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How to Handle the Truth: Avoiding Improper Sentencing Argument in Courts-Martial

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HOW TO HANDLE THE TRUTH: AVOIDING IMPROPER SENTENCING ARGUMENT IN COURTS-MARTIAL

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ABSTRACT

The Court of Appeals for the Armed Forces has identified a variety of sentencing arguments as improper. These arguments are improper because they encourage courts-martial to abandon disinterested impartiality or because they ask courts-martial to consider facts or opinions unrelated to the accused's culpability. This Article catalogs and classifies the improper arguments that violate these principles for use by the JAG Corps.

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I. INTRODUCTION

After a court-martial returns a finding of guilty, the parties turn to sentencing. The guidelines for sentencing are provided in Rule for Courts-Martial (RCM) 1001. But while this rule provides the matters each party may present to courts-martial, it also provides for "argument by trial counsel on sentence."[1] Sentencing argument is unlike argument on the findings. Trial counsel's argument on the findings aims to persuade courts-martial that certain events occurred (or not) and that those events match the elements of the alleged offense (or disprove an alleged defense). The Rules for Courts-Martial even explain that arguments on the findings "may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case."[2]

Argument on the sentence is different. The goal—a just sentence—is far less definite. The sentencing authority must pick a result from a range of possibilities. The government argues for severity; the defense for lenity. The factors are less tangible too: service data, the character of

1. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(a)(1)(E) (2024) [hereinafter MCM].

2. *Id.* R.C.M. 919(b).

the accused's prior service, prior convictions, evidence of aggravation, evidence of rehabilitative potential, the crime victim's statement, and evidence in extenuation or mitigation.[3]

Given the imprecision of the task, perhaps it is no surprise that trial counsel have often turned to creative arguments. But creativity can have a cost. As the Court of Appeals for the Armed Forces ("CAAF") recently admonished in *United States v. Voorhees*[4]:

> [T]he consistent flow of improper argument appeals to [the] Court suggests that those in supervisory positions overseeing junior judge advocates are, whether intentionally or not, condoning this type of conduct. As superior officers, these individuals should remind their subordinate judge advocates of the importance of the prosecutor's role within the military justice system and should counsel them to "seek justice, not merely to convict."[5]

Yet trial counsel was not alone in shouldering the blame. CAAF also pointed to defense counsel's failure to object and the military judge's failure to ensure sua sponte that the accused receives a fair trial.[6]

Besides counsel and military judges, another culprit lurks: the law of sentencing argument. It mostly consists of unhelpful aphorisms. For example, trial counsel "may strike hard blows, [but] he is not at liberty to strike foul ones."[7] What does this mean? The maxim is pithy but does little to explain what distinguishes a "hard blow" from a "foul" one. How are counsel and military judges to discern fair from foul arguments?[8] The absence of clear guiding principles forces courts to make ad hoc calls.

Unsurprisingly, these ad hoc calls have not coalesced into clear doctrine. Justice Sutherland's opinion for the Supreme Court in *Berger v. United States*[9] serves as the cornerstone in this area of the law.[10] The Court in *Berger* explained:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is

3. *Id.* R.C.M. 1001(a)(1)(A), (C), (3)(A), (b)(3)–(5).
4. 79 M.J. 5 (C.A.A.F. 2019).
5. *Id.* at 15 (quoting United States v. Fletcher, 62 M.J. 175, 182 (C.A.A.F. 2005)).
6. *Id.* at 14-15 (quoting United States v. Andrews, 77 M.J. 393, 403-04 (C.A.A.F. 2018)).
7. Berger v. United States, 295 U.S. 78, 88 (1935).
8. *Cf. Association of Boxing Commissions Regulatory Guidelines and Rules for All World and Regional Championship Bouts*, ASS'N OF BOXING COMM'NS AND COMBATIVE SPORTS, https://www.abcboxing.com/abc-regulatory-guidelines/ [https://perma.cc/UR4T-PWCV] (July 27, 2005) (providing examples of "types of contact or acts" which "do[] not meet the standard of a fair blow or the conduct of a responsible professional fighter").
9. 295 U.S. 78 (1935).
10. *Fletcher*, 62 M.J. at 179 (C.A.A.F. 2005) (quoting *Berger*, 295 U.S. at 88).

> as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[11]

Yet this passage provides no guidance about what it means "to govern impartially," to ensure "justice shall be done," or to avoid "improper methods" when it comes to sentencing arguments.[12] The ABA standards are somewhat more concrete, requiring prosecutors to avoid "expressions of personal opinion, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel."[13] These standards also state that trial counsel "should scrupulously avoid any comment on a defendant's right to remain silent."[14]

This Article provides guidance on "foul" arguments in courts-martial by cataloging and classifying the various ways military trial counsel have crossed the line. While others have undertaken similar studies in civilian courts,[15] this is the first Article to do so for the

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11. *Id.* (quoting *Berger*, 295 U.S. at 88).

12. *Id.*

13. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION Standard 3-6.5(c) (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [https://perma.cc/XN2X-CQJE].

14. *Id.*

15. *See, e.g.*, R. Collin Mangrum, *I Believe, The Golden Rule, Send a Message, and Other Improper Closing Arguments*, 48 CREIGHTON L. REV. 521, 521-22 (2015); Grant C. Jaquith, *A View from the Bench: Apply the Golden Rule, but Don't Argue It*, ARMY L., May 2008, at 36; Matthew U. Smith, Note, *Let the Punishment Fit the Criminal: The Use of Societal Value Arguments in Criminal Sentencing*, 21 GEO. J. LEGAL ETHICS 1063, 1064-65 (2008); Stephen A. Saltzburg, *Improper Use of the Trial Judge as Voucher*, CRIM. JUST., Spring 2007, at 57 (2007); Monica K. Miller & Brian H. Bornstein, *Religious Appeals in Closing Arguments: Impermissible Input or Benign Banter*, 29 L. & PSYCH. REV. 29, 32 (2005); Tyler J. Harder, *New Developments in Sentencing: The Fine Tuning Continues, but Can the Overhaul Be Far Behind?*, ARMY L., May 2001, at 67; Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 518-19, 538-39 (2000); Candice D. Tobin, *Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law*, 24 NOVA. L. REV. 35, 36-37 (1999); J. Thomas Sullivan, *Prosecutorial Misconduct in Closing Argument in Arkansas Criminal Trials*, 20 U. ARK. LITTLE ROCK L. REV. 213, 215 (1998); Brian C. Duffy, Note, *Barring Foul Blows: An Argument for a Per Se Reversible-Error Rule for Prosecutors' Use of Religious Arguments in the Sentencing Phase of Capital Cases*, 50 VAND. L. REV. 1335, 1338 (1997); James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send A Message" with Their Verdict?*, 22 AM. J. CRIM. L. 565, 569 (1995); H. Patrick Furman, Criminal Law Newsletter, *Avoiding Error in Closing Argument*, 24 COLO. L. 33, 33 (1995); A.J. Stephani, Casenote, *Dead Again: Prior Death Sentences in*

military justice system. This Article also develops a more concrete touchstone for assessing the propriety of sentencing arguments. Appropriate sentencing arguments must adhere to two fundamental principles: the argument must not (1) encourage the panel to abandon impartial disinterest; nor (2) ask the panel to consider the opinions of others or facts unrelated to the accused's culpability. In other words, any argument that compromises the disinterest of courts-martial or encourages them to base sentences on opinions or irrelevant facts.

Part II of this Article describes the standards of review by which appellate courts determine whether a sentencing argument merits reversal.[16] Part III of this Article describes improper arguments that compromise disinterest by levying personal attacks and threats.[17] Part IV describes improper arguments that compromise disinterest by invoking the Golden Rule and asking courts-martial to assess sentences from the perspective of an interested person.[18] Part V describes improper arguments that encourage courts-martial to substitute someone else's judgment for their own.[19] Finally, Part VI describes the variety of arguments that urge courts-martial to sentence the accused for reasons not specified in RCM 1001.[20]

II. STANDARDS OF REVIEW

As with any issue before an appellate court, the standard of review plays an important—often decisive—role in determining the outcome of an appeal.[21] The most important question for appeals about improper sentencing argument is whether the appellant preserved the issue at trial.[22] When the defense preserves an error by objecting to an improper

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Capital Sentencing Proceedings: Romano v. Oklahoma, *114 S. Ct. 2004 (1994)*, 64 U. CIN. L. REV. 249, 252 (1995); Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After* Payne v. Tennessee, 45 STAN. L. REV. 1027, 1029-30 (1993); Joshua N. Sondheimer, Note, *A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing*, 41 HASTINGS L.J. 409, 412 (1990); Jonathan Willmott, Comment, *Victim Characteristics and Equal Protection for the Lives of All: An Alternative Analysis of* Booth v. Maryland *and* South Carolina v. Gathers *and a Proposed Standard for the Admission of Victim Characteristics in Sentencing*, 56 BROOK. L. REV. 1045, 1048-49 (1990).

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

20. *See infra* Part VI.

21. *See* Mangrum, *supra* note 15, at 523-24.

22. *Id.* at 524-25 (first quoting State v. Tillman, 750 P.2d 546, 555 (Utah 1987); then quoting State v. Bakalov, 979 P.2d 799, 817 (Utah 1999); and then quoting United States v. Salley, 651 F.3d 159, 165 (1st Cir. 2011)).

argument at trial, military appellate courts review the issue de novo.[23] When an issue is reviewed de novo, "the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings."[24]

By comparison, when the defense does not object, the issue is forfeited and appellate courts will only review it for plain error.[25] When reviewing a non-constitutional issue for plain error, CAAF will only grant relief when: (1) there is error; (2) the error is clear or obvious; and (3) the error results in material prejudice to a substantial right of the accused.[26] While both de novo and plain error review require a showing of prejudice, plain error's clear-or-obvious requirement makes the road to relief considerably more arduous. An appellant must convince the court that "the error was so obvious 'in the context of the entire trial' that 'the military judge should be "faulted for taking no action" even without an objection.'"[27] Error is clear only if the court is convinced "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it."[28]

A third possibility is that an issue is waived.[29] If an issue has been waived, CAAF will not review the issue on appeal "because a valid waiver leaves no error . . . to correct on appeal."[30] The rule is different in the service appellate courts, whose responsibilities under Article 66 of

23. United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citing United States v. Andrews, 77 M.J. 393, 398 (C.A.A.F. 2018)).

24. *Appeal De Novo*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable.").

25. United States v. Norwood, 81 M.J. 12, 19 (C.A.A.F. 2021) (citing *Andrews*, 77 M.J. at 398).

26. United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018) (citing United States v. Davis, 76 M.J. 224, 230 (C.A.A.F. 2017)); *accord* United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011) ("To prevail, [the appellant] must prove that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" (quoting United States v. Erickson, 65 M.J. 221, 223 (C.A.A.F. 2007))).

27. United States v. Gomez, 76 M.J. 76, 81 (C.A.A.F. 2017) (first quoting United States v. Burton, 67 M.J. 150, 153 (C.A.A.F. 2009); and then citing United States v. Frady, 456 U.S. 152, 163 (1982)).

28. *Frady*, 456 U.S. at 163.

29. United States v. Davis, 79 M.J. 329, 332 (C.A.A.F. 2020) (citing United States v. Haynes, 79 M.J. 17, 19 (C.A.A.F. 2019).

30. *Id.* (quoting United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009)); *accord* United States v. Rich, 79 M.J. 472, 476 (C.A.A.F. 2020) (quoting *Davis*, 79 M.J. at 332); United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) ("When, on the other hand, an appellant intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." (citing United States v. Harcrow, 66 M.J. 154, 156 n.1 (C.A.A.F. 2008))).

the Uniform Code of Military Justice ("UCMJ") allow them to pierce waiver.[31]

An issue may be waived either by operation of law or by affirmative waiver. "A waiver by operation of law happens when a procedural rule or precedent provides that an objection is automatically waived upon the occurrence of a certain event and that event has occurred."[32] An affirmative waiver refers to a party's "intentional relinquishment or abandonment of a known right."[33] Although "there are no magic words to establish affirmative waiver,"[34] appellate courts seek to ascertain whether there was a "purposeful decision" to relinquish a right.[35] The following statements are examples of affirmative waiver from military cases: "[the] defense will consent to the ruling";[36] "I've decided to waive the issue";[37] "no objection";[38] and "No, Your Honor."[39] The last two examples show how an unaware defense counsel can accidentally stumble into intentional waiver.

Even if an issue is properly preserved, Article 59 of the UCMJ places another hurdle in the way of appellate relief.[40] Military appellate courts may not provide relief unless the error caused material prejudice to a substantial right.[41] Although CAAF has recognized a few exceptions,[42] the appellant typically "bears the burden of establishing [that] the

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31. 10 U.S.C. § 866(c) (2018); *see, e.g.*, United States v. Chin, 75 M.J. 220, 223 (C.A.A.F. 2016).

32. United States v. Day, 83 M.J. 53, 56 (C.A.A.F. 2022) (citing United States v. Swift, 76 M.J. 210, 217-18 (C.A.A.F. 2017)). In the case of improper argument, it's not clear that any provision of the RCM triggers waiver by operation of law when an appellant does not object to improper argument.

33. *Haynes*, 79 M.J. at 19 (first quoting United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018); and then quoting *Gladue*, 67 M.J. at 313).

34. United States v. Gutierrez, 64 M.J. 374, 377 (C.A.A.F. 2007) (citing United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999)).

35. *Id.* (quoting *Smith*, 50 M.J. at 456).

36. *Id.* (quoting United States v. Mundy, 2 C.M.A. 500, 503-04 (1953)).

37. United States v. Villamizar, No. NMCCA 200500439, 2005 WL 3438571, at *2 (N-M. Ct. Crim. App. Dec. 5, 2005).

38. United States v. Hill, No. ARMY 20130331, 2018 WL 1162505, at *1 (A. Ct. Crim. App. Feb. 27, 2018).

39. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020).

40. 10 U.S.C. § 859(a) (2018).

41. United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018) (first citing United States v. Davis, 76 M.J. 224, 230 (C.A.A.F. 2017); and then quoting United States v. Gomez, 76 M.J. 76, 79 (C.A.A.F. 2017)).

