Further, on closing, the trial counsel argued, "[i]magine how hard it is to say he beat me and he forced me to give him oral sex in a public place . . . Think about how humiliating that is *when she's just coming to terms with the idea that there is abuse in that relationship at all*." (JA 512)(emphasis added). These arguments were designed for the panel to place themselves in the victim's shoes while experiencing the alleged humiliation at the time of the charged offenses. Thus, these arguments violated the "Golden Rule." *See Baer*, 53 M.J. 237-8.

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watched as his wife was repeatedly raped); *United States v. Wood*, 18 U.S.C.M.A. 291, 40 C.M.R. 3 (1969) (trial counsel asked members to sentence accused from the perspective that their own sons had been the victims of indecent liberties by the accused); *United States v. Teslim, 869 F.2d 316, 327* (7th Cir. 1989) ("A 'Golden Rule' appeal in which the jury is asked to put itself in the plaintiff's position 'is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.'").

3. The improper arguments were plain and obvious error.

While neither argument was preserved by objection at trial, the erroneous arguments were plain, clear, or obvious because the "the trial judge and prosecutor [would be] derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *See Gomez*, ___ M.J. at slip op. at *8 (C.A.A.F. 2017)(*citing Frady*, 456 U.S. at 163).

In particular, the "Golden Rule" arguments were plain, clear, or obvious because the military judge sua sponte cautioned against the error in opening, yet the government disregarded the instruction during findings argument. In other words, the error is clear under *Gomez* because the government had a duty to follow the judge's earlier admonishment and the judge had a duty to ensure his rulings were complied with. Additionally, the error was plain and obvious in light of the government's repeated attempts during trial to bolster the victim's reporting through impermissible consistent statements to others. (JA 357). Finally, commentary on appellant's "staring" in light of the numerous attempts at trial to cast appellant as an abusive, controlling husband makes the improper arguments plain, clear, or obvious.

C. The *Fletcher* factors weigh in favor of finding prejudicial error.

1. Government Counsel's misconduct was severe due to the extraordinary number of errors in violation of military judge's rulings which elicited improper testimony throughout the entire merits phase of the three-day trial.

Government counsel's improper arguments and conduct garnering forty (40) sustained objections, at least twenty of which violated the military judge's rulings, during the entire three-day trial is severe. *See Hornback*, 73 M.J. at 153. Each of the factors discussed in *Fletcher* weigh heavily in favor of appellant.[12] *See Fletcher*, 62 M.J. at 184-85.

Again, this case is worse than *Hornback*. 73 M.J. at 160-61. In *Hornback*, the trial counsel, who also appeared unable to follow the military judge's rulings, "attempted to elicit improper testimony from nearly every witness during the Government's case-in-chief, and made arguably improper argument during her closing argument." *Id.* However, in this case, as stated supra, the pervasiveness and persistence of the government counsel outmatches even the counsel in *Hornback*. In this case, there were more sustained objections[13] and more

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[12] In *Fletcher*, this Court stated indicators of severity include:

> (1) The raw numbers—the instances of misconduct as compared to the overall length of the argument,
> (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the finding argument or the case as a whole;
> (3) the length of the trial;
> (4) the length of the panel's deliberations, and
> (5) whether the trial counsel abided by any rulings from the military judge.

Fletcher, 62 M.J. at 184-85.

[13] In this case there were forty (40) sustained objections, while in *Hornback* this Court noted only 24 total objections. 73 M.J. at 162 (Baker, C.J., dissenting).

improperly elicited testimony from every government witness,[14] during more phases of a similarly short three-day trial.[15] (See Appendix).[16]

Critically, similarly to *Hornback*, the majority of the improperly elicited testimony related to bad character evidence. *See* 73 M.J. at 160-61; (Appendix). In this case, the testimony improperly heard by the panel effectively brought to fruition what the defense feared from the beginning: the government put Ms. NS on the stand and "let her run rampant" to present SGT Short "as an awful husband" so the panel would find that he assaulted her. (JA 29-30). This is exactly the behavior in *Hornback* which the majority found was severe and Chief Judge Baker

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[14] In this case there were at least twenty (20) violations of military judge's rulings, eliciting at least sixteen (16) instances of improper testimony. Further, in *Hornback*, improper testimony was elicited from "nearly every witness," but in this case, improper testimony was elicited from every government witness. 73 M.J. at 160.

