IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. ANTHONY M. BODOH Private (E-2) United States Army, Appellant	REPLY BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20150218 USCA Dkt. No. 18-0201 / AR

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

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ISSUE PRESENTED

WHETHER THE MILITARY JUDGE PLAINLY ERRED BY ALLOWING THE TRIAL COUNSEL TO MISSTATE THE LAW AND ARGUE THAT THE PANEL SHOULD BASE ITS VERDICT ON SHARP TRAINING.

ARGUMENT

A. The government distorts the meaning of "common sense" and "ways of the world" to justify the prosecutor's reliance on a command policy.

"The term ways of the world refers to court members' evaluation of lay testimony, defenses, and witness credibility." *United States v. Frey*, 73 M.J. 245, 250 (C.A.A.F. 2014). "What the military judge cannot do is invite members to substitute their understanding of the 'ways of the world' for evidence or for the military judge's instructions. . ." *Id.* at 251.

In *Fletcher*, this Court confirmed that prosecutors may comment on contemporary history or matters of common knowledge within the community. *Fletcher*, 62 M.J. 183 (internal citations and quotations omitted). For cases involving errors in *sentencing argument*, this Court permitted prosecutors to comment on topics such as routine personnel actions, knowledge of military actions overseas, knowledge of the Navy's zero tolerance policy for drug offenses, and U.S. efforts in the war on drugs. *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005) (citing *Barrazamartinez*, 58 M.J. 173, 175-76 (C.A.A.F. 2003); *United States v. Stargell*, 49 M.J. 92, 94 (C.A.A.F. 1998); *United States v. Meeks*, 41 M.J. 150, 158-59 (C.M.A. 1994); *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994)). Although there was no legal error in these generalized comments, this case presents a different question because the prosecutor's invocation of service policies permeated the entire trial and not just sentencing. More importantly, the principles and concepts of the SHARP Program are not common knowledge because they are continuously evolving. As a result, the prosecutor's invocation of SHARP training only served to undermine the force and effect of the military judge's instructions on the law.

First, the facts in the record demonstrate that the SHARP program is anything but a matter in which "men in general have a common fund of experience and knowledge. . . notoriously accepted by all." *Fletcher*, 62 M.J. at 183. While

the SHARP program is an Army mission as a whole, the SHARP program varies at each installation, which also includes unit makeup, gender makeup, and other factors. (JA 890).

Second, the Army's SHARP program evolves over time, with different emphasis on aspects within the program spanning several years. (JA 889). The Army adjusted the program from initially focusing on its response to sex assault, to where the Army placed emphasis in the program, where the Army allocated resources, and evaluating on what the Army defined as success in its program. (JA 889). Because the SHARP is intended to improve the culture within the service, not merely to stop or identify crimes, it includes training to discourage rude or boorish behaviors that may be precursors to actual crimes. In some instances, this has led to confusion about what is criminal misconduct.

For example, a member of the Army's Office of the Judge Advocate General stated, "[T]here is a myth in the Army, which should be dispelled, that once somebody has consumed one drink of alcohol, they are no longer capable of consenting to sexual activity." (JA 891). As a result, the SHARP program's training material required the government to correct the misstatement of law. (JA 891). Despite this attempt, not all individual units used the training material approved by senior leaders responsible for the Army's SHARP Program. (JA 891). Therefore, the Army' SHARP program, in 2015 and as it stands *today*, is

anything but a cohesive and standard program with guidelines understood and accepted by all.

This last point is significant: the government justifies the use of the Army's SHARP policy in a findings argument because it is part of the military judge's instruction on "common sense" and "ways of the world." (Gov't Br. at 23). However, the SHARP program is anything but a common fund of experience and knowledge when it is applied differently at each level of the chain of command, is subject to changes, and evolves over time. Additionally, the government's position is inconsistent with the direction from the prosecutor in his last statement to the panel, in which he described common sense and training as distinct concepts on which the panel could convict appellant. (JA 804).

B. The government ignores the severity of error that occurs when prosecutors invite panel members to rely on command policy during findings.

Appellee argues that the prosecutor "mentioned the Army SHARP Program in conjunction with proper arguments and inferences should be read in that context." (Gov't Br. at 22). However, invoking a command policy is an area where prosecutors are warned to tread lightly, especially one as prominent as the Army's SHARP Program. *United States v. Barramartinez*, 58 M.J. 173 (C.A.A.F. 2003). Appellant agrees with the government that context is important in this Court's evaluation of error. That context, here, is one in which the prosecutor mentioned SHARP in every phase of the trial. The only purpose for bringing

command policy into this court-martial was an improper one, as this Court has held as early as *United States v. Estrada*:

> It is unnecessary to suggest to the members of a court-martial that they implement a commander's policy. There is one reason that the commander's policies are brought to the attention of the Court. That reason is to influence the members in their decisions of the case before it, and this is error. . . .

Estrada, 7 U.S.C.M.A. 635, 638 (C.M.A. 1957); *see also United States v. Pope*, 63 M.J. 68 (C.A.A.F. 2006).