42. On several occasions, CAAF has erroneously put the burden on the government in prejudice analysis. For example, in *United States v. Edwards*, CAAF remanded for resentencing because the government was unable to persuade the court an error was not prejudicial: "[T]he [g]overnment . . . bears the burden of demonstrating that the admission of erroneous evidence was harmless." 82 M.J. 239, 246-47 (C.A.A.F. 2022). And *Edwards* does not stand alone: CAAF required the government to show no prejudice resulted from an error in *United States v. Flesher*, 73

error materially prejudiced a substantial right."[43] In order to show prejudice from an error during sentencing argument, the appellant "must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different."[44] The difficulty of showing prejudice means military appellate courts often conclude there was no prejudice regardless of whether there was a legal error.[45] And even when military appellate courts hold that there was an error, they often affirm the sentence because the appellant failed to demonstrate prejudice.[46]

In *Pace v. Warden, Ga. Diagnostic & Classification Prison*,[47] Judge Robin Rosenbaum of the Eleventh Circuit explained why it is crucial for trial counsel and judges to know the law on sentencing arguments.[48] In her view, "there is little [courts of appeal] can do" about improper sentencing arguments: procedural requirements prevent prosecutorial misconduct from being a reversible error in many cases; bar complaints are ineffective; and the prosecutors responsible for misconduct cannot be *held* responsible by their supervisors because they have usually left the position by the time a complaint reaches an appellate court.[49] Judge Rosenbaum's warning is even more important given the UCMJ's prejudice

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M.J. 303, 317-18 (C.A.A.F. 2014), and *United States v. Berry*, 61 M.J. 91, 97-98 (C.A.A.F. 2005), among others. These precedents conflict with CAAF's statutory grant of authority. Article 59(a) of the UCMJ only permits CAAF to reverse errors which have caused material prejudice to the accused. § 859(a). If courts presume prejudice in the absence of contrary evidence, Article 59(a) of the UCMJ ceases to operate as a restriction on the court. *Id.* In the above cases, CAAF ran against both these authorities by presuming that an error merits reversal unless the government can prove otherwise.

43. *Robinson*, 77 M.J. at 299 (citing *Davis*, 76 M.J. at 230).

44. United States v. Norwood, 81 M.J. 12, 20 (C.A.A.F. 2021) (citing Molina-Martinez v. United States, 578 U.S. 189, 194 (2016)).

45. *See, e.g.*, United States v. Halpin, 71 M.J. 477, 479-80 (C.A.A.F. 2013) ("[O]ur judgement does not depend on whether any of trial counsel's sentencing arguments were, in fact, improper. Rather, we conclude that Appellant has not met his burden of establishing the prejudice prong of plain error analysis."); United States v. Sewell, 76 M.J. 14, 18-19 (C.A.A.F. 2017) (finding the appellant failed to establish prejudice without addressing whether an error occurred); United States v. Witt, 83 M.J. 282, 285 (C.A.A.F. 2023) (finding the appellant failed to establish prejudice without determining whether an error occurred).

46. *See, e.g.*, United States v. Rodriguez, 60 M.J. 87, 88, 90 (C.A.A.F. 2004) (finding error but no prejudice); United States v. Burton, 67 M.J. 150, 154 (C.A.A.F. 2009) (finding "trial counsel's closing argument arguably conflicted with [the military judge's] instruction" but affirming the lower court because the court did "not believe that any error in trial counsel's argument" caused prejudice); *Norwood*, 81 M.J. at 20 ("However, while those improper arguments constituted obvious error, there was no material prejudice to Appellant during findings.").

47. No. 16-10868, 2023 WL 3376683 (11th Cir. May 11, 2023).

48. *Id.* at *41 (Rosenbaum, J., concurring) ("[T]he prosecutor[] . . . urged the jurors to impose the death penalty rather than send [the defendant] to prison for life because 'if anal sodomy is your thing, prison isn't a bad place to be.'").

49. *Id.* The same is particularly true in the military justice system where tours of duty may ensure an offending attorney has changed positions by a case's appeal.

requirement for relief on appeal: "The [government] must train its prosecutors to act within the limits of the law and professionalism, and it must hold its prosecutors responsible if they fail to do so."[50]

Because standards of review may determine the outcome of an appeal,[51] trial counsel must preserve sentencing argument errors to ensure a favorable standard of review on appeal. And to preserve an error, trial counsel must be able to immediately distinguish proper and improper arguments. Similarly, military judges must be able to immediately distinguish proper and improper arguments in order to rule on objections, cut off improper arguments, or cure the harm of an improper sentencing argument. In other words, trial counsel and military judges must know the law.

III. INAPPROPRIATE PERSONAL ATTACKS AND THREATS

The first principle of sentencing arguments is that trial counsel must not encourage courts-martial to abandon impartiality.[52] This principle means that trial counsel should not make inappropriate comments about the accused, defense counsel, or even courts-martial themselves. Improper comments about the accused or defense counsel typically concern their litigation conduct. Comments about courts-martial typically invoke their reputation or minimize the importance of their role in the overall system of military justice. These arguments are improper because they ask courts-martial to assess a sentence, not as punishment for the offenses, but rather based on prejudice or social concerns.

A. Inflaming the Passions or Prejudices of the Panel

Trial counsel may not "seek unduly to inflame the passions or prejudices of the court members."[53] Although evidence may have inherent emotional appeal, and trial counsel may remind the panel of the evidence presented under RCM 1001, trial counsel may not unreasonably leverage the pathos of the evidence.[54]

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50. *Id.*

51. *See* United States v. Sparrow, 33 M.J. 139, 140-41 (C.M.A. 1991) (finding error but affirming nonetheless because the court "d[id] not believe that . . . it constituted *plain* error" (emphasis added)).

52. United States v. Clifton, 15 M.J. 26, 29-30 (C.M.A. 1983) (citing United States v. Bouie, 26 C.M.R. 8 (1958)).

53. *Id.* at 30 (first citing United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976); and then citing United States v. Nelson, 1 M.J. 235 (C.M.A. 1975)).

54. *See Shamberger*, 1 M.J. at 379 ("The inflammatory nature of the trial counsel's argument coupled with the severity of the imposed sentence convinces us that there is a fair risk that the ac-

Counsel's argument may be impermissible because it is prohibited by the general prohibition against inflaming the passions or prejudices of a panel. *United States v. Clifton*[55] demonstrates the general prohibition. In *Clifton*, trial counsel likened the accused's adultery to heroin use and intimated that his adultery indicated he was a habitual liar who should not be trusted by the panel.[56] The United States Court of Military Appeals ("CMA") held that trial counsel's statements ran afoul of the general prohibition and therefore constituted reversible error.[57] The court determined this argument was impermissible simply because counsel sought "unduly to inflame the passions or prejudices of the court members."[58]

A similar case is *United States v. Barrazamartinez*.[59] During sentencing for the accused's drug-related offenses, trial counsel made references to the ongoing "war on drugs."[60] Explaining that "we are trying, as a nation, to stop [drugs] from coming in," trial counsel described the accused as "almost a traitor."[61] But while CAAF explained that the term "traitor" was "odious, particularly in the military community," it concluded that its use by trial counsel did not constitute plain error.[62]

In *United States v. Erickson*,[63] the accused sexually abused his own daughters.[64] As part of the sentencing argument, trial counsel compared the accused to "the embodiments of evil, Adolph Hitler, Saddam Hussein, [and] Osama bin Laden."[65] These villainous "names were used only for their sensational value and to inflame the passions of the military judge," "went well beyond the norm," and "were outside the bounds of fair comment."[66]

B. Unsupported Characterizations of the Accused

Attorneys may not make certain ad hominem attacks on the character of the accused. What qualifies as crossing the line can be difficult to

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cused was prejudiced by the prosecutor's remarks." (citing United States v. Gerlach, 16 C.M.A. 383 (1966))).

55. 15 M.J. 26 (C.M.A. 1983).
56. *Id.* at 30.
57. *Id.* at 30-31.
58. *Id.* at 30 (first citing *Shamberger*, 1 M.J. at 377; and then citing *Nelson*, 1 M.J. at 235).
59. 58 M.J. 173 (C.A.A.F. 2003).
60. *Id.* at 175.
61. *Id.* at 175-76.
62. *Id.* at 176.
63. 65 M.J. 221 (C.A.A.F. 2007).
64. *Id.* at 222.
65. *Id.* at 223.
66. United States v. Erickson, 63 M.J. 504, 510 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 221 (C.A.A.F. 2007) (citing *Barrazamartinez*, 58 M.J. at 175).

discern. Indeed, CAAF has described the line between "permissible advocacy" and improper argument in this area as "exceedingly fine."[67] The key rule is that counsel should avoid unsupported characterizations of the accused.[68]

For example, in *United States v. Fletcher*,[69] trial counsel said during his closing argument that the accused "had 'zero credibility'" and was "utterly unbelievable."[70] He added in rebuttal that the accused's "first lie" had been to his own counsel.[71] CAAF concluded that trial counsel's comments were "more of a personal attack on the defendant than a commentary on the evidence."[72] Rather than "characterizing [the accused] as a liar," CAAF explained, trial counsel should have "confined her comments instead to the plausibility of his story."[73] The lesson of *Fletcher* is that trial counsel should avoid name-calling as a means of persuasion.[74] Even if an accused has been convicted of various sexual offenses, for example, characterizing the accused with unnecessarily pejorative terms, such as "old dirty man in the trench coat" or "sexual predator," is improper.[75]

Another instructive case on this point is *United States v. Voorhees*.[76] The accused was convicted of five specifications of conduct unbecoming an officer and a gentleman and one specification of sexual assault.[77] Trial counsel, in closing argument on the merits, called the accused "perverted" and "sick," a "narcissistic, chauvinistic, joke of an officer," and "[n]ot an officer, not a gentleman, but a pig."[78] Trial counsel then described the conduct and nature of the accused as "[d]isgusting," "[d]eplorable," and "[d]egrading."[79] On review, CAAF held that these personal attacks, "directed to the defendant himself," were "clear error."[80] The court reasoned that the government did not need to demonstrate that the accused "was perverted, deplorable,

67. United States v. Fletcher, 62 M.J. 175, 183 (C.A.A.F. 2005) (quoting United States v. White, 486 F.2d 204, 207 (2d Cir. 1973)).

68. *Id.*

69. 62 M.J. 175 (C.A.A.F. 2005).

70. *Id.* at 182. Arguably, this comment *also* violates the prohibition against an attorney commenting on the evidence. *Id.* at 180 (citing United States v. Young, 470 U.S. 1, 8 (1985)).

71. *Id.* at 182.

72. *Id.* at 183.

73. *Id.*

74. *Id.* at 184.

75. United States v. Sewell, 76 M.J. 14, 17-18 (C.A.A.F. 2017).

76. 79 M.J. 5 (C.A.A.F. 2019).

77. *Id.* at 8.

78. *Id.* at 11.

79. *Id.*

80. *Id.* (quoting United States v. Fletcher, 62 M.J. 175, 182 (C.A.A.F. 2017)).

disgusting, chauvinistic, narcissistic, or a pig," so it was not "necessary for trial counsel to repeat these insults throughout his argument."[81] Instead, counsel should have limited his argument to demonstrating that the accused "violated the UCMJ."[82]

C. Personal Attacks on Defense Counsel

Trial counsel must not attempt to "win favor with the members [of the jury] by maligning defense counsel."[83] Such arguments are impermissible because they risk "turning the trial into a 'popularity contest' and influencing the members such that they may not [be] able to objectively weigh the evidence."[84] Instead, courts-martial might "decide the case based on which lawyer they like[] better."[85] One counsel's disparagement of another—either implicitly or explicitly—suggests the disparaged counsel's "characterization of the evidence should not be trusted and, therefore, that a finding [against the disparaged counsel] would be in conflict with the true facts of the case."[86] The Supreme Court has explained this principle by referencing the ABA Standards for Criminal Justice:

> The prohibition of personal attacks on the prosecutor is but a part of the larger duty of counsel to avoid acrimony in relations with opposing counsel during trial and confine argument to record evidence. It is firmly established that the lawyer should abstain from any allusion to the personal peculiarities and idiosyncrasies of opposing counsel. A personal attack by the prosecutor on defense counsel is improper, and the duty to abstain from such attacks is obviously reciprocal.[87]

It goes without saying that military counsel are not immune from the temptation to cross "the line [into] indecorum."[88] In *Fletcher*, trial counsel went to great lengths in closing arguments to malign defense counsel.[89] She accused him of "scaring" and "cutting off witnesses," as well as eliciting "perjury from his own client."[90] Then in her rebuttal argument, "[s]he drew direct comparisons between" their litigation styles,

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81. *Id.* (citing United States v. Clifton, 15 M.J. 26, 29, 30 (C.M.A. 1983)).
82. *Id.*
83. *Fletcher*, 62 M.J. at 181.
84. *Voorhees*, 79 M.J. at 10 (quoting *Fletcher*, 62 M.J. at 181).
85. *Id.* (quoting *Fletcher*, 62 M.J. at 181).
86. United States v. Xiong, 262 F.3d 672, 675 (7th Cir. 2001).
87. United States v. Young, 470 U.S. 1, 10 (1985) (quoting STANDARDS FOR CRIM. JUST. Standard 4-7.8 (AM. BAR ASS'N 1980) [hereinafter ABA STANDARDS, 2d ed.]).
88. *Voorhees*, 79 M.J. at 14.
89. *Fletcher*, 62 M.J. at 181-82.
90. *Id.* at 181.