[15] Unlike in *Hornback*, the government counsel in this trial committed prosecutorial misconduct in opening argument and during cross examination of defense witnesses.

[16] Appellant has attached a chart depicting all the relevant impermissible testimony the panel heard in violation of the military judge's Mil. R. Evid. 404(b) and 412 rulings, as well as failure to pro vide Section III notice, impermissible hearsay, etc. (Appendix).

found particularly concerning in his dissent. 73 M.J. at 162 (Baker, C.J., dissenting).[17]

Finally, government counsel's inappropriate comments during closing arguments were egregious. Not only did government counsel comment on SGT Short's exercise of his Sixth Amendment right to confrontation in an attempt to garner sympathy for Mrs. NS, but government counsel also blatantly violated the military judge's earlier admonition not to ask the panel to step into Mrs. NS's shoes. Thus this court should find government counsel's misconduct both pervasive and severe.

2. Measures adopted to cure the misconduct were insufficient because no amount of curative instructions could have remedied the errors and, even if the instructions could, because the military judge's instructions were mostly generalized or nonexistent.

No amount of curative instructions could have remedied the amount of improper testimony heard by the panel in this case. *See United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994)(stating "[w]hen improper inquiries and innuendos permeate a trial to such a degree as occurred in this case, we do not believe that instructions from the bench are sufficient to offset the

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[17] Chief Judge Baker, concurring with the majority on severity of misconduct, stated, "Character evidence is particular anathema to U.S. notions of fair trial, running the risk as it does that members may be swayed to convict not on the basis of evidence, but because the defendant is a bad person deserving of punishment." *Hornback*, 73 M.J. at 162 (Baker, C.J., dissenting).

prejudicial effect suffered by the accused."); *see also United States v. Thompkins*, 58 M.J. 43, 47-48 (C.A.A.F. 2003)(stating while panel members are presumed to follow the law, "instructions alone may not cure all instances of misconduct.").

The sheer amount of improper character testimony heard by the panel exceeds that in *Hornback* and exceeds the "tipping point," described by Chief Judge Baker in his dissent. 73 M.J. at 162 (Baker, C.J., dissenting). No less than twenty different statements and adverse inferences towards SGT Short's character or other acts permeated the short merits case and were heard by the panel due solely to the prosecution's misconduct. (Appendix). Thus, the unique circumstances of this case comprise a situation where this Court and other federal courts have noted that "instructions alone may not cure all [the] instances of misconduct." *Thompkins*, 58 M.J. at 47-48; *see also Moore v. Morton*, 255 F.3d 95, 119-20 (3d Cir. 2001); *United States v. Weatherspoon*, 410 F.3d 1142, 1152 (9th Cir. 2005); *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992); *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990); *Crutchfield*, 26 F.3d at 1103.

Even if curative instructions could have cured the misconduct, the measures taken by the military judge in this case fell woefully short. Unlike the judge in *Hornback*, who left no stone unturned, the military judge took insufficient measures to cure government counsel's misconduct. *See Hornback*, 73 M.J. at 161. The military judge's sixteen (16) curative instructions were not enough to

counteract trial counsel's forty (40) sustained objections and over twenty (20) improper comments or inferences. (JA 100, 102, 103, 107, 112, 119, 129, 135, 148, 141, 251, 282, 314, 342, 358). On most occasions the military judge provided only generalized admonishments to simply disregard the testimony after the panel had already heard it, often vaguely prohibiting the "last statement" after numerous statements. (JA 107, 112, 151, 153, 314, 342, 358). Some improper character evidence garnered no instruction at all. (JA 103, 106).

