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 APPELLEE)))) Crim. App. Dkt. No. 20150320)) USCA Dkt. No. 17-0187/AR))

MELISSA DASGUPTA SMITH
Major, Judge Advocate
Branch Chief, Government Appellate Division
U.S. Army Legal Services Agency
9275 Gunston Road, Room 2003
Fort Belvoir, VA 22060
(703) 693-0822
Melissa.d.dasguptasmith.mil@mail.mil
U.S.C.A.A.F. Bar No. 36108

A.G. COURIE III
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 36422

MARK H. SYDENHAM
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No 34432

Index of Brief

Table of Authorities

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Issue Presented

WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY REPEATEDLY ELICITED INADMISSIBLE TESTIMONY AND MADE IMPROPER ARGUMENT.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2012) [hereinafter UCMJ]. The statutory basis for this Court's jurisdiction is Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

A panel with officer and enlisted members sitting as a general court-martial convicted Sergeant Brian G. Short (Appellant), contrary to his pleas, of simple

assault (one specification) and assault consummated by battery (four specifications), in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2012) [hereinafter UCMJ]. (JA 6-9). The panel acquitted Appellant of forcible sodomy (one specification), assault consummated by battery (three specifications), and aggravated assault with means likely to produce death or grievous bodily harm (one specification), in violation of Articles 125 and 128, UCMJ. (JA 6-9). The panel sentenced Appellant to be discharged from the service with a bad conduct discharge. (JA 7). The convening authority approved the sentence. (JA 1).

On November 17, 2016, the Army Court of Criminal Appeals affirmed the findings and sentence. (JA 1-5). On March 21, 2017, this Honorable Court granted the Appellant's petition for review.

Statement of Facts

In May 2011, Appellant met Mrs. NS through an online dating website while he was stationed in Korea and she was living in Florida. (JA 83). They continued the online relationship and later met in person in August 2011. (JA 84). The relationship progressed long distance until Appellant married Mrs. NS on 18 October 2011 and they began living together in February 2012. (JA 85-87). Mrs. NS described the beginning of their relationship as "wonderful" but within a few weeks after living together, Appellant began to physically abuse her. (JA 83-98).

The instances of domestic violence continued and Mrs. NS ultimately filed an unrestricted report with law enforcement in November 2013. (JA 145-147).

Mrs. NS alleged that Appellant unlawfully struck Mrs. NS in the head with a shampoo bottle (Specification 1 of Charge II), pulled and dragged her by her hair (Specifications 2 and 4 of Charge II), struck her legs (Specification 6 of Charge II), forced her to perform oral sex (The Specification of Charge I), shoved her head into the hood of a car (Specification 3 of Charge II), and struck her in the head and face (Specifications 5 and 7 of Charge II). (JA 89-164). Mrs. NS provided a detailed description of the assaults in Specifications 1, 2, 4, and 6 of Charge II, describing distances, locations of objects, the associated pain, and demonstrating her reactions to Appellant's assaults by holding her hands up over her head and behind her back. (JA 90-94). Mrs. KP, a friend and neighbor, corroborated Specifications 1 and 2 (the allegations that took place in May of 2012), as she observed bruises on Mrs. NS around that time period and was aware of several marital arguments. (JA 252, 258-261).

Mrs. NS did not testify that Appellant struck her in the head as alleged in Specification 5 of Charge II. (JA 123). Mrs. NS also testified that Appellant's brother and the brother's girlfriend were outside immediately prior to the allegation of forcible oral sex and that it occurred on the public street. (JA 110). Further, she testified that she had been drinking the night Appellant shoved her head into the

hood of a car. (JA 98). She went on to explain that she had to ask Appellant what happened when she observed her black eye resulting from the incident. (JA 101). Shortly after the incident, Mrs. NS jokingly told Mrs. KP that the injury was from "rough sex." (JA 101). With regard to Specification 7 of Charge II, Mrs. NS testified that she was in bed with Appellant, that she kicked him, that he started wrestling with her, and then Appellant slapped her in the face. (JA 133-134). Later, the defense counsel effectively cross-examined Mrs. NS, getting her to somewhat admit that her sex life with Appellant had, at one time included slapping, choking, or hair pulling. (JA 193-194). Appellant was acquitted of Charge I and Specifications 3, 5, and 7 of Charge II. (JA 6-7).

Before trial, the prosecution moved the court to admit evidence of uncharged misconduct pursuant to Military Rule of Evidence [hereinafter Mil. R. Evid.) 404(b). (JA 515). Appellant opposed the motion. (JA 528). The military judge granted the motion in part and denied it in part, making specific rulings regarding what uncharged misconduct would be admissible and what would be excluded. (JA 533).