"painting herself as . . . more polite and more honest."[91] She argued that defense counsel, in contrast, was "overpowering," "yelling" at, and cutting off witnesses.[92] She claimed that she did not cut off witnesses and would have apologized if she had.[93] She even told the panel: "[A]sk yourselves, do I scare you?"[94] CAAF held that these statements "were plainly improper."[95] By "attack[ing] . . . defense counsel's courtroom manner and integrity," trial counsel had "encouraged the members to decide the case based on the personal qualities of counsel rather than the facts."[96]

CAAF applied the same principle a few years later in *Voorhees*. Trial counsel bolstered his credibility with the panel by telling the court-martial that he was "a senior trial counsel" who traveled between "[two hundred] and [two hundred-fifty] days a year" to "prosecut[e] the Air Force's most serious cases."[97] He further told the panel that he did not "leave [his] family for [two hundred-fifty] days a year to sell [them] a story."[98] He then compared himself to defense counsel, saying that defense counsel was "lying" and that defense counsel's "imagination is not reasonable doubt."[99] CAAF condemned this argument.[100] Trial counsel, the court explained, had "fram[ed] defense counsel as an overly imaginative liar, while contrasting himself as a highly experienced, well-trained prosecutor."[101] By doing so, he "ha[d] falsely suggested to the panel that trial counsel was so experienced he could select and try only winning cases."[102] These statements risked the panel's objectivity because they may have "believe[d] that the defense's characterization of the evidence should not [have been] trusted, and, therefore, that a finding of not guilty would [have been] in conflict with the true facts of the case."[103]

It should be noted that personal attacks by defense counsel on the prosecutor are similarly impermissible. In *United States v. Young*,[104] the Supreme Court explained "[t]he prohibition of personal attacks" applies

91. *Id.* at 182.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Voorhees*, 79 M.J. at 10.
98. *Id.* at 10 n.3.
99. *Id.* at 10.
100. *Id.*
101. *Id.* (citing United States v. Xiong, 262 F.3d 672, 675 (7th Cir. 2001)).
102. *Id.* at 10 n.3.
103. *Id.* at 10 (quoting *Xiong*, 262 F.3d at 675).
104. 470 U.S. 1 (1985).

as strongly to the defense as to the prosecutor and such statements have "no place in the administration of justice."[105] Whether prosecuting or defending, military lawyers should avoid this style of argument.

D. Threatening the Reputation of Courts-Martial

Another impermissible attack on the disinterest of courts-martial is an argument that threatens courts-martial "with the specter of contempt or ostracism."[106] Threats of public censure pressure courts-martial to make a decision that benefits the sentencing authority's reputation rather than the one that is best supported by fact and law. One example of this impermissible style of argument comes from trial counsel's closing argument in *United States v. Wood*[107]:

> [W]ouldn't it embitter you for the Air Force to permit a sex pervert to live in our highly selective and interdependent, inter-related society? Would you want Sergeant Wood to have access to other young boys, your friends' sons, or your own sons? Would you want this man living in your stairwell, or someone else's stairwell, or on the German economy in a U. S. uniform?[108]

Trial counsel then argued that answering "no" to these questions but still voting for retention or for no confinement would be "selfish," "self-centered," and would not fulfill the jury members' "responsibility" to the Air Force or to society in general.[109] The CMA characterized the argument as "scold[ing] or scourg[ing]" the court-martial for any

105. *Id.* at 18 (quoting ABA STANDARDS, 2d ed. Standards 3-5.8(c), 4-7.8 (AM. BAR ASS'N 1980)). The gist of defense counsel's improper argument was that the prosecution had presented the case "unfairly" in order to "poison" the minds of the jury "unfairly." *Id.* at 4. Defense counsel also "intimated that the prosecution deliberately withheld exculpatory evidence" and told the panel that the prosecution had been "reprehensible" in its attempts to "cast a false light on [the accused]." *Id.* Defense counsel then told the panel that the accused was "the only one in this whole affair that has acted with honor and with integrity." *Id.* at 5. Defense counsel's most direct attack on the prosecution came when he "pointed directly at the prosecutor's table" and said: "I submit to you that there's not a person in this courtroom including those sitting at this table who think that [the accused] intended to [commit the crime]." *Id.* at 4-5.

106. United States v. Wood, 18 C.M.A. 291, 297 (1969), *overruled by* United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976). *Shamberger* overruled the part of the *Wood* decision that laid out tests for prejudice involving examination of counsel's voir dire of veniremembers, holding such a method as "inappropriate . . . for determining the prejudicial impact of a closing argument." *Shamberger*, 1 M.J. at 379 n.2. The court did, however, reiterate its main holding in *Wood*. *Id.* ("[T]o ask a court member to place himself in the position of a near relative wronged by the accused is to invite him to cast aside the objective impartiality demanded of him as a court member and judge the issue from the perspective of personal interest." (quoting *Wood*, 18 C.M.A. at 296)).

107. 18 C.M.A. 291 (1969), *overruled by* United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976)).

108. *Id.* at 297-98 (Ferguson, J., dissenting).

109. *Id.* at 298.

decision that did not conform to trial counsel's "preconceptions," and held that this argument "exceeded the bounds of fair comment."[110] These arguments also impermissibly invoked the Golden Rule. The ruling principle is that a court-martial may not be "insulted or threatened with personal disadvantage" for a decision against the Government's request.[111]

Except in *Wood*, neither CAAF nor its predecessor have concluded that trial counsel violated this rule. The service appellate courts, however, have recognized this principle.[112] In *United States v. Witt*,[113] for example, the Air Force Court of Criminal Appeals ("AFCCA") reviewed trial counsel's statements which asked the panel members to "consider how they would be judged by others by virtue of the sentence" given and contemplate "what their sentence would say about them personally."[114] The Air Force Court of Criminal Appeals concluded that trial counsel's statements "placed on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment."[115] These statements were erroneous because they threatened "contempt or ostracism" and therefore constituted "an inappropriate appeal to the members' emotions for an improper purpose."[116]

E. Minimizing the Weight of Courts-Martial's Responsibility

Counsel must not make arguments which diminish a court-martial's sense of its responsibility to determine the appropriateness of a death sentence. This principle was established by the Supreme Court in *Caldwell v. Mississippi*.[117] In *Caldwell*, "the prosecutor sought to minimize the sentencing jury's role" by telling the panel that a judgment of death

110. *Id.* at 297 (majority opinion).

111. *Id.* at 296.

112. *See, e.g.*, United States v. Poteet, 50 C.M.R. 73, 75 (1975) ("Threatening court members with the spectre of contempt or ostracism if they reject his appeal for a severe sentence exceeds the bounds of fair argument." (citing *Wood*, 18 C.M.A. at 297)); United States v. Jackson, No. ACM 39955, 2022 WL 1624838, at *33 (A.F. Ct. Crim. App. May 23, 2022) ("declin[ing] to extend [*United States v. Norwood*, 81 M.J. 12 (C.A.A.F. 2021)] to remarks aimed at specific or general deterrence" but noting that "threaten[ing] the members [of the jury] with contempt or ostracism from others if they reached a sentence" would be impermissible).

113. No. ACM 36785, 2021 WL 5411080 (A.F. Ct. Crim. App. Nov. 19, 2021).

114. *Id.* at *43.

115. *Id.*

116. *Id.* (citing *Norwood*, 81 M.J. at 21).

117. 472 U.S. 320, 342 (1985) (O'Connor, J., concurring in part and concurring in the judgment). The Supreme Court has since held "[Justice O'Connor's] position is controlling" in *Caldwell* because she was the concurring vote on narrower grounds than those in the plurality opinion. Romano v. Oklahoma, 512 U.S. 1, 8-9 (1994) (first quoting *Caldwell*, 472 U.S. at 342 (O'Connor, J., concurring in part and concurring in the judgment); then citing Marks v. United States, 430 U.S. 188, 193 (1977); and then citing Gregg v. Georgia, 428 U.S. 153, 169 n. 15 (1976)).

was "reviewable" and "not the final decision."[118] This statement was not accurate and "creat[ed] the mistaken impression" that if the jury chose a death sentence an appellate court would automatically "provide the authoritative determination of whether death was appropriate."[119] The Supreme Court concluded that these statements "misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously'" in violation of the Eighth Amendment.[120] The Court reasoned that juries must "treat their power to determine the appropriateness of death as an 'awesome responsibility'" and any minimization of that responsibility was erroneous.[121] But because this principle is based on the Eighth Amendment, it is unclear to what extent this principle is applicable beyond death penalty cases.[122]

In *United States v. Witt*,[123] the AFCCA applied *Caldwell* in reviewing "three passing comments" about the "appellate process following the verdict."[124] Unlike the lower state courts in *Caldwell*, service appellate courts have plenary power to review the appropriateness of sentence under Article 66 of the UCMJ.[125] The AFCCA therefore concluded that the prosecutor's comments were not "false, inaccurate, or misleading," and the court therefore decided the statements did not violate the *Caldwell* principle.[126] Nevertheless, trial counsel should avoid diminishing the importance of courts-martial's decisions, especially in view of the modern changes to the remedial powers of the service appellate courts.[127]

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118. *Caldwell*, 472 U.S. at 342-43 (O'Connor, J., concurring in part and concurring in the judgment).

119. *Id.* at 343.

120. *Id.* (quoting California v. Ramos, 463 U.S. 992, 999 (1983)).

121. *Id.* at 330 (majority opinion) (first quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Rehnquist, J., dissenting) (plurality opinion); then citing Eddings v. Oklahoma, 455 U.S. 104 (1982); and then citing Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion)).

122. *Id.* at 329.

123. 73 M.J. 738 (A.F. Ct. Crim. App. 2014), *vacated*, 75 M.J. 380 (C.A.A.F. 2016).

124. *Id.* at 803.

125. *See* United States v. Chin, 75 M.J. 220, 222 (C.A.A.F. 2016) (first quoting 10 U.S.C. § 866(c) (2018); then citing United States v. Nerad, 69 M.J. 138, 141-44 (C.A.A.F. 2010); then citing United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001); then citing United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991); then citing United States v. Cole, 31 M.J. 270, 272 (C.M.A. 1990); then citing United States v. Evans, 28 M.J. 74, 75-76 (C.M.A. 1989); and then citing United States v. Britton, 26 M.J. 24, 26-27 (C.M.A. 1988)).

126. *Witt*, 73 M.J. at 802-03.

127. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, sec. 539E(a), (c)(1)(B), §§ 853(b)(1), (c)(1)(A)(i)–(ii), (B), (2), 856(c)(2)(A), (3)–(6), 135 Stat. 1541, 1700-02 (2021).

IV. GOLDEN RULE ARGUMENTS

Another improper form of argument is one that invokes the "Golden Rule."[128] Although the Golden Rule is a moral concept of high pedigree,[129] courts have rejected its use in sentencing arguments. The reason is that "'Golden Rule' appeal[s]"[130] or "'Golden Rule' arguments"[131] ask courts-martial to render judgments from the perspective of an "interested party."[132] Courts have also explained that it "invite[s] [a] decision based on bias and prejudice rather than consideration of facts."[133] Military courts have prohibited Golden Rule-style arguments asking courts-martial to consider the views of the victim, close relatives of the victim, future victims, or what they would have done in the accused's circumstances. But certain very similar arguments are permissible. Trial counsel may ask courts-martial to consider the views of eyewitnesses or to act as a representative of society because these perspectives are still disinterested.

A. As If You Were the Victim

In its simplest form, a Golden Rule argument asks "the members [of the jury] to put themselves in the victim's place."[134] The prohibition on Golden Rule arguments started as a restriction on the arguments of plaintiffs in civil trials[135] but has since been "incorporated into the protection afforded a criminal defendant."[136] CAAF therefore held that the

128. *See* United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976)).

129. *See, e.g.*, *Luke* 6:31; *Leviticus* 19:18; SUTTA-NIPĀTA 705; THE ANALECTS OF CONFUCIUS bk. XV, ch. 24 (Robert Eno trans., 2015) (c. 206 B.C.).

130. *See* Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982) (first quoting Ivy v. Security Barge Lines, Inc., 585 F.2d 732, 741 (5th Cir. 1978), *rev. on other grounds*, 606 F.2d 524 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956, *reh. denied*, 448 U.S. 912, *on remand*, 89 F.R.D. 322 (N.D. Miss. 1980); and then citing Shroyer v. Kaufman, 426 F.2d 1032, 1033 (7th Cir. 1970)).

131. Johnson v. Howard, 24 F. App'x 480, 487 (6th Cir. 2001) (first quoting Lovett v. Union Pacific R.R. Co., 201 F.3d 1074, 1083 (8th Cir. 2000); then citing Edwards v. City of Philadelphia, 860 F.2d 568, 574 (3d Cir. 1988); and then citing *Spray-Rite*, 684 F.2d at 1246).

132. Boop v. Baltimore & Ohio R.R. Co., 193 N.E.2d 714, 716 (Ohio Ct. App. 1963); *see* STEPHEN E. ARTHUR & ROBERT S. HUNTER, FEDERAL TRIAL HANDBOOK: CIVIL § 22:14 (2023-2024 ed.).

133. *Johnson*, 24 F. App'x at 487 (first quoting *Lovett*, 201 F.3d at 1083; then citing *Edwards*, 860 F.2d at 574; and then citing *Spray-Rite*, 684 F.2d at 1246).

134. United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000).

135. *Id.* at 237-38 (citing Forrestal v. Magendantz, 848 F.2d 303, 309 (1st Cir. 1988)).

136. *Id.* at 238 (citing *Forrestal*, 848 F.2d at 309).

following argument "cross[ed] the line and wander[ed] dangerously into the realm of improper argument"[137]:

> Imagine [the victim] entering the house, and what happens next? A savage beating at the hands of people he knows, fellow Marines, to which the accused was a willing participant. He's grabbed, he's choked, he's beaten, he's kicked, he's hit with a bat, small baseball bat. *Imagine being [the victim] sitting there as these people are beating him*.[138]

Beyond the military justice system, federal courts uniformly reject arguments that urge the jury to identify with the position of the victim. For example, in *United States v. Al-Maliki*,[139] the Sixth Circuit held that statements like "'it could have been you' the defendant [harmed]" would violate the prohibition against Golden Rule arguments.[140] Similarly, in *United States v. Matías*,[141] the First Circuit noted that it is impermissible for a prosecutor to "improperly suggest[] to jurors that they put themselves in the shoes of a victim."[142] While emotional evidence may inherently inspire a panel to consider how it would feel to be the victim, prompting these considerations constitutes improper argument because it induces sentences not based upon impartial consideration of evidence.

