IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MANUEL PALACIOS CUETO,
Airman First Class (E-3), USAF
Appellant.

USCA Dkt. No. 21-0357/AF

Crim. App. Dkt. No. ACM 39815

BRIEF ON BEHALF OF APPELLANT

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II.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter CCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ).[2] This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

Statement of the Case

Airman First Class (A1C) Manuel Palacios Cueto (hereinafter

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[1] The presented issues have been re-numbered from the Court's granted issues.

[2] References to the UCMJ, Military Rules of Evidence, and Rules for Courts-Martial (R.C.M.) are to the Manual for Courts-Martial, United States (2019 ed.), except where noted otherwise.

Appellant) was tried by general court-martial at Hanscom Air Force Base (AFB), Massachusetts, on August 20-24, 2019. Joint Appendix (JA) at 350. Contrary to his pleas, a panel of officer and enlisted members found him guilty of one charge and one specification of abusive sexual contact by touching A1C M.T.'s stomach with his hand when A1C M.T. was incapable of consenting due to impairment by alcohol in violation of Article 120, UCMJ, ("Specification 2")[3]; and an additional charge and specification of abusive sexual contact by touching A1C M.T.'s lips and mouth with his lips and mouth by causing bodily harm in violation of Article 120, UCMJ. JA at 304.

The panel acquitted Appellant of one charge and specification of sexual assault by penetrating A1C M.T.'s vulva with his penis when A1C M.T. was incapable of consenting due to impairment by alcohol in violation of Article 120, UCMJ. *Id.* The panel sentenced him to reduction to the grade of E-1, to perform hard labor without confinement for 90 days, and a bad-conduct discharge. JA at 336. The convening authority disapproved the adjudged hard labor without

[3] Pursuant to R.C.M. 917, the military judge found Appellant not guilty of the words "and thighs" in Specification 2. JA at 224-25.

confinement and approved the remaining sentence. JA at 349.

In a divided opinion, the CCA approved the findings and sentence. JA at 001, 003. Judge Meginley dissented on grounds of factual and legal sufficiency, ineffective assistance of counsel, and prosecutorial misconduct. JA at 030. On July 12, 2021, the CCA denied Appellant's Motion for Reconsideration *en banc*. JA at 056.

Statement of Facts

Background

Appellant met A1C M.T. when he moved into the dorms on Hanscom AFB, where they both lived. JA at 103. She saw him walking down a hallway carrying some fast food, approached him and asked if he was new, and then offered to take him to get groceries. *Id*. He accepted her offer and, shortly thereafter, she learned they had a lot in common—she liked how they were both around the same age, raised in a foreign country, spoke Spanish, and had similar educational goals. JA at 104-06, 167. They later exchanged phone numbers and, over the next several months, communicated over text message. JA at 104-05, 108. A1C M.T. also went out with Appellant twice; once to get drinks at an Irish pub near base and another to get food at a Peruvian

restaurant in Boston. JA at 106-07, 120.

Although A1C M.T. described Appellant as being "the only person" she could talk to about certain things (JA at 175), and how absolutely no one else on base could relate to her, she declined to describe her relationship with him as close. JA at 105-08, 113, 174-75. For example, she claimed the only reason she invited him to the Peruvian restaurant—some distance away from Hanscom AFB[4]—was because she "needed someone who could help [her] with parking and everything" as she was unable to parallel park. JA at 107. She further alleged that he had sent her several text messages that made her "feel uncomfortable" and "feel bad," and she often rejected his invitations to socialize.[5] JA at 108-110.

Despite her purported misgivings, A1C M.T. continued to

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[4] A1C M.T. described how a subsequent trip with Appellant to Boston involved an approximately 40-minute drive from Hanscom AFB. JA at 120.

[5] Among the "uncomfortable" texts A1C M.T. received was an apparently flirtatious messages wherein Appellant asked her to purchase "something sexy." JA at 108-09. A1C M.T. also described how Appellant made a comment about her menstrual cycle, but later conceded she was the one who brought up the subject and that she responded, in part, by texting "Ha ha." *Compare* JA at 109 *with* JA at 168-169.

communicate with Appellant via text. JA at 112. As the Memorial Day weekend approached, she knew Appellant recently had a wisdom tooth removed and was taking medication. JA at 112-13. She nevertheless decided she "[didn't] want to spend another long weekend by [herself]," so she texted him to see if he would join her for dinner at a Honduran restaurant in Boston. *Id.* She also claimed, once again, that "the only reason" she invited him was because she could not "parallel park." JA at 111-12.

A1C M.T.'s Allegations

Appellant accepted A1C M.T.'s invitation and met her at approximately 1400 hours on Saturday, May 26, 2018. JA at 115. She then allowed him to drive her vehicle to downtown Boston, approximately 40 minutes away. JA at 113, 120. According to A1C M.T., she consumed one beer after they arrived at the restaurant, and she believed Appellant also drank alcohol.[6] JA at 114. They

[6] A1C M.T. did not explain why she allowed Appellant to drive her car while he was still apparently taking medication for his wisdom tooth removal, nor whether she condoned him drinking alcohol despite her purported earlier warning not to do so on medication. *See* JA at 113. (A1C M.T. claiming she told him "Hey, but you know, you cannot drink.").

remained at the restaurant until around 1700 hours, and then went to a bar near the water. JA at 115. A1C M.T. estimated she had one or two more drinks, and thought Appellant had something too. *Id*.