Before opening statements at trial, the military judge "advise[d the panel] that opening statements are not evidence, rather they are what counsel expect the evidence will show in the case." (JA 68). Next, the prosecution gave an opening statement that spanned ten pages in the record, which previewed the evidence

related to the multiple acts of charged misconduct. (JA 68-77). At the conclusion of the statement, the prosecution started to make an improper comment, but was promptly interrupted by the military judge, sua sponte, in the following exchange:

> ATC: . . . I'm not asking you to take anything that [the victim] says for granted, but I'm asking you to be fair to her. And I'm asking you to try understand her as she went through this relationship, as she ---
>
> MJ: Counsel, stay away from that.
>
> ATC: Okay. I'm asking you to try to understand her.
>
> MJ: And, panel members, before I go any further, you are supposed to evaluate the evidence in this case. You are not supposed to put yourself into the shoes of an alleged victim and try to imagine what they were feeling like, so if I could just ask you to just please refrain from doing that.

(JA 76).

During the direct and redirect examination of Mrs. NS, Appellant objected to the prosecution's questions approximately twenty-nine times. (JA 82-165, 221-234). In response, the military judge sustained the objection (or the prosecution withdrew the question) twenty-three times, and overruled the objection six times. Only nine objections related to the military judge's ruling under Mil. R. Evid. 404(b), of which eight were sustained. (JA100, 102, 103, 106-107, 111-112, 123, 229). Almost every sustained objection regarding Mil. R. Evid. 404(b), Mil. R. Evid. 412, and Section III was also followed by a curative instruction to the panel to disregard both the question and the answer. (JA 100, 102, 103, 106, 107, 111,

112, 119, 123, 129, 135, 148-151, 229).[1] After giving curative instructions, the military judge noted or requested nonverbal signals (e.g. head nodding, hand raising) from panel members showing they understood and would follow the instruction. (114-115, 118-119, 129).

As an additional measure to clarify and enforce his Mil. R. Evid. 404(b) ruling, the military judge initiated one Article 39(a) session sua sponte and granted three of Appellant's requests for subsequent Article 39(a) sessions. (JA 103-104, 112-118, 124-129, 148-150, 160-164). During these sessions, the military judge personally instructed Mrs. NS on the scope of his Mil. R. Evid. 404(b) ruling, and allowed Appellant to help craft the curative instruction to the panel. (JA 117-119). The curative instruction clearly indicated to the panel that they were not permitted to consider any of the impermissible evidence.

> MJ: You have heard about three instances thus far of some uncharged misconduct, or perhaps misconduct, with respect to certain incidents, specifically the sex in the garage as to whether or not it was consensual, the perhaps a breaking in or some sort of burglarizing the Peoples' house in order to meet with Nicole, and also the throwing of a beer can at Nicole following the incident in Brooksville, Florida. All of these three incidents, they are not evidence. You are not to consider any of them, and you are not to draw any adverse inference towards Sergeant Short with respect to any general bad tendencies or that he had the propensity to commit any of the charged offenses.

[1] Specifically, of the nine listed complaints by Appellant, only three (#s 2, 4, and 9) were not followed by curative instructions. (App. Brief 8-9; JA 100, 102, 103, 106, 107, 111, 112, 119, 123, 129, 135, 148-151, 229). The testimony that Appellant would "yell" for hours did not run afoul of the military judge's ruling because it related to arguing. (JA 533-535).

> Can each panel member—do you understand that instruction and can you follow it? If you could, just signify by raising your hand.

(JA 119).

Doubting the effectiveness of the curative instructions, Appellant moved the court on three occasions to declare a mistrial. (JA 112-116, 124-128, 160-161). Before denying Appellant's motions, the military judge made the following, detailed findings:

> MJ: The court is aware of the military judge's discretion to declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings that cast substantial doubt upon the fairness of the proceedings. I understand that the power to grant a mistrial should be used with great caution and under urgent circumstances and for plain and obvious reasons. Examples would be where inadmissible matters so prejudicial that a curative instruction would be inadequate are brought to the attention of the members, or where the members engage in prejudicial misconduct. The court does not find that the evidence that has been brought in that has been counter to the court's Mil. R. Evid. 404(b) ruling is of such a nature as to be so prejudicial that a curative instruction would be inadequate. The court further finds that the evidence that was presented was in the context of what was going on at the time. The court told the panel members to disregard any mention of or anything with respect to whether the sex in the garage was consensual or whether she did not remember. The panel members indicated readily that they understood that and would disregard that. The panel members further, when I told them that they were not to consider and to disregard the throwing of a beer can, that they would disregard that as well. And I will provide them with additional instruction, curative instruction with

> respect to both of those when they return. The defense motion for mistrial is denied.