B. As If You Were the Victim's Relatives

It is also improper for counsel to ask panels to consider the evidence from the perspective of those close to the victim.[143] Even if the panel is otherwise disinterested, these arguments can generate bias and prejudice within the panel. For example, in *United States v. Wood*,[144] "[a] general court-martial convicted the accused of . . . taking indecent liberties with [underage] boys . . . ."[145] During closing argument, trial counsel asked the panel members to "administer justice" as if "your own sons," "your son," or "your child" had been abused.[146] Trial counsel asked: "What would you have done had it been your child?"[147] As later

137. *Id.*
138. *Id.* at 237 (emphasis added).
139. 787 F.3d 784 (6th Cir. 2015).
140. *Id.* at 795 (citing Bedford v. Collins, 576 F.3d 225, 234 (6th Cir. 2009)).
141. 707 F.3d 1 (1st Cir. 2013).
142. *Id.* at 6 (citing United States v. Kirvan, 997 F.2d 963, 964 (1st Cir. 1993)).
143. United States v. Wood, 18 C.M.A. 291, 296 (1969), *overruled by* United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976).
144. 18 C.M.A. 291 (1969), *overruled by* United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976).
145. *Id.* at 293.
146. *Id.* at 296.
147. *Id.*

noted by the Army Court of Military Review in *United States v. Williams*,[148] the "practical effect" of trial counsel using this language in *Wood* "was to decrease the likelihood that the evidence would be weighed in a fair and objective manner."[149] In other words, it compromised the disinterested position of the court-martial. If one of the members of the court-martial had been the victim's father, he would have been disqualified from the panel.[150] By asking the members of the court-martial to adopt that position, trial counsel encouraged them to abandon impartial disinterest and to "judge the issue from the perspective of personal interest."[151]

Another example comes from the prosecution of a service member for a gang rape.[152] In sentencing argument, trial counsel argued:

> Put yourself in the position that Shamberger says Sergeant Crawford was put, right here. Put yourself next to your car or a borrowed car at night; put 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. . . . You think of Sergeant Crawford pinned to the ground and in no way able to do anything about three men taking turns.[153]

The CMA held "the prosecutor's argument exceeded the bounds of propriety" because these statements "invite[d] [the panel] to cast aside the objective impartiality demanded of [them] as [court members] and judge the issue from the perspective of personal interest."[154]

C. As If You Were a Future Victim

Counsel may not ask panels to consider whether they may be victimized by the defendant in the future. Such an argument is a direct attack on a panel's objectivity.[155] In *United States v. Marsh*,[156] the accused was "convicted of making a false official statement."[157] At sentencing,

148. 23 M.J. 776 (A.C.M.R. 1987).
149. *Id.* at 779.
150. *Wood*, 18 C.M.A. at 296 (citing United States v. Gordon, 1 C.MA. 255 (1952)).
151. *Id.* (citing United States v. Begley, 38 C.M.R. 488 (A.B.R. 1967)).
152. *Shamberger*, 1 M.J. at 378.
153. *Id.* at 379.
154. *Id.* (quoting *Wood*, 18 C.M.A. at 296).
155. United States v. Marsh, 70 M.J. 101, 106 (C.A.A.F. 2011) (first citing Hodge v. Hurley, 426 F.3d 368, 384 (6th Cir. 2005); and then quoting Bedford v. Collins, 567 F.3d 225, 234 (6th Cir. 2009)).
156. 70 M.J. 101 (C.A.A.F. 2011).
157. *Id.* at 102.

the panel heard testimony that it was standard policy to suspend accused service members from their duties as aviation mechanics in order to ensure that they made no "inadvertent[] or purpose[ful]" errors.[158] The witness explained that an accused might "accidentally do something to the aircraft or forget to put a bolt on the right way or something to that nature that would cause a problem with the aircraft" because he was distracted by the pending court-martial.[159] As a result, the accused in *Marsh* was not performing his duties as an aviation mechanic at the time of his trial.[160] Trial counsel argued that the panel could not "trust the accused" and asked rhetorically whether the accused was "someone you [could] trust to work on *your* airplanes."[161] Trial counsel then asked the panel to consider if they could "trust someone who lies with the *lives of those pilots*."[162] CAAF concluded this "argument constituted error and that it was plain and obvious" because "[t]rial counsel personalized his argument to the panel members."[163] Reviewing this argument, CAAF reiterated that trial counsel may not "ask court members to place themselves in the shoes of [the] victim or a near relative"[164] and extended this principle to prohibit trial counsel from asking the "court members to place themselves in the shoes of potential future victims."[165] These arguments diminish the impartiality and disinterest of courts-martial.

CAAF was not the first federal court to conclude that future-victim arguments are impermissible. As one example, the Sixth Circuit has long done the same. In *Hodge v. Hurley*,[166] the Sixth Circuit reviewed a prosecutor's closing argument in which he "suggest[ed] that the jury try to 'put [itself] in the place of someone that might run into [the defendant] at night.'"[167] The Sixth Circuit concluded this argument was an impermissible "[G]olden [R]ule argument."[168] The Sixth Circuit ruled similarly in *Bedford v. Collins*[169]: a prosecutor's intimations that "a crime wave or some other calamity [would] consume their community" if the panel

158. *Id.* at 105.
159. *Id.*
160. *Id.*
161. *Id.* at 105-06 (emphasis added).
162. *Id.* at 106.
163. *Id.*
164. *Id.* (citing United States v. Baer, 53 M.J. 235, 237-38 (C.A.A.F. 2000)).
165. *Id.*
166. 426 F.3d 368 (6th Cir. 2005).
167. *Id.* at 384 (first citing City of Cleveland v. Egeland, 497 N.E.2d 1383, 1389 (Ohio Ct. App. 1986); and then citing Boop v. Baltimore & Ohio R.R. Co., 193 N.E.2d 714, 716 (Ohio Ct. App. 1963)).
168. *Id.* (first citing *Egeland*, 497 N.E.2d at 1389; and then citing *Boop*, 193 N.E.2d at 716).
169. 567 F.3d 225 (6th Cir. 2009).

did not convict were improper.[170] These arguments are improper because they "ask the jurors to shed their objectivity and to assume the role of interested parties" by asking the jury to consider whether "an acquittal would jeopardize them personally."[171]

The Eighth Circuit found a similar type of Golden Rule argument impermissible in *United States v. Palma*.[172] In *Palma*, the defendant was convicted of conspiracy to defraud the United States by receiving medical disability benefits while holding gainful employment.[173] In closing argument, the prosecutor told the jury that, because it was taxpayer dollars the defendant fraudulently received, "he got money from you and you and you and you and these folks back here," pointing to individual jurors.[174] The Eighth Circuit held this argument was "improper" and "akin to a [G]olden [R]ule violation because [the prosecutor] suggested the jurors were themselves direct victims of [the defendant]'s crimes."[175] This same type of argument—telling the jurors they *were* somehow victims of the crime—was also found impermissible by the Sixth Circuit in *United States v. Hall*.[176] While this principle has not been explicitly accepted in the military justice system, it is likely that the military appellate courts would find such an argument impermissible because this argument asks the jury to act as an interested party.[177]

It is nevertheless permissible for attorneys to ask the panel to act in the interest of preventing future lawlessness. While such an argument seems to provoke the panel to act as an interested party rather than only as an evaluator of evidence, the military justice system has historically permitted these arguments. For example, in *United States v. Williams*, trial counsel asked the panel to consider "how long [the accused] should be incarcerated before he is again permitted to walk among 'your daughters,' 'our daughters?'"[178] Although this statement asks the panel to assume an interest in the case, the Army Court of Military Review found this interest was an appropriate one because "whether [the accused]

170. *Id.* at 234 (citing United States v. Solivan, 937 F.2d 1146, 1152-53 (6th Cir. 1991)).

171. *Hodge*, 426 F.3d at 383 (citing *Boop*, 193 N.E.2d at 716).

172. 473 F.3d 899, 902 (8th Cir. 2007).

173. *Id.* at 900.

174. *Id.* at 901.

175. *Id.* at 901-902.

176. 979 F.3d 1107, 1119 (6th Cir. 2020) (citing United States v. Roman 492 F.3d 803, 806 (7th Cir. 2007)).

177. *Cf.* United States v. Wood, 18 C.M.A. 291, 297 (A.C.M.R. 1969), *overruled by* United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976) ("Consequently, to ask a court member to place himself in the position of a near relative wronged by the accused is to invite him to cast aside the objective impartiality demanded of him as a court member and judge the issue from the perspective of personal interest." (citing United States v. Begley, 38 C.M.R. 488 (A.B.R. 1967))).

178. 23 M.J. 776, 779 (A.C.M.R. 1987).

could be expected to refrain from committing the same or similar crimes of violence in the future" is a "legitimate sentencing concern."[179]

This principle is also recognized outside the military justice system. For example, in *Brooks v. Kemp*,[180] the Eleventh Circuit reviewed a death penalty sentencing argument in which the prosecutor suggested the defendant "might kill a guard or a [fellow] prisoner" or escape from prison and commit another murder if he was not given the death penalty.[181] Although the Eleventh Circuit referred to these statements as "dramatic," the court determined the argument was "not erroneous" because it was "directly relevant to the consideration of whether [the defendant] would remain a threat to society."[182] "A legitimate future dangerousness argument is not rendered improper merely because the prosecutor refers to possible victims."[183] As these examples highlight, the line between permissible and impermissible arguments is fuzzy. Trial counsel should tread carefully when making these arguments.

D. As If You Had Been in the Accused's Circumstances

Although CAAF and its predecessor have not yet encountered this issue, civilian courts have extended the Golden Rule prohibition to arguments that the panel should place itself in the shoes of the accused. In *United States v. Teslim*,[184] the Seventh Circuit reviewed a rebuttal argument in which the prosecutor stated:

> You heard the testimony of the police officers, and [the defendant] was advised that he could stay with his luggage while the drug dog was brought to the scene or he could leave. I ask you, ladies and gentlemen, *if it happened to you and you had nothing to hide* . . . .[185]

The judge sustained the defense's objection to this argument as a violation of the prohibition against Golden Rule arguments.[186] The Seventh Circuit concluded "the prosecutor's comment was improper" because he

179. *Id.*

180. 762 F.2d 1383 (11th Cir. 1985) (en banc), *vacated*, 478 U.S. 1016 (1986), *reinstated*, 809 F.2d 700 (11th Cir. 1986) (per curiam). Following the Supreme Court's decision in *Rose v. Clark*, 478 U.S. 570 (1986), where the Court held that a violative jury instruction was subject to a harmless error inquiry, the Eleventh Circuit's decision was vacated and remanded for reconsideration. *Brooks*, 809 F.2d at 700. The Eleventh Circuit concluded that the analyses conducted in previous opinions of *Brooks* were in line with the traditional analysis discussed in *Rose*. *Id.* The court thus reinstated its previous opinion. *Id.* (citing *Brooks*, 762 F.2d 1383).

181. *Id.* at 1396.

182. *Id.* at 1411.

183. *Id.* at 1412.

184. 869 F.2d 316 (7th Cir. 1989).

185. *Id.* at 327-28.

186. *Id.* at 328.

"should not have asked the jurors to put themselves in [the] defendant's position."[187] Although military courts have not yet addressed this particular variation on the Golden Rule argument, it is likely that they would follow the civilian courts in concluding that it "encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias."[188]

E. Two Permissible Arguments

The following categories may at first glance appear to be impermissible Golden Rule arguments but are nonetheless permissible forms of sentencing argument. Though similar, these arguments do not ask courts-martial to decide sentences from an interested position.

1. Shoes of Eyewitnesses

Although military courts have not addressed the issue, they would likely hold that trial counsel may ask the jury to put themselves in the shoes of an eyewitness. Asking a panel to consider the position of a witness encourages the panel to base its decision on the evidence presented.

In *United States v. Kirvan*,[189] the First Circuit reviewed a prosecutor's argument about an eyewitness who claimed he was able to identify the driver of an oncoming vehicle.[190] Counsel questioned the credibility of this testimony because "both cars were travelling in opposite directions between 30 and 35 miles per hour."[191] "The prosecutor [told] the jury: 'I'm not going to talk in terms of feet or seconds or milliseconds. I want you to put yourselves in the place that [the eyewitness] was in.'"[192] The First Circuit concluded the Golden Rule doctrine was not invoked in this case because asking the jury "to put itself in the place of an *eyewitness*" did not ask "the jury to base its decision on sympathy for the victim" and was instead "a means of asking . . . whether a witness'[s] testimony is plausible."[193] Because these arguments ask the jury to evaluate evidence, prohibition on Golden Rule arguments does not prohibit requests for the jury to consider the position of an eyewitness.[194]

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187. *Id.*

188. *Id.* (quoting Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984)).

189. 997 F.2d 963 (1st Cir. 1993).

190. *Id.* at 964.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Cf.* United States v. Wood, 18 C.M.A. 291, 297 (A.C.M.R. 1969), *overruled by* United States v. Shamberger, 1 M.J. 377 (C.M.A. 1976) ("Consequently, to ask a court member to place

2. Representatives of Society

It may be permissible for attorneys to ask the panel to act as representatives of society, although neither CAAF nor its predecessor court have passed on the issue.[195] In *United States v. Williams*,[196] the Army Court of Military Review reviewed an argument by trial counsel which "called upon the members, *as representatives of society*, to determine what criminal sanction would be appropriate for the accused."[197] While this argument asks the panel to adopt an interested position, the Army Court of Military Review concluded this argument was not erroneous.[198] Similarly, in *United States v. Witt*,[199] trial counsel made statements the Government characterized as requests for the panel to "[represent] the conscience of the community" in their sentencing decisions.[200] In *Witt*, however, CAAF did not reach the issue of this argument's permissibility, instead resolving the matter on the basis of prejudice.[201]

While the precise boundaries of this principle are hazy, the precedent of other federal courts is helpful. The Supreme Court has recognized that these arguments may be important because the government has "a strong interest in having the jury 'express the *conscience of the community*.'"[202] Similarly, the Fifth Circuit distinguished these arguments from improper ones: "Although the prosecution may not appeal to the jury's passions and prejudices, the prosecution may appeal to the jury to act as the conscience of the community."[203]

In *United States v. Ebron*,[204] the prosecutor told the jury that if it did not give the defendant the death penalty, it would send a message to the prison community telling them to "[c]arry on with your killings" because "[n]o punishment will be waiting."[205] These statements may seem inflammatory, but the Fifth Circuit concluded there was no error because the statements were "designed to call on the jurors to act as the

himself in the position of a near relative wronged by the accused is to invite him to cast aside the objective impartiality demanded of him as a court member and judge the issue from the perspective of personal interest." (citing United States v. Begley, 38 C.M.R. 488 (A.B.R. 1967))).