When that bar closed, A1C M.T. wanted to further explore the area. JA at 116. So, still accompanied by Appellant, she decided to go to yet another bar, where the pair consumed more drinks while sitting in an outdoor area. *Id*. A1C M.T. recalled "having such a good time" that they stayed for approximately three to four hours. *Id*. A1C M.T. described how the bar played good music and also had a dance floor, and claimed Appellant asked her to dance at one point. JA at 117-18. However, she attested she declined his offer because she "was not interested." JA at 118. She further denied they were on a date that evening, or to touching him in a sexual manner while at the bar. *Id*.

By the time the pair left, A1C M.T. estimated she had consumed four to five mixed vodka drinks, which were starting to affect her. JA at 117-19. They then drove back to Hanscom, AFB, arriving around one o'clock in the morning. JA at 119-20. A1C M.T. proceeded to her dorm room; however, instead of remaining there, she changed into some shorts and returned to spend time with Appellant. JA at 120-22.

They subsequently agreed to drink Pisco, a hard liquor from Peru, with A1C M.T. choosing their drinking location—a secluded site behind the Base Exchange where she often went to be alone. JA at 120-24, 182. A1C M.T. guessed they remained there for about 15-20 minutes, with each consuming a shot of the liquor, before departing to purchase cigarettes. JA at 123, 182. Thereafter, again at her suggestion, they drove to a spot behind the Civil Engineering building. JA at 186. They then remained there, in her car, talking and drinking Pisco, until the sun came up. JA at 124-25.

At 0729 hours, they returned to A1C M.T.'s dorm room. JA at 004. Surveillance video depicted them walking through a hallway and into a dayroom. *Id.* At one point, A1C M.T. fell to the ground and Appellant tripped over her. *Id.* He later leaned over and kissed her, whereupon she pushed him away. *Id.* Appellant next helped her to her feet, and they eventually made it back to her dorm room, which they both entered together. *Id.*

At trial, A1C M.T. claimed she had no memory between drinking in her vehicle and entering her dorm room. JA at 127-28. This was consistent with her previous statement to investigators that she did

not remember anything from that walk back to her room. JA at 157. Upon viewing the surveillance footage, A1C M.T. claimed—apparently for the first time[7]—that she remembered the kiss and did not consent to it. JA at 129-30.

A1C M.T. was also able to recount what happened after she and Appellant entered her dorm room. She first claimed she was unaware Appellant was even with her. JA at 132. She then described how she went into her bathroom to use the toilet, was surprised Appellant had followed her, and that he "saw [her] while [she] had [her] underwear down." *Id*. Citing her intoxication, A1C M.T. said she was confused and "didn't have the strength to fight it," so she just laid down on her bed. *Id*. The last thing she remembered was "feeling touched" on her stomach, but admitted it was "very, very blurry" and "hard to remember." JA at 135; *see also* JA at 164. She further conceded that she never opened her eyes to see what exactly was happening, and had no memory of being rubbed, stroked, or caressed on her stomach. JA

[7] *See* JA at 032-33 (Judge Meginley describing how the kissing incident first arose during the preliminary hearing, it was added as an additional charge due to the insistence of A1C M.T.'s Special Victims' Counsel, and A1C M.T. never reported it or had a memory of it until trial.)

at 164-65. She also never testified that Appellant touched her stomach with his hand. *See* JA at 032.

When A1C M.T. finally awoke, she found Appellant in her bed, clothed only in his underwear. JA at 136. She claimed she felt disgusted and ashamed, and asked Appellant if he violated her. JA at 137. She recalled how he was surprised by her reaction (*id.*), and he responded "No, I didn't do anything. I didn't touch you." JA at 136. She then asked him to leave and he complied, doing it so quickly "he wasn't even able to put back on his shirt." JA at 138.

A1C M.T. testified she believed she had been sexually assaulted, and later went to Appellant's dorm room to confront him. JA at 141. He did not then admit to assaulting her, nor did he confess to such crimes when he sent her a series of apologetic texts. JA at 005. As A1C M.T. described it, his oral response and texts—the latter of which were in Spanish—were instead apologies for the entirety of his actions, with a specific admission of wrongdoing for staying in her room. JA at 143-44; *see also* JA at 214-17. He also sent her a photo of a Sexual Assault Prevention and Response poster. JA at 214.

A1C M.T. ultimately reported her allegations to a Sexual Assault

Response Coordinator, and then went to a hospital to get a Sexual Assault Nurse Examination. JA at 145. While there, she told her examiner that she was unsure whether there was prolonged or forceful touching on her skin by Appellant. JA at 082-83. A1C M.T. also reported that the last thing she remembered was him touching her body over her clothes. *Id.*

For his part, Appellant voluntarily provided statements to both investigators and his leadership. On his own accord, Appellant reported the incident to his First Sergeant, wherein he admitted to kissing A1C M.T.; however, he claimed it was consensual. JA at 096. He also denied sexually assaulting A1C M.T. JA at 097. Appellant instead recounted how A1C M.T. had vomited in the bathroom just prior to going to bed, and that he had cleaned up this vomit before joining her to go to sleep.[8] JA at 096.