(JA 115-116).

Before closing arguments on the merits, the military judge reminded the panel that the arguments from counsel are not evidence, and they "must base the determination of the issues in the case on the evidence as [they] remember it and apply the law as [the military judge] instructed [them]." (JA 444). Afterwards, the prosecution gave a closing argument that spanned twenty-three pages in the record of trial and included the following statement:

> Let's talk about [Mrs. NS's] credibility. Talk about her demeanor on the stand. She was terrified, absolutely petrified sitting on that stand. She cried and she shook and she tore up tissues in her hands and she tried to just stop shaking. She took deep breaths and at times she had trouble focusing because for the second time, she escaped this abuse, she had to sit in this same room with the person who abused her. The person who beat her. The person who sexually abused her. And, he stared at her for the entire afternoon while she gave that testimony.

(JA 445-446). Appellant did not object to this argument. However, Appellant challenged Mrs. NS's demeanor and credibility multiple times during his argument, which spanned thirty-six pages in the record. (JA 466-501). Appellant specifically referred to Mrs. NS's demeanor as proof that her testimony was based on lies. (JA 467-468). During rebuttal argument, the prosecution again mentioned Mrs. NS's demeanor in the following context:

> Defense talked to you a little bit about credibility. About why you shouldn't believe Mrs. [NS] when she sat up there on the stand and told you everything she knew and every detail she could about what happened to her. They talked about how she looked up to try to find the truth. Members of the panel, you know why she was looking up. You know why she couldn't handle looking someone in the eye as she tried to relive all of her trauma, because if she looked at you, she would have completely melted down looking at more strangers, a room full of strangers, a room with the accused, a room with the person who abused her. If she made eye contact with those people, she wouldn't have been able to get her story out. Imagine how uncomfortable and how terrifying it was to sit on that stand.

(JA 501-502). Appellant did not object to this argument. In a similar context, the prosecution made another reference to the panel imagining Mrs. NS's feelings during rebuttal argument, which again met with no objection from Appellant. (JA 512).

This trial lasted three days and the panel deliberated for almost an hour and a half. (R. at 792, 803). The trial counsel's opening argument spanned approximately 8 pages of the 888 page record, the closing argument was 23 pages, and the rebuttal was 6 pages. (JA 68-77, 444-466, 501-507).

Summary of Argument

This Court should deny the Appellant's request for relief and affirm the lower court's findings that trial counsel's arguments did not amount to plain error and that any impermissible arguments or character evidence did not materially

prejudice a substantial right of the Appellant. The lack of prejudice in this case is supported by several logical acquittals and a reasonable sentence. While not specified by Appellant, the Court should also affirm the lower court's ruling that the military judge did not abuse his discretion in denying a mistrial.

WHETHER GOVERNMENT COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY REPEATEDLY ELICITED INADMISSIBLE TESTIMONY AND MADE IMPROPER ARGUMENT.

Standard of Review

Where proper objection is entered at trial, courts review alleged prosecutorial misconduct for prejudicial error. *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (citing *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). Where there has been no objection at trial, courts review claims of prosecutorial misconduct and improper argument for plain error. *Id.* at 159 n.3; Rule for Courts-Martial (R.C.M.) 919(c); *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011).

Law

"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.'" *Hornback,* 73 M.J. at 159 (quoting *Fletcher*, 62 M.J. at 179). The test for prosecutorial misconduct is (1) whether there has been "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 standard," and (2) whether there has been prejudice. *Id.* at 160 (citing *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). Similarly, 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. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Courts balance three factors when considering prejudice: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* (citing *Fletcher*, 62 M.J. at 184). "In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that [appellate courts] cannot be confident that the members convicted the Appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184.

"However, as a threshold matter, the argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [an appellate court's] inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Baer*, 53 M.J. at 238 (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)). The presence of prosecutorial misconduct by erroneous argument does not necessarily mandate dismissal of charges or a rehearing. *Hornback*, 73 M.J. at 160. "If every remark made by counsel outside of the

testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Dunlop v. United States*, 165 U.S. 486, 498 (1897).