195. United States v. Williams, 23 M.J. 776, 779 (A.C.M.R. 1987).

196. 23 M.J. 776 (A.C.M.R. 1987).

197. *Id.* at 779.

198. *Id.* (first citing *Wood*, 18 C.M.A. at 291; and then citing *Shamberger*, 1 M.J. at 377).

199. 83 M.J. 282 (C.A.A.F. 2023).

200. *Id.* at 284-85.

201. *Id.* at 285.

202. Lowenfield v. Phelps, 484 U.S. 231, 238 (1988) (emphasis added) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

203. Jackson v. Johnson, 194 F.3d 641, 655 (5th Cir. 1999).

204. 683 F.3d 105 (5th Cir. 2012).

205. *Id.* at 145.

conscience of the community."[206] Similarly, in *United States v. Alloway*,[207] the prosecutor asked the jury to "be the . . . conscience of the community" and "to speak out for the community," "let[ting] the [defendant] know that this type of conduct will not be tolerated."[208] This statement appears to ask the jury to base its decision on considerations other than the evidence, but the Sixth Circuit decided the prosecutor's argument did not "exceed[] permissible bounds of advocacy."[209]

In contrast, in *United States v. Johnson*,[210] the defendant was convicted of various offenses in relation to his distribution of methamphetamine.[211] In rebuttal argument, the prosecutor told the jury that their "decision to uphold the law is very important to society" and that the jury members are "the people that stand as a bulwark against the continuation of what [the defendant] is doing on the street, putting this poison on the street."[212] While the Eighth Circuit found these statements constituted an "appeal[] to the jurors to be the conscience of the community," the court concluded the argument was impermissible because this appeal happened "in an improper and inflammatory manner."[213] According to the Eighth Circuit, therefore, statements which are calls to "the conscience of the community" may still be improper if they are "calculated to inflame."[214] This principle is consistent with the Eighth Circuit's holding in *United States v. Lewis*[215]: "Unless calculated to inflame, an appeal to the jury to act as the conscience of the community is not impermissible . . . ."[216] This reasoning suggests that calls to the conscience of the community are not categorically impermissible, but may nonetheless be erroneous if they fall within the general category of inflammatory argument.

206. *Id.* at 146.
207. 397 F.2d 105 (6th Cir. 1968).
208. *Id.* at 113.
209. *Id.*
210. 968 F.2d 768 (8th Cir. 1992).
211. *Id.* at 769.
212. *Id.*
213. *Id.* at 771.
214. *Id.* at 770 (quoting United States v. Lewis, 547 F.2d 1030, 1037 (8th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977)).
215. 547 F.2d 1030 (8th Cir. 1976).
216. *Id.* at 1037 (first citing United States v. Alloway, 397 F.2d 105, 113 (6th Cir. 1968); then citing Henderson v. United States, 218 F.2d 14, 19 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955); and then citing Stassi v. United States, 50 F.2d 526, 532 (8th Cir. 1931)).

V. IRRELEVANT OPINIONS OF THIRD PARTIES

Trial counsel may not argue for a sentence based on the opinions of interested parties about appropriate punishment.[217] This style of argument asks courts-martial to abandon their disinterest. The common characteristic of these arguments is that trial counsel asks courts-martial to arrive at their results by relying on the judgments of others, rather than their own.

A. Trial Counsel's Opinion of the Case

The Supreme Court has explained that civilian prosecutors "sometimes breach their duty . . . by commenting on the defendant's guilt and offering unsolicited personal views on the evidence."[218] Military courts have followed this lead, holding that military trial counsel may not "interject [himself or] herself into the proceedings by expressing a 'personal belief or opinion as to the truth or falsity of any testimony or evidence.'"[219] The personal opinions of trial counsel are treated as "a form of unsworn, unchecked testimony and tend to exploit the influence of [a lawyer's] office and undermine the objective detachment which should separate a lawyer from the cause for which he argues."[220] An error of this kind is commonly marked by counsel's "use of personal pronouns in connection with assertions."[221]

One example of an improper use of personal pronouns comes from *United States v. Knickerbocker*.[222] In that case, trial counsel told the panel members: "I think that having listened to all of the evidence in this case, there is very little doubt, *in fact in my mind there is no doubt whatsoever*, that the man sitting over there at the defendant's table . . . was in fact the individual who was involved in this matter . . . ."[223] In addition, trial counsel disparaged the plausibility of the accused's defense, calling it a "fairy tale," "imaginative," and "foolishness."[224] He also opined that the accused's testimony was "by any stretch of one's imagination,

217. United States v. Ohrt, 28 M.J. 301, 304-05 (C.M.A. 1989).

218. United States v. Young, 470 U.S. 1, 7 (1985).

219. United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005) (first quoting United States v. Horn, 9 M.J. 429, 430 (C.M.A. 1980); and then citing United States v. Knickerbocker, 2 M.J. 128, 129-30 (C.M.A. 1977) (per curiam)).

220. *Horn*, 9 M.J. at 430 (quoting STANDARDS FOR CRIM. JUST., 1st ed. Standard 5.8(a), (AM. BAR ASS'N 1974)).

221. *Fletcher*, 62 M.J. at 180 (citing United States v. Washington, 263 F. Supp. 2d 413, 431 (D. Conn. 2003)).

222. 2 M.J. 128 (C.M.A. 1977) (per curiam).

223. *Id.* at 129.

224. *Id.*

incredible at the very least."[225] Trial counsel added that "the whole gist of [the accused's] testimony" was "well beyond the grounds of anything reasonable."[226] These statements "improperly interjected personal comments on matters that were for the court members to determine."[227]

United States v. Fletcher provides another example of improper "interjection" of "personal beliefs and opinions" into the case.[228] Trial counsel described the government's inculpatory evidence as "'unassailable,' 'fabulous,' and 'clear.'"[229] Then trial counsel stressed that it was "so *clear* from the urinalyses that [the accused] was doing [cocaine] over and over" and that the accused "*clearly* is a weekend cocaine user."[230] Additionally, trial counsel described the accused's defense as "'nonsense,' 'fiction,' 'unbelievable,' 'ridiculous,' and 'phony'" while describing the government's case as "a perfect litigation package."[231] CAAF determined these statements were improper as "trial counsel's interjection of her personal beliefs and opinions."[232]

In *United States v. Voorhees*,[233] trial counsel declared to the panel: "I *know* that the defense counsel's imagination . . . is not reasonable doubt."[234] Trial counsel also told the panel he was "not in the business of convicting innocent people, but this man is guilty. . . . [W]ithout a doubt . . . guilty."[235] Trial counsel also opined on the quality of the evidence by declaring: "[W]e win. Clearly."[236] CAAF concluded, "[t]hese statements are all clear and obvious error."[237]

Lastly, in *United States v. Sewell*,[238] trial counsel attempted to identify with the court-martial by saying: "We all know [the victim] didn't make this up"; "[W]e all know [the accused] lied"; "[W]e know [the accused's conduct] wasn't accidental"; "[W]e know this was not the actions [sic] of an innocent man"; and "we all know there's not reasonable doubt."[239] Additionally, trial counsel encouraged the inference that

225. *Id.*
226. *Id.*
227. *Id.*
228. United States v. Fletcher, 62 M.J. 175, 180 (C.A.A.F. 2005).
229. *Id.*
230. *Id.* (emphasis added).
231. *Id.*
232. *Id.*
233. 79 M.J. 5 (C.A.A.F. 2019).
234. *Id.* at 12.
235. *Id.*
236. *Id.*
237. *Id.*
238. 76 M.J. 14 (C.A.A.F. 2017).
239. *Id.* at 20-21 (Ohlson, J., concurring in part and dissenting in part).

"defense counsel . . . knew that their client was guilty."[240] While a majority of CAAF did not reach the issue,[241] Judge Ohlson wrote separately and concluded "trial counsel improperly used personal pronouns throughout findings argument."[242]

B. Witness Vouching

Trial counsel must not make "assertions that a witness was correct or to be believed."[243] Witness vouching is impermissible because it "plac[es] the prestige of the government behind the witnesses through personal assurances of their veracity [and] suggest[s] that information not presented to the jury supports the witnesses' testimony . . . ."[244]

Witness vouching "can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed."[245] A trial counsel may not vouch for a witness using phrases like "I think it is clear," "I'm telling you," or "I have no doubt."[246] Instead, trial counsel should stick to presenting the evidence by saying "'[Y]ou are free to conclude,' '[Y]ou may perceive that,' '[I]t is submitted that,' or '[A] conclusion on your part may be drawn.'"[247]

In *United States v. Fletcher*, trial counsel improperly vouched for an expert witness at least twice. First, trial counsel opined, "It's very apparent from talking to [the government's expert witness] that he is the best possible person in the whole country to come speak to us about this."[248] Second, in relation to the expert testimony, trial counsel said, "[*W*]*e know* that that was from an amount that's consistent with recreational use," rather than simply restating the evidence.[249] These statements crossed the line into impermissible argument.

CAAF also addressed three instances of witness vouching in *United States v. Voorhees*.[250] First, in reference to the testimony of a government witness, trial counsel told the panel: "That was the truth."[251]

240. *Id.* at 21.
241. *Id.* at 15.
242. *Id.* at 20.
243. United States v. Fletcher, 62 M.J. 175, 180 (C.A.A.F. 2005) (citing United States v. Washington, 263 F. Supp. 2d 413, 431 (D. Conn. 2003)).
244. United States v. Molina, 934 F.2d 1440, 1445 (9th Cir. 1991) (first citing United States v. Wallace, 848 F.2d 1464, 1473 (9th Cir. 1988); and then citing United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980)).
245. *Fletcher*, 62 M.J. at 180 (citing *Washington*, 263 F. Supp. 2d at 431).
246. *Id.*
247. *Id.* (quoting *Washington*, 263 F. Supp. 2d at 431).
248. *Id.*
249. *Id.*
250. 79 M.J. 5, 11-12 (C.A.A.F. 2019).
251. *Id.* at 11.

Second, trial counsel told the panel to "rely entirely on [the government witness]'s credibility" and to "[h]ang your hat there, because you can. Because that airman is credible."[252] Third, trial counsel told the panel "[the government witness] testified credibly; she told you what happened to her," adding that "[the government witness is] not lying. It's the truth. It's what happened."[253] These statements were "grievous error" because "trial counsel . . . vouched for the credibility of his witnesses . . . ."[254]

In *United States v. Norwood*,[255] trial counsel—in both opening and closing statements—referred to the victim-witness as an "'innocent' child [with] no [motive] to lie," opined "that [the victim] was telling the truth, and [claimed] that her family believed her" testimony.[256] With these statements, trial counsel "clearly committed misconduct during findings by repeatedly vouching" for the victim-witness, which is "explicitly prohibited."[257]

In contrast, in *United States v. Terlep*,[258] trial counsel asserted that the victim "weathered the storm of this whole incident with dignity and with a courageous spirit to get up there and tell you what happened that night, *to tell you the truth*."[259] CAAF explained "that it is [im]proper for a trial counsel to express his personal opinion or belief that a government witness is telling the truth."[260] The court, however, concluded this statement was not plain error because the "argument could reasonably be construed as simply calling the court's attention to the victim's fortitude in performing her civic duty as a witness in this personally difficult case."[261] Nevertheless, trial counsel should be cautious when describing the witness testimony.

252. *Id.* at 12.
253. *Id.*
254. *Id.*
255. 81 M.J. 12 (C.A.A.F. 2021).
256. *Id.* at 18-19.
257. *Id.* at 20 (first citing *Voorhees*, 79 M.J. at 11-12; and then citing United States v. Fletcher, 62 M.J. 175, 180 (C.A.A.F. 2005)).
258. 57 M.J. 344 (C.A.A.F. 2002).
259. *Id.* at 347.
260. *Id.* at 349.
261. *Id.*

C. Command Policies

Trial counsel may not argue that the accused violated specific command policies related to the charged misconduct.[262] Although the prohibition on referencing command policies is not new,[263] it has proven to be a consistent stumbling block for trial counsel.[264] Using a command policy in sentencing argument "brings the commander into the deliberation room" to "improperly influenc[e] the court-martial proceedings."[265] And that raises "the spectre of command influence."[266]

Moreover, this rule applies to both government and defense trial counsel. Neither side may bring it up because "it is the *fact* of the reference to command policy that has been condemned and not the *source* of the reference."[267] Likewise, the military judge must not instruct the sentencing panel about command policies.[268] Even trial counsel should be ready to object to improper references to command policies.

D. Opinions of Others

Military courts have held the sentencing witnesses must not give an opinion on the appropriate punishment. "The question of appropriateness of punishment is one which must be decided by the court-martial; it cannot be usurped by a witness."[269] The problem arises most often when trial counsel calls a witness to give an opinion on the accused's potential for rehabilitation. A sentencing witness may testify about the accused's "character, his performance of duty as a service member, his moral fiber,

262. *See* United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983); *see also* United States v. Washington, 80 M.J. 106, 113 (C.A.A.F. 2020) (quoting United States v. Kropf, 39 M.J. 107, 109 (C.M.A. 1994)) (explaining that referencing command policies is "not a best practice").

263. *See* United States v. Fowle, 22 C.M.A. 139, 141 (1956).

264. *See, e.g.*, United States v. Mallett, 61 M.J. 761, 763-64 (A.F. Ct. Crim. App. 2005) (first quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986); and then quoting United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994)); United States v. Thomas, 44 M.J. 667, 669 (N-M. Ct. Crim. App. 1996); *see also Washington*, 80 M.J. at 113 (quoting *Kropf*, 39 M.J. at 109).