The only two specific curative instructions issued by the military judge were given only after the defense requested a mistrial. (JA 100, 119). Any other measures the military judge took to address government counsel's conduct after the "[e]verybody in my chambers" exclamation are unknown because nothing was put on the record. (JA 357). However, unlike the judge in *Hornback*, the judge in this case did not give any comprehensive instruction prior to findings to disregard the wide swath of improper evidence that was heard by the panel. *See Hornback*, 73 M.J. at 161.

Lastly, when government counsel attempted to have the panel step into the shoes of Mrs. NS during opening statements, the military judge rightfully stopped counsel and immediately instructed the panel that on the impropriety of government counsel's request. (JA 76). However, when government counsel disregarding the judge's previous admonishment and asked to panel to again step

into the shoes of Mrs. NS, the military judge did nothing. (JA 446). The military judge also failed to act when government counsel commented on SGT Short's exercise of his Sixth Amendment right to confront the witnesses against him in an attempt to garner sympathy for Mrs. NS. (JA 446).

3. The Weight of Evidence Supporting Conviction Was Weak and There Was No Apparent Reason for the Mixed Findings.

The government's case against SGT Short was not overwhelming. Most, if not all, the evidence was provided by Mrs. NS, who had credibility issues due to her evident biases. Ms. NS and other witnesses testified that she believed SGT Short was cheating on her. Further, prior to reporting, she was in a custody battle for their children. Thus, there were motives for the sole witness to lie.

The defense called multiple witnesses to discount and undermine the statements of Ms. NS, to include SGT Peoples, who was a neutral party. He indicated that there were arguments, but neither had indicated that there was physical or sexual abuse. Further, medical records failed to corroborate injuries which would have occurred as a result of the offenses, especially those she alleged to have occurred while she was pregnant. (R. at 769-70).

Further, the record demonstrates the panel didn't wholeheartedly believe Mrs. NS as they acquitted SGT Short of half of the specifications. As Chief Judge Baker explained in his dissent in *Hornback*:

> In context, the fact that members acquitted on five of eight charges can cut both ways. It can suggest that members carefully followed the military judge's instruction. But it can also suggest that members found the Government's case close and were open to persuasion, in which case character evidence may have made a difference, either directly or indirectly, by giving members a margin of comfort that, even if there was doubt, Appellant deserved what he got.

Hornback, 73 M.J. at 164 (Baker, C.J., dissenting).

No rhyme nor reason can be necessarily drawn from the panel's findings as this Court did in *Sewell*. In *Sewell*, this court found that the CID statement of the accused and the testimony of corroborating witnesses were sufficient to find there was no prejudice as to the main charges and the lack of corroboration accounted for the acquittals. *Sewell*, 76 MJ. at 19. There was a clear line: where there was corroboration, he was found guilty.

However, unlike in *Sewell*, the sole source of evidence here was the victim without any corroborating physical evidence or statements by the accused. *See id.* The only potentially corroborating witnesses, the Peoples, noted bruising on Ms. NS, including under her eye, but SGT Short was acquitted of the charge of pushing her head into the hood of a car. Indeed, the charges for which SGT Short was convicted had nearly the same quantum of evidence as those he for which he was acquitted. Thus, unlike in *Sewell*, there is no clear line, evidentiary or otherwise, the panel followed in convicting SGT Short.

Thus, on this record, this court cannot be confident that the panel convicted SGT Short on the basis of the permissible evidence alone. *See Fletcher*, 62 M.J. at 184. Thus the government counsel's misconduct requires reversal.

Conclusion

WHEREFORE, appellant requests this Court grant his petition for review.