Argument

Trial counsel's arguments in opening, closing, and rebuttal were not prohibited under the "golden rule." Because defense counsel did not object to trial counsel's argument regarding Mrs. NS' demeanor on the stand, the Court reviews for plain error. The arguments here do not rise to the level of plain error. They are distinguishable from *Marsh* where the trial counsel invited the panel to think about the accused repairing "your" aircraft, with no nexus in evidence between the charged offense (a false official statement to CID) and repairing an aircraft. 70 M.J. at 106-107. The case at hand is also distinguishable from *Baer* where the trial counsel stated "imagine being Lance Corporal (sic) sitting there as these people are beating him." 53 M.J. at 237. *See also United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1976) (finding improper argument where the trial counsel said "[p]ut yourself being forced down by one or two men, big men; picture being told to keep your head down but being able to glance out from the side; and picture your wife having her clothes ripped off her and then being raped, once, twice, three times, four times, five times. You picture that.").

The arguments in this case were different from those in *Marsh*, *Baer*, and *Shamberger*. 70 M.J. at 106; 53 M.J. at 237; 1 M.J. at 379. Here, the trial counsel mentioned Mrs. NS' demeanor to explain some of her mannerisms during testimony and address the criticisms from defense counsel, such as, "she did not look you in the eye," not to put the panel in her shoes. (JA 76, 467). Had the trial counsel said "imagine being Mrs. NS as he is relentlessly beating you while you are pregnant" or "how would you feel if your spouse abused you," such could have been an improper "golden rule" argument.

While the lower court doubted whether some of the alleged 404(b) violations from Appellant actually ran contrary to 404(b), it gave deference to the trial judge, who was in the best position to weigh the considerations of Mil. R. Evid. 403. (JA 1-5). Likewise, it gave deference to the trial judge in ruling on Appellant's motions for mistrial. (JA 4-5). This Court should also give deference to the trial judge, as there is no evidence of abuse of discretion and Appellant has not specified that issue.

Even if this Court finds plain error, the Court should affirm the findings and sentence because Appellant has failed to meet his burden to show prejudice in light of the military judge's extensive curative measures. Even if portions of trial counsel's argument were improper, they were small portions of argument and even smaller portions of the trial as a whole. The trial counsel's comments and direct

examination, taken as a whole, did not prejudice appellant and were not so damaging this court cannot be confident that the members convicted appellant on the basis of the evidence.

While the trial counsel's direct examination of Mrs. NS resulted in several objections under Mil. Rule of Evid. 404(b) from defense counsel and curative instructions from the military judge, the majority of these were not intentionally elicited by trial counsel but the result of the victim testifying slightly differently than anticipated. (JA 104). For example, the trial counsel asked if the sex in the garage prior to the incident charged in Specification 3 of Charge II was consensual, fully expecting the victim to respond affirmatively. (JA 113-114).

While Appellant argues that the military judge's curative measures were insufficient, the record of trial stands for the opposite proposition. Short of granting a mistrial or holding the prosecution in contempt, the military judge employed multiple and escalating curative measures. For example, during the testimony of Mrs. NS, the military judge gave numerous curative instructions for a variety of sustained objections. (JA 100, 102, 103, 106, 107, 111, 112, 119, 123, 129, 135, 148-151, 229). While the initial curative instructions were not sufficient to prevent further missteps from the prosecution, they were not ineffective as Appellant suggests because the target audience of the curative instructions was the panel as the trier of fact. When giving the curative instructions, the military judge

specifically noted and requested nonverbal cues from panel members showing they understood and would comply. (JA 114-115, 119, 129). Therefore, Appellant's claim that the curative instructions were not effective on the panel ignores the record of trial, is contrary to the findings of the military judge, and is unsupported by the mixed findings of the panel, which included several acquittals.

Moreover, the military judge did not only target his remedies at the panel, he also addressed them at the prosecution and the witness. For example, during the Article 39(a) sessions, the military judged sought to clarify any confusion the prosecution had regarding his Mil. R. Evid. 404(b) ruling, and admonished counsel "to be very careful" in their questions. (JA 104). Later admonishments to the prosecution were phrased as the "last warning" not to stray into improper questioning. (JA 128). Without relying on the prosecution to make the necessary adjustments in their questions, the military judge also instructed the witness directly about the permissible scope of her testimony. (JA 117-118).