The prosecutor, whether intentionally or inadvertently, invited SHARP training and the specter of a command policy into appellant's trial and it was error to do so. Despite the government's assertions to the contrary, (Gov't Br. at 22-23), the scope of the prosecutor's permissible argument is not a cure for repeatedly invoking and arguing the application of the SHARP program to the trier of fact. Such invocations and references to SHARP training invite the command into the deliberative process. The errors in this case are more severe than other improper argument cases caused solely by a prosecutor's misstatements. (App. Br. at 27-28). Here, the prosecutor went beyond misstatements and invited the command into the court-martial by referencing to the Army SHARP Program, principles and standards of which continuously evolve.

C. The government overstates the strength of its evidence, and the mixed findings show the government's case was weak.

Appellee argues that "Mrs. VH's drug use, alcohol use, injuries, and fear of appellant" presented a compelling case. (Gov't Br. at 29). Additionally, the appellee claims that PV2 Bodoh's statements are incredible despite corroboration by PV2 Blazer, a witness the government relies upon to demonstrate the purported strength of its case. (Gov't Br. 29).[1] In actuality, the appellee does not address all the ways the government's case was not particularly compelling:

> (1) Mrs. VH recalls the sexual acts that occurred throughout the night, which contradicted her purported level of intoxication. (JA at 282, 286-290, 292, 320). Comparatively, DH described Mrs. VH as sober. (JA 555, 573);
>
> (2) The panel acquitted appellant of anal rape despite Mrs. VH's testimony, a medical hearsay statement, and expert testimony of corroboration. (JA 170-75);
>
> (3) The injuries to the vaginal area were also consistent consensual intercourse with someone on their menstrual cycle, according to expert testimony. (JA 173, 180, 362, 396);
>
> (4) Mrs. VH also made statements that she did not fear appellant. (JA 254, 258). Another witnesses and Mrs. VH's own actions corroborated her lack of fear of appellant. (JA 651-52);
>
> (5) Mrs. VH testified why she engaged in acts with appellant. (JA 304, 355, 340); and
>
> (6) Immediately after the event, Mrs. VH told PV1 Blazer that she loved both him and PV2 Bodoh as brothers and told PV1 Blazer to keep the

[1] For example, PV2 Blazer corroborated appellant's account that VH crawled around naked on the floor in the living room. (JA 686, 697).

> event a secret. (JA 308-10, 355). Additionally, Mrs. VH had motives to preserve her marriage and feared her husband would become violent if he believed the acts were consensual. (JA 296, 361).

The mixed findings[2] demonstrate that *something* rendered Mrs. VH's testimony unreliable on its own even where independent corroboration existed. For example, the panel acquitted PV2 Bodoh, through exception of the word "anus" from Charge II, despite physical corroborative evidence to the contrary. (JA 016). The mixed findings demonstrate that Mrs. VH's testimony, alone, was not enough as they acquitted appellant of Specification 1 of Charge III.[3] (JA 016, 274, 279). Instead, the mixed findings serve as substantial evidence that the members did not follow the military judge's instructions, and that their decision to convict PV2 Bodoh was based on something other than the admitted evidence. *United States v. Short*, 77 M.J. 148, (Ohlsen, J., dissenting) ; *United States v. Sewell*, 76 M.J. 14, 19 (C.A.A.F. 2017).

Instead of addressing these inconsistencies, the appellee tries to shift the focus to appellant's pretrial statements. First, the government's cumulative theory

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[2] Unclear are the sexual acts for which the panel convicted PV2 Bodoh. Mrs. VH testified to oral penetration in the bathroom, (JA 286), and in the kitchen, (JA 290). Mrs. VH also testified to vaginal penetration in the bathroom, (JA 282), and in the living room, (JA 292). The only time Mrs. VH alleged anal penetration was in the kitchen. (JA 288).

[3] Contrary to Mrs. VH's testimony, NH did not describe PV2 Bodoh as pulling Mrs. VH out of bed, but instead saw Mrs. VH go to the bathroom, and he later saw both Mrs. VH and PV2 Bodoh leave the bathroom. (JA 289).

of nonconsent is not supported by the record. Second, at trial and now on appeal, the government attempts to parse appellant's various pretrial statements out of context. Consistent throughout all of these statements is that PV2 Bodoh believed, or at least mistakenly believed, Mrs. VH consented to the sexual acts.

Comments to bolster, rehabilitate, and persuade the members through the Army's SHARP training instead of the facts, or inferences therefrom, shift the focus to something *other than* admitted facts and military judge's instructions. After emphasizing SHARP training throughout trial and closing arguments, the last statement the prosecutor left the panel with was, "You have the evidence. You have the common sense. You have the training. Find him guilty . . . ." (JA 804).

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing in the case of *United States v. Bodoh,* Crim. App. Dkt. No. 20150218, USCA Dkt. No. 18-0201 / AR, was delivered to the Court and Government Appellate Division on October 24, 2018.

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