265. *Grady*, 15 M.J. at 275, 276 (C.M.A. 1983) (first citing United States v. Fowle, 7 C.M.A. 349, 351 (1956); and then quoting United States v. Hawthorne, 7 C.M.A. 293, 297 (1956)).

266. *Id.* (quoting *Hawthorne*, 7 C.M.A. at 297).

267. *Id.* (first citing United States v. Davis, 8 C.M.A. 425 (1957); and then citing United States v. Silva, 8 C.M.A. 105 (1957) (Ferguson, J., dissenting)).

268. *See* United States v. Kirkpatrick, 33 M.J. 132, 133 (C.M.A. 1991) (first citing *Grady*, 15 M.J. at 275; and then citing United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986)).

269. United States v. Ohrt, 28 M.J. 301, 305 (C.M.A. 1989).

and his determination to be rehabilitated."[270] But the witness must not give "opinions as to appropriate sentences."[271]

The most frequent violation of this rule occurs when a witness moves beyond "rehabilitative potential" and opines on "retention in the service."[272] These so-called *Ohrt* violations arise from "the subtle shift from general rehabilitation to preference for separation."[273] Although CAAF has recognized that it is difficult, if not impossible, to distinguish between these two concepts, sentencing witnesses must not give opinions as to appropriate sentences.[274] An opinion about retention in service falls into this category because a court-martial has no other "discharge[] 'available to it.'"[275]

The difficulty of distinguishing the two concepts has two fine-grain distinctions. The most important rule is that trial counsel must avoid soliciting euphemisms about retention in service from sentencing witnesses. Testimony such as "no potential for continued service," "he should be separated,"[276] or "the accused doesn't deserve to remain in the Army," are treated by military courts as an improper recommendation for a punitive discharge.[277]

Prohibited euphemisms can be subtle. For instance, counsel may not present evidence that a commander "just wanted to administratively discharge" a service member who could not conform to military standards.[278] Nor may trial counsel ask whether a sentencing witness would want the accused back in his unit or whether the accused could fulfill a role anywhere in the Army, at least when the question draws a negative response.[279] Stating that it would be "a waste of Air Force resources to retain" the accused was an impermissible comment for the same

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270. *Id.* at 304.

271. *Id.* at 305 (first citing United States v. Azure, 801 F.2d 336 (8th Cir. 1986); and then citing United States v. Arruza, 26 M.J. 234, 239 (C.M.A. 1988) (Sullivan, J., concurring in the result), *cert. denied*, 489 U.S. 1011 (1989)).

272. *Id.* at 304.

273. United States v. Rice, 33 M.J. 451, 453 (C.M.A. 1991).

274. *Id.* (citing *Ohrt*, 28 M.J. at 305).

275. United States v. Hampton, 40 M.J. 457, 459 (C.M.A. 1994) (quoting *Ohrt*, 28 M.J. at 305).

276. *Ohrt*, 28 M.J. at 305.

277. *Hampton*, 40 M.J. at 458.

278. United States v. Williams, 50 M.J. 397, 399 (C.A.A.F. 1999) (emphasis omitted).

279. United States v. Wilson, 31 M.J. 91, 92, 94 (C.M.A. 1990) (first citing *Ohrt*, 28 M.J. at 303, 305-06; and then citing United States v. Aurich, 31 M.J. 95 (C.M.A. 1990)); *see also* United States v. Goodman, 33 M.J. 84, 85 (C.M.A. 1991) (first citing *Wilson*, 31 M.J. at 94; then citing *Ohrt*, 28 M.J. at 301; and then citing *Aurich*, 31 M.J. at 95) (prohibiting similar testimony from a direct-line supervisor).

reason.[280] So too if a witness provides an opinion that an accused "had no potential for further service."[281] A direct-line supervisor should not testify that they do not want the accused back in the unit or that the accused has no place in the armed forces.[282]

Despite this rule, trial counsel may argue that a punitive discharge is an appropriate punishment. But in doing so, trial counsel must be careful not to "blur[] the distinction between a punitive discharge and administrative separation from the service."[283] The failure to assess a punitive discharge is not a vote for retention because an accused can be administratively separated. In *United States v. Motsinger*,[284] trial counsel made this error by implying that the decision not to adjudge a punitive discharge would "retain [the accused] in the Air Force."[285] Trial counsel may also present evidence about how a witness would feel if an accused received no punishment because it "does not call for impact testimony based upon the offense but rather calls for impact testimony based upon the judicial process."[286]

On the other side of the issue, defense counsel may present mitigation evidence that "a witness would willingly serve with the accused again."[287] In *United States v. Griggs*,[288] CAAF reviewed sentencing testimony that the accused "will continue to be an asset to the mission of the squadron and Air Force," that he should be "given a second chance to be a productive member of the United States Air Force," that "the Air Force could use more airmen like him," that the Air Force did not have a "one mistake" policy, and "that he has learned from this experience and can still be of great potential to the United States Air Force."[289]

Testimony like this comes at a cost. When defense counsel opens the door by presenting mitigation evidence that witnesses would "gladly serve" with the accused, then trial counsel may present rebuttal evidence that "this was not the consensus of the command."[290] There are some limits: counsel may only present evidence which is necessary to show that "retaining the accused is not the view of every member of the

280. United States v. Kirk, 31 M.J. 84, 88 (C.M.A. 1990) (first citing *Ohrt*, 28 M.J. 301; and then citing United States v. Cherry, 31 M.J. 1 (C.M.A. 1990)).

281. United States v. Rice, 33 M.J. 451, 453 (C.M.A. 1991).

282. *Goodman*, 33 M.J. at 85 (first citing *Wilson*, 31 M.J. at 94; then citing *Ohrt*, 28 M.J. at 301; and then citing *Aurich*, 31 M.J. at 95).

283. United States v. Motsinger, 34 M.J. 255, 257 (C.M.A. 1992) (citing *Ohrt*, 28 M.J. at 306).

284. 34 M.J. 255 (C.M.A. 1992).

285. *Id.* at 256-57.

286. United States v. Davis, 39 M.J. 281, 283 (C.M.A. 1994).

287. United States v. Griggs, 61 M.J. 402, 409 (C.A.A.F. 2005).

288. 61 M.J. 402 (C.A.A.F. 2005) (emphasis omitted).

289. *Id.* at 406 (emphasis omitted).

290. United States v. Eslinger, 70 M.J. 193, 198 (C.A.A.F. 2011).

command."[291] If the government wants to call multiple senior command witnesses, "trial counsel should assess which and how many are necessary to rebut the defense contention that the accused should be retained . . . ."[292] As with all witnesses, rebuttal witnesses must have a proper foundation under Military Rule of Evidence 701.[293]

Rebuttal testimony must be probative on the issue of rehabilitative potential.[294] In *United States v. Hursey*,[295] a witness testified that his assumption of a delay in a court-martial proceeding was caused by the unavailability of the accused even though "he had no knowledge of the reason for the appellant's absence," or whether the delay was unavoidable, justified, or the accused's fault.[296] CAAF held that the testimony should have been excluded because it "had virtually no probative value," "had the potential for wasting time by provoking a mini-trial," and "had the potential of misleading the court members by suggesting . . . that appellant was so unreliable that he was absent without authority from his own court-martial."[297]

Trial counsel must also avoid presenting irrelevant or prejudicial evidence. In *United States v. Reyes*,[298] for example, trial counsel offered a 139-page service record of an accused into evidence.[299] It turned out that other documents were "[t]ucked between the actual excerpts" of the service record, contained inadmissible pictures, inadmissible hearsay, and the accused's pretrial offer to plead guilty to specifications on which he was acquitted.[300]

A recurring problem in sentencing testimony arises when the accused's commander testifies about the accused's potential for rehabilitation. A commander's testimony "implicates unlawful command influence" if its purpose is to influence the court to return a particular sentence.[301] However, a commander may serve as a rebuttal witness for the prosecution.[302] If a commander does testify, "it is essential for the

291. *Id.* at 199 (quoting *Griggs*, 61 M.J. at 410).
292. *Id.*
293. *Id.* (quoting United States v. Saferite, 59 M.J. 270, 273 (C.A.A.F. 2004)).
294. *See* United States v. Hursey, 55 M.J. 34, 36 (C.A.A.F. 2001).
295. 55 M.J. 34 (C.A.A.F. 2001).
296. *Id.* at 36.
297. *Id.*
298. 63 M.J. 265 (C.A.A.F. 2006).
299. *Id.* at 266.
300. *Id.* at 266-67 (quoting United States v. Reyes, 2005 WL 995676, at *1 (N-M. Ct. Crim. App. Apr. 29, 2005), *aff'd in part and rev'd in part*, 63 M.J. 265 (C.A.A.F. 2006)).
301. United States v. Chikaka, 76 M.J. 310, 313 (C.A.A.F. 2017) (quoting United States v. Ohrt, 28 M.J. 301, 303 (C.M.A. 1989)).
302. United States v. Eslinger, 70 M.J. 193, 199 (C.A.A.F. 2011) (stating that "a commander may testify").

military judge to be on guard for the possibility, intended or not, that a commander's testimony could convey undue command influence to the members."[303]

Beyond rebuttal testimony, testimony from commanders on rehabilitation risks additional pitfalls. Commanders must not provide an opinion about appropriate punishment to avoid "invad[ing] the province of the court-martial" and "unlawful command influence."[304] And despite *United States v. Eslinger*'s[305] statement that a "commander may testify," CAAF has held in recent cases that a commander's testimony constituted unlawful influence. In *United States v. Chikaka*,[306] trial counsel asked the accused's commander to explain "how important it [was] to set a strong example for general deterrence in [the Sixth] Marine Corps District as a whole."[307] The commander explained that the punishment should be "a significant blow" that would deter other Marines from similar misconduct.[308] CAAF held this evidence contravened "long-standing precedent" because it is impermissible for panels to base their sentence on the opinion of an officer "who outranked the entire panel and was within the chain of command of at least one member . . . about the importance of a harsh sentence."[309]

Any permissible opinion on rehabilitative potential must provide "insight into an individual's personal circumstances," and may not be "based solely on the severity of the offenses."[310] For example, the CMA held that a major who testified that an accused lacked rehabilitative potential because the offenses themselves showed "*a total disregard for military standards*" and "*for rules and regulations*" based his view on rehabilitation "on his inflexible view of the grave nature of appellant's infractions."[311] Today, RCM 1005(b)(5)(C) provides that "the principle basis for an opinion of the accused's rehabilitative potential" may not be "[t]he opinion of the witness or deponent regarding the severity or nature of the accused's offense or offenses."[312]

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303. *Id.*

304. United States v. Cherry, 31 M.J. 1, 5 (C.M.A. 1990) (first citing *Ohrt*, 28 M.J. at 305; and then citing United States v. Sanford, 29 M.J. 413, 415 (C.M.A. 1990)).

305. 70 M.J. 193 (C.A.A.F. 2011).

306. 76 M.J. 310 (C.A.A.F. 2017).

307. *Id.* at 311.

308. *Id.* at 312.

309. *Id.* at 313.

310. United States v. Kirk, 31 M.J. 84, 88 (C.M.A. 1990) (first citing United States v. Antonitis, 29 M.J. 217, 220 (C.M.A. 1989); then citing United States v. Gunter, 29 M.J. 140, 141-42 (C.M.A. 1989); and then citing United States v. Ohrt, 28 M.J. at 307); *see also* United States v. Horner, 22 M.J. 294, 295 (C.M.A. 1986).

311. *Id.* at 87-89.

312. MCM, UNITED STATES, R.C.M. 1001(b)(5)(C) (2024).

An important restriction on testimony about rehabilitative potential is that trial counsel must not "present the basis for the witness'[s] opinion of the potential or lack thereof."[313] In *United States v. Rhoads*,[314] trial counsel asked the accused's first sergeant to provide the basis for his opinion on the accused's potential for rehabilitation.[315] The sergeant replied "that his opinion was based in part on appellant's statement that he had no respect for the command structure in the unit and in part on appellant's prior record in another battery."[316] Rejecting this testimony, CAAF held that "testimony as to the basis of the opinion may only be elicited when the accused attacks the opinion as being without foundation."[317] The basis of the witness's opinion also likely cannot be based on evidence seized in violation of the Constitution—the question is not yet formally settled.[318]

E. Smuggling in Hearsay

When evidence is admitted at trial as the basis of expert testimony under Military Rule of Evidence (MRE) 703, it is reversible error for an attorney to use that evidence for its truth value in argument.[319] MRE 703 generally permits an expert witness to testify about materials on which he relied in forming an opinion, even if those materials are otherwise inadmissible.[320] "If the expert is denied an opportunity to relate the facts or data that support his or her testimony, it is difficult for the [trier of fact] to evaluate the legitimacy of his or her opinion."[321] Where evidence is only admitted to help the trier of fact evaluate the legitimacy of the expert's conclusions, the "evidence is not . . . offered for the truth of the matter asserted."[322]

For example, *United States v. Neeley*[323] involved the testimony of a government psychologist that the "consensus" of five other psychologists was that the accused had attempted to manipulate his Minnesota

313. United States v. Rhoads, 32 M.J. 114, 116 (C.M.A. 1991).
314. 32 M.J. 114 (C.M.A. 1991).
315. *Id.* at 115.
316. *Id.*
317. *Id.* at 116.
318. United States v. Oquendo, 35 M.J. 24, 26-27 (C.M.A. 1992) (citing United States v. Corraine, 31 M.J. 102, 106 (C.M.A. 1990)) (agreeing with the Government's concession that "the testimony of each of [the sentencing] witnesses was improperly based on unconstitutionally seized evidence").
319. 2 STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL § 703.02 cmt. 1, 3 (9th ed., Matthew Bender & Co. 2020).
320. *Id.* § 703.02 cmt. 4.
321. *Id.* § 703.02 cmt. 3.
322. *Id.*
323. 25 M.J. 105 (C.M.A. 1987).