In all these respects, the facts in this case are distinguishable from *Fletcher*, upon which Appellant relies, and are more akin to *Hornback*, which should guide this court's decision. In both *Fletcher* and *Hornback*, the prosecution engaged in multiple acts of misconduct in their argument or in eliciting testimony. *See Fletcher*, 62 M.J. at 184-85 (describing the trial counsel's improper comments, which "permeated her entire findings argument" as "both pervasive and severe");

Hornback, 73 M.J. at 160 (finding "[t]rial counsel repeatedly and persistently elicited improper testimony, despite repeated sustained objections as well as admonition and instruction from the military judge."). However, in *Fletcher*, the "military judge's curative efforts were minimal and insufficient" given the severity of the misconduct. 62 M.J. at 185. In contrast, the military judge in *Hornback* "appears to have left no stone unturned in ensuring that the members considered only admissible evidence in this case." 75 M.J. at 161. Specifically, the military judge in *Hornback*:

> called multiple Article 39(a), UCMJ, sessions to prevent tainting the panel. He issued repeated curative instructions to the members, each time eliciting that they understood and would follow his instructions. He also issued a comprehensive instruction during trial counsel's closing argument, again explaining that the members could not consider evidence that was the subject of a sustained objection for any purpose. The military judge acted early and often to ameliorate trial counsel's misconduct.

Id.

Although the weight of the evidence on one of the charges in *Hornback* was relatively weak and based on unsupported testimonial evidence, the court found "no evidence . . . that the members failed to comply with the military judge's instructions" when convicting the Appellant. *Id.* (explaining that "despite the clumsy attempts by the trial counsel to elicit improper character evidence related to drug use generally, the fact that the panel acquitted [a]ppellant of other, weaker

drug charges indicates that it took the military judge's instructions to disregard impermissible character evidence seriously"). While Appellant argues that the evidence here was weak and there was no rhyme or reason for the panel's findings, the record indicates the panel considered the evidence carefully and was not swayed by impermissible character evidence. For example, Mrs. NS testified in detail regarding the assaults that the panel convicted on. She described the times, locations, what occurred, and how she felt in detail. (JA 90-94). Specifications 1 and 2 of Charge II were corroborated by testimony from Mrs. KP regarding her observation of bruises and arguments. (JA 252, 258-261).

In contrast, Mrs. NS did not testify to being hit in the head at all as alleged in Specification 5 of Charge II. (JA 123). She barely remembered Appellant banging her head into the hood of a car as alleged in Specification 3 of Charge II because she was drinking alcohol that night, and later referred to the incident jokingly as "rough sex." (JA 101). Further, as defense pointed out in their motion under R.C.M. 917, Mrs. NS' description of the forcible oral sex was extremely brief and did not clarify that the Appellant's penis penetrated Mrs. NS' mouth. (JA 111, R. at 793). This testimony was also difficult to believe beyond a reasonable doubt without corroboration of other witnesses, given that the alleged incident occurred on a public street while Appellant's brother and brother's girlfriend were nearby. (JA 110). Finally, Mrs. NS' description of kicking Appellant while they were in

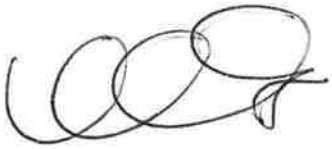
bed and wrestling with him prior to him slapping her as alleged in Specification 7 of Charge II, leaves several doubts given their past sexual behavior of slapping and wrestling during sex. (JA 133-134, 193-194). The panel's acquittals line up directly with the weakest charges, indicating a careful, deliberative, process based on evidence.

The panel sentenced Appellant to a bad conduct discharge as requested by him, and no confinement. (JA 7). Given the violent assaults on Mrs. NS, Appellant received a very reasonable sentence.

On balance of the three factors used to analyze prejudice, the facts in *Hornback* supported its findings and sentence while the facts in *Fletcher* could not. *Fletcher*, 62 M.J. at 185-86; *Hornback*, 73 M.J. at 161. Given the factual similarities in this case with the curative measures employed in *Hornback*, this Court should also hold that the balance of the prejudice factors favor the government, and demonstrate Appellant has failed to meet his burden for relief. Any error did not materially prejudice the substantial rights of Appellant. Accordingly, this court should affirm the lower court's findings in this case.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.



MELISSA DASGUPTA SMITH
Major, Judge Advocate
Branch Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 36108

A.G. COURIE III
Lieutenant Colonel, Judge Advocate
Deputy Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 36422

MARK H. SYDENHAM
Colonel, Judge Advocate
Chief, Government Appellate Division
U.S.C.A.A.F. Bar No. 34432

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

This brief contains 4,392 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because:

This brief has been typewritten in 14-point font with proportional, Times New Roman typeface using Microsoft Word Version 2013.

MELISSA DASGUPTA SMITH
Major, Judge Advocate
Attorney for Appellee
May 23, 2017

CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on May 24, 2017.

DANIEL L. MANN
Lead Paralegal Specialist
Office of The Judge Advocate
General, United States Army
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822