RYAN T. YODER
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0666
USCAAF No. 36337

BRYAN A. OSTERHAGE
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
USCAAF No. Pending

CHRISTOPHER D. CARRIER
Lieutenant Colonel, Judge Advocate
Chief, Complex and Capital Litigation
Defense Appellate Division
USCAAF No. 32172

MARY J. BRADLEY
Colonel, Judge Advocate
Chief,
Defense Appellate Division
USACAAF No. 30649

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Short, Crim. App. Dkt. No. 20150320, USCA Dkt. No. 17-0187/AR, was electronically filed with the Court and Government Appellate Division on April 27, 2017.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736

APPENDIX

The following is a non-exhaustive list of improperly elicited testimony in *United States v. Short*.

1) Ms. NS didn't remember if the sex in the garage was consensual (JA 100.);

2) Appellant would "yell at [Ms. NS] for hours." (JA 103);

3) Sergeant Short wouldn't let her go anywhere or do anything (JA at 102);

4) Their sex life wasn't good because SGT Short "would always watch porn and make comments [to Ms. NS]," (JA 106);

5) Sergeant Short broke into their neighbor's house in order to find her (JA 107);

6) Sergeant Short poured a beer on Ms. NS and then threw a full beer can at Ms. NS and hit her in the head (JA 111);

7) Sergeant Short "held [Ms. NS] by the throat and – till I went to sleep. [putting her hands around her throat]." (JA 123);

8) In order to conceal her injuries, SGT Short told someone they were not attending a party because Ms. NS was pregnant. (JA 135);

9) Sergeant Short sent a gag and rope to Ms. NS after she filed an unrestricted report. (JA 148);

10) Sergeant Short "would track [Ms. NS] on her phone." (JA 229);

11) Sergeant Short asked SGT Peoples to come over the first time because he was afraid of the implications of a fight with Ms. NS in April. (JA 248);

12) Ms. KP received a text message from who she thought was Ms. NS, but it was not from her, creating the perception that SGT Short was seeking to conceal the potential misconduct. (JA 251);

13) The government doubled down on the previous statement and attempts to elicit who informed her that Ms. NS did not send a text saying she was fine, cementing the perception that SGT Short was seeking to conceal potential misconduct. (JA 251);

14) Ms. KP asked about bruises on Ms. NS's arm and Ms. NS told her something about them. This was misleading because immediately before the sustained question, the government examination was asking about Ms. KP observing bruising in 2012. However, the government question referenced a discussion between Ms. NS and Ms. KP that occurred a year later, after a motive to fabricate was established. Thus the panel was left with the inference that Ms. NS told Ms. KP about how she got the bruises at the time of the alleged assaults. (JA 261);

15) After being told there was "marital discord" by Ms. NS (as restricted by the military judge's ruling) Ms. KP advised Ms. NS to leave SGT Short "if it is going to save your life" inferring that the "discord" were threats of violence. (JA 279);

16) Ms. AH wondered if she should call the police after she heard Ms. NS stating "ow, ow, ow" through the wall of their apartment. (JA 314);

17) Ms. NS told Ms. AH that she was physical abused by SGT Short. Government erroneously attempted to elicit a prior consistent statement, thus effectively improperly corroborated Ms. NS's testimony. (JA 319);

18) that SGT Short told SGT Peoples he called him over because he was afraid the noise would get the military police involved, thus inferring he was guilty of something. (JA 341);

19) Sergeant Peoples later learned that the bruise over her eye was not, in fact, from rough sex. The government counsel attempted to elicit this twice in a row after sustained objections. (JA 349);

20) Sergeant Peoples had conversations with Ms. KP where he learned information about incidents that took place between Ms. NS and SGT Short after the fact, creating an inference that Ms. NS told his wife she had been assaulted consistent with her testimony, thus bolstering her statement. (JA 352);

21) The government used a guilt assuming hypothetical to create the inference that "if somebody had to go over and break up fights on a monthly basis that may be a sign of domestic violence?" (JA 418).