Multiphasic Personality Inventory test.[324] Under MRE 703, if the testimony was admitted to show "appellant intentionally inflated the results of his tests, then the evidence [would be] clearly hearsay and not admissible."[325] However, if counsel only sought to establish the basis of the expert's testimony, the evidence testimony would be admissible "although 'the truth of the matter asserted' is *smuggled* into evidence."[326]

Neeley demonstrates that the use of MRE 703 carries with it an inherent danger. The trier of fact may errantly rely on the evidence for its *substance* rather than the limited purpose of evaluating the expert's testimony.[327] This evidence is *only* entered so that the panel may evaluate the credibility of a witness.[328] It therefore is impermissible for counsel to use the evidence for its truth value during sentencing arguments.[329] For example, in *United States v. George*,[330] the Navy-Marine Court of Criminal Appeals reviewed—in part—government counsel's statement during closing argument that the accused "had been evaluated as a 'predatory person.'"[331] This statement was based on expert testimony from a social worker about the accused's rehabilitative potential.[332] The expert testified that the accused had been described by a therapist as "predatory in nature" and that the accused's records had reflected the accused's failure to "re-initiate treatment" after a prior conviction.[333] By using the therapist's statements to prove that the accused was "predatory," trial counsel "'smuggl[ed]' hearsay statements as substantive evidence."[334]

VI. FACTS UNRELATED TO CULPABILITY

Trial counsel can err by invoking facts that lack a connection to the evidence of the accused's culpability. Basing an argument on a fact not in evidence is one of the most common forms of error. Others include referring to other cases, such as factually unrelated legal authorities, urging the sentencing authority to make inferences that are unsupported by the evidence, and suggesting that defense counsel invented a defense. These errors violate the rule that counsel should limit their arguments to

324. *Id.* at 108.
325. *Id.* at 107.
326. *Id.*
327. SALTZBURG ET AL., *supra* note 319, § 703.01 & cmt. 1.
328. *Id.* § 703.02 cmt. 2.
329. *See* United States v. George, No. NMCM 97 01969, 1998 WL 557565, at *5-6 (N-M. Ct. Crim. App. Aug. 6, 1998).
330. No. NMCM 97 01969, 1998 WL 557565 (N-M. Ct. Crim. App. Aug. 6, 1998).
331. *Id.* at *5 n.3.
332. *Id.* at *4.
333. *Id.*
334. *Id.* at *5 (quoting United States v. Neeley, 25 M.J. 105, 107 (C.M.A. 1987)).

"the evidence of record, as well as all reasonable inferences fairly derived from such evidence."[335]

A. Protected Characteristics of the Accused

Trial counsel may not make "racially biased prosecutorial arguments,"[336] as the race of the accused is never an appropriate sentencing consideration.[337] The prohibition extends to "unwarranted references to race or ethnicity," which "have no place in either the military or civilian forum."[338] These rules mean that trial counsel should be careful not to invoke racial, ethnic, or cultural stereotypes. For example, in *United States v. Rodriguez*,[339] the accused identified as a person "of Mexican descent" and as "Latino."[340] In his sentencing argument, trial counsel said, "[t]hese are not the actions of somebody who is trying to steal to give bread so his child doesn't starve, sir, some sort of a [L]atin movie here."[341] Although the government argued that the comment was "gratuitous" and not "based upon racial animus," CAAF held that it was improper.[342] The Court explained that an "unwarranted reference[] to race or ethnicity" is almost always obvious error because "there is no room at the bar of military justice for racial bias or appeals to race or ethnicity."[343] The lesson is that trial counsel should avoid referencing the accused's race altogether.[344]

Similarly, the accused's religion is not a permissible sentencing consideration, and it is improper for trial counsel to make sentencing

335. United States v. Sewell, 76 M.J. 14, 20 (C.A.A.F. 2017) (quoting United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)).

336. McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987) (citing Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

337. United States v. Green, 37 M.J. 380, 385 (C.M.A. 1993) ("[W]e also hold that race is an inappropriate factor upon which to generally determine a sentence." (citing Powers v. Ohio, 499 U.S. 400, 402 (1991))). While the race of the accused is itself not a permissible factor in sentencing, a racial motivation for an offense is a proper consideration. *See* MCM, UNITED STATES, R.C.M. 1001(b)(4) (2024) (providing that "evidence in aggravation may include evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived race . . . of any person").

338. United States v. Rodriguez, 60 M.J. 87, 89 (C.A.A.F. 2004).

339. 60 M.J. 87 (C.A.A.F. 2004).

340. *Id.* at 88.

341. *Id.*

342. *Id.* at 88-89.

343. *Id.* at 89 (first citing United States v. Witham 47 M.J. 297, 303 (C.A.A.F. 1997); then citing United States v. Green, 37 M.J. 380, 384 (C.M.A. 1993) then citing United States v. Diffoot, 54 M.J. 149, 154 (C.A.A.F. 2000) (Cox, J., dissenting); and then citing United States v. Greene, 36 M.J. 274, 282 (C.M.A. 1993) (Wiss, J., concurring)).

344. *Id.*

arguments on this basis.[345] The United States Coast Guard Court of Criminal Appeals has suggested that "an appeal to religious impulses or beliefs as an independent source of a higher law calling for a particular result" is an improper sentencing argument.[346] Although CAAF does not have a case on this point, it would likely adopt this rule.[347]

It is also error for trial counsel to encourage courts-martial to base their sentencing decisions on the political opinions of the accused.[348] In *United States v. Garza*,[349] the accused's company Gunnery Sergeant explained that the accused's security clearance had been withdrawn after an investigation into his political beliefs and that the accused had family members who were members of the Socialist Workers Party, which he believed to be "a Marxist organization."[350] This testimony turned the sentencing proceeding "into a political trial" about "the *allegedly heinous political philosophy* of the accused and his family."[351]

B. Comments on Constitutional Rights

Trial counsel may not comment on an accused's choice to exercise his or her constitutional rights. Although this constraint "does not depend on the specific right at issue," it is worth identifying a few specific rights which may tempt trial counsel. First, trial counsel should avoid statements about the accused's refusal to plead guilty.[352] The CMA has explained in *United States v. Johnson*[353] that "comments as those we now condemn convey the intolerable unspoken message that it is proper to punish an accused who has put the prosecution to the test, not just for the crime itself, but also for so inconveniencing the Government."[354] Second, trial counsel must also avoid commenting on "an accused's exercise of his right to remain silent and offer no testimony."[355] As the CMA explained, "[i]t is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that the accused did not

345. *Green*, 64 M.J. at 294.
346. United States v. Kirk, 41 M.J. 529, 533 (C.G. Crim. Ct. App. 1994).
347. *See Green*, 64 M.J. at 294.
348. *See* Zant v. Stephens, 462 U.S. 862, 885 (1983) (citing Herndon v. Lowry, 301 U.S. 242 (1937)).
349. 20 C.M.A. 536 (1971).
350. *Id.* at 537.
351. *Id.* at 540.
352. United States v. Johnson, 1 M.J. 213 (C.M.A. 1975).
353. 1 M.J. 213 (C.M.A. 1975).
354. *Id.* at 215.
355. United States v. Edwards, 35 M.J. 351, 356 (C.M.A. 1992).

testify in his defense."[356] An example of an inadvisable indirect comment is supplying the answers to rhetorical questions posed to the "mute defendant."[357] Third, it is not proper to reference an accused's invocation of the right to counsel while being investigated.[358]

While it is proper to argue that an accused is mendacious or lacks remorse, the basis for this argument must come from evidence besides protected silence.[359] Trial counsel also may argue that the accused did not accept responsibility[360] or "comment on the defense's failure to refute government evidence or to support its own claims."[361] When making these arguments, however, trial counsel must "use care in eliciting testimony that may cross the line into impermissible comment on an accused's invocation of his constitutional rights."[362] The line is difficult to identify precisely. For example, trial counsel may not "explicitly" argue that the accused's "invocation of his constitutional right to a trial forced the victim to endure the rigors of cross-examination and relive the experience of being attacked."[363] However, CAAF held that trial counsel may make "a brief reference to the effect of the entire proceeding" on the victim.[364]

A limited exception to the rule exists for rebuttal,[365] but trial counsel should be careful when venturing into this territory. Rebuttal comments must be "fair."[366] For example, a comment on post-arrest silence is permissible to contradict an accused "who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest."[367] Trial counsel may also explain that a defendant had the right to take the stand and testify if defense counsel argues that the Government did not allow the accused to explain his side of the story.[368] Similarly, if defense counsel explains that the accused invoked the right

356. United States v. Mobley, 31 M.J. 273, 279 (C.M.A. 1990) (citing Griffin v. California, 380 U.S. 609 (1965)).

357. *Id.*

358. United States v. Moran, 65 M.J. 178, 186-87 (C.A.A.F. 2007).

359. *Id.* at 186.

360. United States v. Garren, 53 M.J. 142, 144 (C.A.A.F. 2000).

361. United States v. Paige, 67 M.J. 442, 448 (C.A.A.F. 2009) (citing United States v. Carter, 61 M.J. 30, 33 (C.A.A.F. 2015)).

362. United States v. Stephens, 67 M.J. 233, 236 (C.A.A.F. 2009).

363. *Id.* (first citing United States v. Carr, 25 M.J. 637, 638 (A.C.M.R. 1987); and then citing Burns v. Gammon, 260 F.3d 892, 896 (8th Cir. 2001)).

364. *Id.*

365. United States v. Moran, 65 M.J. 178, 186 (C.A.A.F. 2007) (citing United States v. Edwards, 35 M.J. 351, 355 (C.M.A. 1992)).

366. United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001).

367. *Id.* at 120 (quoting Doyle v. Ohio, 426 U.S. 610, 619 n.11 (1976)).

368. United States v. Robinson, 485 U.S. 25, 30-31 (1988) (quoting Griffin v. California, 380 U.S. 609, 610-11, 614-15 (1965)).

to counsel because a proposed written confession was "full of lies," trial counsel may use testimony about the accused's invocation of the right to counsel for the "limited purpose" of rebutting that claim.[369] But "fair rebuttal" is the limit, and the response must not go further.[370]

C. Other Cases or Legal Authority

It is improper to cite the facts of unrelated cases or appeal to legal authority when encouraging the sentencing authority to draw factual conclusions.[371] In sentencing, this cashes out in the rule that "the sentences in other cases cannot be given to court-martial members for comparative purposes."[372] This means that "[i]t is unquestionably improper for counsel to argue facts of other cases to a court-martial."[373] Likewise, trial counsel may not ask a panel to consider appellate opinions with facts that "closely parallel the facts" of the case being tried.[374]

The best illustrations of the more general rule come from merits arguments. For example, in *United States v. Fletcher*, the accused testified about "his strict religious upbringing, his nearly twenty years in the Air Force, his family life and his involvement in the community."[375] In response, trial counsel referenced a number of "entertainers and public religious figures" who had, among other misdeeds, fathered illegitimate children, solicited prostitutes, cheated on their taxes, and used drugs.[376] It is not hard to imagine similar statements in sentencing. In holding these statements to be plain error, CAAF explained that the references to these famous figures "invited comparison to other cases, the facts of which were not admitted into evidence and which bore no similarity to Fletcher's case."[377] More than mere "references to public figures and

369. *Gilley*, 56 M.J. at 123.

370. *Id.*

371. *See* United States v. Lacy, 50 M.J. 286, 287-89 (C.A.A.F. 1999) (first citing United States v. Christopher, 13 C.M.A. 231, 236 (1962); then quoting United States v. Dukes, 5 M.J. 71, 73 (C.M.A. 1978); and then citing United States v. Henry, 42 M.J. 231, 234 (1995) (explaining how the Court of Criminal Appeals uses the "closely related" test to decide whether the cases cited by the appellant are sufficient to use as comparison for their sentencing determination)).

372. United States v. Mamaluy, 10 C.M.A. 102, 106 (1959). This rule does not apply to appellate review of court-martial sentences, which in appropriate cases can involve sentence comparison. *See Lacy*, 50 M.J. at 288 (citing *Christopher*, 13 C.M.A. at 236).

373. United States v. Bouie, 9 C.M.A. 228, 233 (1958).

374. United States v. McCauley, 9 C.M.A. 65, 66 (1958).

375. United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005).

376. *Id.* at 178-79, 179 n.2 (disclaiming any validation of "the accuracy of the trial counsel's statements with respect to the conduct mentioned or whether the persons named were in fact appropriately linked to such conduct"). Trial counsel appears to have confused Jerry Falwell with Jimmy Swaggart. *Id.* at 178.

377. *Id.* at 184.

news stories," trial counsel's argument invited "the members to accept new and inflammatory information as factual based solely on her authority as the trial counsel."[378] This was plain error.[379]

This rule extends beyond references to public figures. In *United States v. Clifton*, trial counsel "seemingly testified" that he knew a nurse who had been a rape victim and she had told him: "I'm a nurse and I've been in a hospital and I've seen too many rape victims who tried to fight off the rapist, so I submitted."[380] No nurse had testified in the case, and the CMA held that it was improper for him to discuss the facts of other cases.[381] Likewise, it is error for counsel to tell a panel to consider past opinions of appellate courts which have "facts . . . which closely parallel the facts" of the case being tried.[382]

A closely related problem is citation or discussion of legal authority. Early on, the CMA explained that "the reading of legal authorities to the jury by counsel" is a practice that "should be avoided."[383] Beyond the facts of comparable cases or precedents, trial counsel should not invoke legal authorities to support permissible inferences.[384] For example, even when counsel relies on a common-sense argument that shows consciousness of guilt, it is inappropriate to cite *Wigmore on Evidence* to buttress the argument.[385] An important caveat is that counsel may cite legal authority "when arguing before a military judge alone."[386] Nevertheless, trial counsel should avoid suggesting that a military judge rely on legal authority to draw *factual* conclusions.

D. Unproven Misconduct

RCM 1001 generally permits the government to use evidence of prior misconduct in sentencing argument, but not if the admission of the evidence conflicts with other provisions of the Military Rules of Evidence and the Rules for Courts Martial.[387] Although MRE 414 and RCM 1001 permit the prosecution to present evidence of prior or uncharged

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378. *Id.* (first citing United States v. Barrazamartinez, 58 M.J. 173, 175-76 (C.A.A.F. 2003); and then citing United States v. Kropf, 39 M.J. 107, 108-09 (C.M.A. 1994)).

379. *Id.*

380. United States v. Clifton, 15 M.J. 26, 29 (C.M.A. 1983).

381. *Id.*

382. United States v. McCauley, 9 C.M.A. 65, 66 (1958).

383. United States v. Fair, 2 C.M.A. 521, 526 (1953).

384. *Clifton*, 15 M.J. at 30.

385. *Id.*

386. *Id.* (first citing United States v. Johnson, 9 C.M.A. 178 (1958); then citing *McCauley*, 9 C.M.A. at 65; and then citing *Fair*, 2 C.M.A. at 521).

387. MCM, UNITED STATES, R.C.M. 1001(b)(3)(A) (2024).

misconduct, these rules are subject to restrictions recognized in precedent.[388]

MRE 404(b) prohibits "[e]vidence of . . . crime[s], wrong[s], [and] other act[s] . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[389] Even so, MRE 414(a) provides that when an "accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation," which "may be considered on any matter to which it is relevant."[390] In *United States v. Schroder*,[391] CAAF reviewed an accused's convictions for raping his twelve-year-old daughter in 1987 and committing indecent acts with a twelve-year-old neighbor in 2001.[392] Before trial, the government moved to admit evidence that the accused had also molested his stepdaughter in 1981.[393] Trial counsel asked the panel "to render justice for [the stepdaughter]" in argument.[394] Trial counsel told the panel the accused "used his position as a father, *stepfather*, and a father figure to abuse young girls."[395] Trial counsel also displayed a photo of the stepdaughter alongside photos of the charged victims during sentencing, telling the panel: "Look at *those girls*. . . . *They* deserve justice. *They* have been waiting years for justice. *They* scream for justice. Members, make sure your sentence delivers justice to *those girls*."[396] During the merits portion of trial, counsel told the panel: "This case details events lasting 20 years, *three* different girls, one common ground, that this man . . . raped, molested, committed indecent acts with each of them."[397] CAAF concluded that it was not an abuse of discretion to admit this evidence under MRE 414(a); however, CAAF determined the *use* of the evidence was improper because trial counsel effectively asked the panel to punish the accused for an act with which he was not charged.[398] While MRE 414(a) permits the use of prior misconduct as character and propensity evidence, it does not permit trial counsel to ask the sentencing authority to convict or punish the accused for uncharged acts.[399]

388. *Id.* R.C.M. 1001(b)(3)(C); MIL. R. EVID. 414.
389. MIL. R. EVID. 404(b)(1).
390. MIL. R. EVID. 404(a).
391. 65 M.J. 49 (C.A.A.F. 2007).
392. *Id.* at 51.
393. *Id.* at 51-52.
394. *Id.* at 58.
395. *Id.* at 57 (emphasis added).
396. *Id.* (emphasis added).
397. *Id.* (emphasis added).
398. *Id.* at 53-54, 58.
399. *Id.* at 58 (quoting MIL. R. EVID. 414(a)).

RCM 1001(b)(2) permits counsel to present evidence of the accused's "character of prior service," including "reports reflecting the past military efficiency, conduct, performance, and history of the accused."[400] RCM 1001(b)(2) also allows records of "any disciplinary actions, including punishments under Article 15" to be presented during sentencing.[401] This phrasing broadly permits courts-martial to consider an accused's prior misconduct during sentencing but is not a "blanket authority to introduce all information that happens to be maintained in the personnel records of an accused."[402] The breadth of RCM 1001(b)(2) is tempered by the "questionable accuracy, relevance, [and] completeness" of personnel records.[403] For example, in *United States v. Zakaria*,[404] the accused was convicted primarily of larceny of property valued at less than $100.00.[405] Pursuant to RCM 1001(b)(2), the government introduced a letter of reprimand concerning the accused's indecent acts with four minor girls.[406] CAAF concluded this evidence was erroneously admitted during sentencing because the letter and reprimand had "obvious reliability problems" which were not clarified by government counsel or the military judge.[407]

The CMA recognized an additional restriction on the use of RCM 1001(b)(2) to present evidence of prior misconduct in *United States v. Fontenot*.[408] During sentencing in *Fontenot*, the prosecution introduced the accused's Installation Detention Facility (IDF) file which contained documents detailing the accused's misconduct and disciplinary action during pretrial confinement.[409] Although the CMA concluded that these documents comported with RCM 1001(b)(2), the unsworn statements of witnesses attached to the IDF documents did not.[410] They fell outside RCM 1001(b)(2) because no policy, regulation, or provision provided for their inclusion in the personnel file.[411] So while RCM 1001(b)(2) broadly permits personnel records to be used against an accused in sentencing, counsel may not introduce material which is not required to be kept in the personnel file.[412]

400. MCM, UNITED STATES, R.C.M. 1001(b)(2) (2024).
401. *Id.*
402. United States v. Ariail, 48 M.J. 285, 287 (C.A.A.F. 1998).
403. *Id.*
404. 38 M.J. 280 (C.M.A. 1993).
405. *Id.* at 284.
406. *Id.* at 282.
407. *Id.* at 283.
408. 29 M.J. 244, 248 (C.M.A. 1989).
409. *Id.* at 245.
410. *Id.* at 247.
411. *Id.*
412. *Id.* (quoting MCM, UNITED STATES, R.C.M. 1001(b)(2) (2024)).

RCM 1001(b)(4) permits counsel to present evidence in aggravation to increase the severity of the accused's sentence.[413] Although RCM 1001(b)(4) enumerates certain types of evidence, such as victim impact and adverse impact on the accused's command, the text of 1001(b)(4) clarifies that it is not exhaustive.[414] For example, during sentencing in *United States v. Ross*,[415] trial counsel prompted the accused to admit to additional uncharged criminal acts: completing more than twenty military aptitude tests for others.[416] The CMA held this evidence was "proper aggravating circumstances within the meaning of [RCM 1001(b)(4)]" and therefore trial counsel did not err in its admission or use.[417] The CMA provided an alternate theory for this evidence's use: the uncharged misconduct was evidence of the "full impact on the military community" of the charged conduct, a necessary element of a conviction under Article 134 of the UCMJ.[418] As Judge Cox rephrased in his concurrence, the evidence that the accused "defrauded the Government 'twenty or thirty' times . . . demonstrates the impact of his continuing course of criminal conduct on the military mission."[419]

United States v. Nourse[420] provides another example of permissible use of uncharged misconduct.[421] Appellant stole rain ponchos—valued at $2,256—from a sheriff's office where he worked part-time.[422] Trial counsel presented evidence that the accused had stolen other property from the sheriff's office; no charges were brought for these other acts of larceny because the acts were "discovered after preferral of charges and arraignment."[423] CAAF concluded this additional misconduct was properly introduced because it "*directly relat*[*ed*] *to or result*[*ed*] *from* the offenses of which the accused [was] found guilty."[424] It contextualized the charged conduct "as part of a continuing scheme to steal from the . . . [s]heriff's office" and was therefore "admissible as an aggravating circumstance."[425] Counsel may use continuing criminal action "to

413. *Id.* at 251 (quoting MCM, UNITED STATES, R.C.M. 1001(b)(4) (2024)).
414. MCM, UNITED STATES, R.C.M. 1001(b)(4) (2024).
415. 34 M.J. 183 (C.M.A. 1992).
416. *Id.* at 184.
417. *Id.* at 187 (first citing United States v. Ciulla, 32 M.J. 186 (C.M.A. 1991); and then citing United States v. Mullens, 29 M.J. 398 (C.M.A. 1990)).
418. *Id.*
419. *Id.* at 188 (Cox, J., concurring).
420. 55 M.J. 229 (C.A.A.F. 2001).
421. *Id.* at 232.
422. *Id.* at 230.
423. *Id.*
424. *Id.* at 231 (first quoting MCM, UNITED STATES, R.C.M. 1001(b)(4) (2024); and then citing United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1988)).
425. *Id.* at 232.

show the full impact of [an accused]'s crimes" on the victim, even where it includes conduct for which the accused could have been charged.[426]

RCM 1001(b)(5) also provides a basis for counsel to use prior misconduct evidence.[427] RCM 1001(b)(5) broadly permits counsel to present evidence of the accused's rehabilitative potential: an accused's "potential to be restored . . . to a useful and constructive place in society."[428] In *United States v. King*,[429] the CMA reviewed a sentencing proceeding in which a government witness testified about the accused's lack of rehabilitative potential.[430] At the time of his court-martial, the accused was already serving a sentence for an unrelated crime.[431] This witness testified that the accused had "been in maximum custody" and that it was not "common for an inmate to spend that much time in maximum custody."[432] At trial counsel's prompting, the witness also testified that the accused had appeared before nineteen Discipline and Adjustment Boards during his sentence, adding that "[o]n the scale of things" this was "a lot."[433] The CMA found the government's introduction of this evidence to be an error: though trial counsel may produce evidence of an accused's rehabilitative potential during sentencing, "trial counsel may not inquire into 'specific instances'" of prior misconduct to establish it.[434] While RCM 1001(b)(5)(E) permits *cross-examination* about specific instances of conduct,[435] the CMA made clear in *King* that "[t]he negative implication of [RCM 1001(b)(5)(E)] is that, on direct examination, trial counsel may not inquire into 'specific instances of conduct.'"[436]

E. Facts Not in Evidence

The sentence of a court-martial must be based only on the facts in evidence.[437] Arguments made by counsel are not evidence.[438] It follows that trial counsel must not try to persuade the sentencing authority to

426. *Id.* (first citing United States v. Mullens, 29 M.J. 398 (C.M.A. 1990); then citing United States v. Ross, 34 M.J. 183 (C.M.A. 1992); and then citing United States v. Shupe, 36 M.J. 431 (C.M.A. 1993)).

427. MCM, UNITED STATES, R.C.M. 1001(b)(5) (2024).

428. *Id.*

429. 30 M.J. 334 (C.M.A. 1990).

430. *Id.* at 335-36.

431. *Id.* at 334.

432. *Id.* at 335.

433. *Id.*

434. *Id.* at 336 (citing United States v. Wingart, 27 M.J. 128 (C.M.A. 1988)).

435. MCM, UNITED STATES, R.C.M. 1001(b)(5)(E) (2024).

436. *King*, 30 M.J. at 336 (citing *Wingart*, 27 M.J. at 128).

437. United States v. Fletcher, 62 M.J. 175, 183 (C.A.A.F. 2005) (citing United States v. Bouie, 9 C.M.A. 228, 233 (1958)).

438. *Id.* (citing United States v. Clifton, 15 M.J. 26, 29 (C.M.A. 1983)).

increase a sentence's severity by using facts not in evidence.[439] CAAF often describes these types of arguments as improper "testimony." In *United States v. Garza*,[440] trial counsel effectively gave "unsworn testimony" by referring to "a document marked 'Secret' regarding 'the entire background of the family and the defendant'" in order to insinuate "that the accused was actively participating, with his family, in activity inimical to the best interests of the United States."[441] Likewise, in *United States v. Clifton*, trial counsel explained his theory about the psychology of rapists and their victims after the military judge refused to allow a Government expert to present testimony on the matter.[442] The CMA explained that "[w]hen trial counsel . . . discoursed on the practices and fantasies of rapists, and when he described the attitudes of unrelated rape victims, he was not drawing upon legitimate inferences from evidence of record or appeal to the common sense of the court-martial."[443] Rather, he was "inviting the members to accept new information as factual, *based on his authority*."[444] The court concluded that "it was grossly improper for trial counsel to cite evidence allegedly excluded from the court-martial's consideration or to suggest that there was other evidence that might have been adduced."[445] In a similar case, CAAF held that trial counsel acted improperly when an accused's sanity board was not in evidence but trial counsel nevertheless told a court-martial that an accused had "issues and his issues are dangerous and they're criminal."[446]

Counsel also must not ask the sentencing authority to infer specific facts that lack an evidentiary basis.[447] For example, in *United States v. Frey*,[448] the defense argued that there was no evidence that the accused had previously molested any children.[449] Trial counsel's rebuttal was to ask the court-martial to "think what we know, common sense, ways of the world, about child molesters."[450] The court explained that this argument was "not derived from the evidence presented at trial," but instead

439. *See id.* (quoting *Clifton*, 15 M.J. at 29-30).
440. 20 C.M.A. 536 (1971).
441. *Id.* at 539.
442. *Clifton*, 15 M.J. at 28-29.
443. *Id.* at 30.
444. *Id.*
445. *Id.* (first citing United States v. Tackett, 16 M.A. 226 (1966); and then citing United States v. Edwards, 39 C.M.R. 952 (A.F.B.R. 1968)).
446. United States v. Sewell, 76 M.J. 14, 20 (C.A.A.F. 2017).
447. United States v. Frey, 73 M.J. 245, 248 (C.A.A.F. 2014) (quoting United States v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000)); *id.* at 252 (first quoting United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007); and then quoting *Baer*, 53 M.J. at 237).
448. 73 M.J. 245 (C.A.A.F. 2014).
449. *Id.* at 247.
450. *Id.*

appealed to "a risk of recidivism through serial molestation."[451] These statements "went beyond the evidence of record and constituted error."[452]

VII. CONCLUSION

A variety of pitfalls await the unwary trial counsel in sentencing. When preparing for sentencing, trial counsel should keep two fundamental questions in mind. First, does the argument encourage the court-martial to abandon a disinterested and non-partisan point of view? Second, does the argument ask the court-martial to base the sentence on something other than the history, character, and proven misconduct of the accused? If the answer to either of these questions is "yes," trial counsel should be able to point to a legal authority that expressly authorizes the argument. Otherwise, counsel should go back to the drawing board.

Defense counsel should test trial counsel's arguments with the same questions. Improper arguments are tempting because they can be effective. Yet on plain error review, it is difficult for an accused to demonstrate the prejudicial effect of any given argument in the context of an entire sentencing proceeding. To best protect the rights of the accused, defense counsel should be ready to object if trial counsel crosses the line.

451. *Id.* at 249.
452. *Id.* at 248.