Appellant further told investigators that he had danced closely with A1C M.T. at one of the bars they visited in Boston that night, and that she had touched his penis over his pants. JA at 093-94. Appellant also stated that, while they were parked in her car at one point, he

[8] Investigators found signs of vomit in A1C M.T.'s room. JA at 087.

sexually caressed her—with her permission—while she was standing through the sun roof. JA at 092, 094. Despite learning of these potential prior sexual acts, investigators only obtained incomplete copies of video surveillance from the bar in question, and did not later return to see if additional footage was available. JA at 088-89. Similarly, investigators did not seek any video surveillance from the locations where Appellant and A1C M.T. spent hours in her car prior to the alleged non-consensual acts. JA at 089-90, 094.

Following her allegations against Appellant, A1C M.T. received an expedited transfer from Hanscom, AFB. JA at 098, 149. This allowed an out-of-cycle permanent change-of-station to Royal Air Force Mildenhall, England. *Id.* A1C M.T. had admitted that she was lonely at Hanscom, AFB, and missed her family; in particular, her father. JA at 105, 110-11, 125-26, 175. Her expedited transfer allowed her father to visit—something he could not previously do while she was stationed at Hanscom AFB because he did not have legal access to visit the United States. JA at 152.

The Government's "Pursuit of Justice"

During voir dire, circuit trial counsel (CTC) introduced himself to the panel members as follows:

> Good morning, panel members. My name is [G.F.] I'm the circuit trial counsel and I'm stationed at Langley Air Force Base. I am TDY here to represent the United States of America in the pursuit of justice in this case.

JA at 066. He largely repeated this introduction during the second round of voir dire, including his purported "pursuit of justice." JA at 067. However, he expanded his description of assistant trial counsel (ATC), who he said was "excited and privileged as well to represent the United States in this case." *Id.*

ATC similarly referenced "justice" in his opening statement, concluding his remarks with the following request:

> Now I ask you all to repair the little that can be repaired and bring justice to [A1C M.T.] by finding the accused guilty of all charges and specifications that he faces today.

JA at 073.

Later, during closing argument, CTC continued with the Government's "justice" theme:

> [T]his will be the last time that I speak with [you] before this trial becomes yours. Our duties will be over and your duties will begin. And you will have the ultimate decision

> on what happened in this case and *whether justice will be served, or whether the accused will be acquitted.* A tremendous responsibility. One that is not easy and one that I'm going to attempt to help out with today.

JA at 240-241 (emphasis added). He subsequently added how "there would be no justice, if the Government had to prove its case with 100 percent mathematical certainty." JA at 264-65.

Civialian defense counsel (CDC) responded to CTC's assertion in the beginning of his own closing argument, stating the prosecutor "utter[ed] words that should never come out of a prosecutor's mouth," and that if the members "think there's a real possibility that [Appellant is] not guilty, you give him the benefit of the doubt and you find him not guilty." JA at 269. He concluded by arguing how the Government was giving the panel "a false choice," and that if the panel thought "there's a real possibility that [Appellant is] not guilty, then please, give him the benefit of the doubt." JA at 290.

CTC then retorted in rebuttal:

> It's not a false choice. It's a simple choice: guilty or not guilty. And that decision has to be based upon the evidence and the law. And when that decision is made, that's what we call justice. And the evidence in this case supports guilt beyond a reasonable doubt. That's not a false choice. That is justice. And that is what the evidence requires you to do in this case.

JA at 291-92.

The panel ultimately acquitted Appellant of one charge and specification of sexual assault by penetrating A1C M.T.'s vulva with his penis when A1C M.T. was incapable of consenting due to impairment by alcohol, but found him guilty of abusive sexual contact for the kissing and stomach touch specifications. JA at 304. During the sentencing proceedings, ATC reminded the panel of their purported duty to provide justice:

> Now I know it has been a long week for everybody. But if you could go back to when I first spoke with you all, days ago, I stood up here. I said you all had a duty, you all had a responsibility to find justice in this case. And there is no justice without an appropriate punishment.

JA at 313. He later ended his argument by opining how a "sufficient punishment that will bring justice here to this case, and that will bring some form of closure to [A1C M.T.] for all that she has [] endured in this year-and-a-half nightmare . . . [is] two years of confinement, reduction to the grade of E-1, and a dishonorable discharge." JA at 317-18.

Other Sentencing Matters

The Defense admitted four sentencing exhibits—Appellant's written unsworn statement and three character statements (JA at 337, 343, 345, 347)—and called two live witnesses. JA at 395-404. Appellant also provided an oral unsworn statement. JA at 305. Neither of his unsworn statements referenced the fact that his offenses triggered mandatory administrative discharge processing if he did not receive a punitive discharge at trial nor his required registration as a sex offender JA at 305, 337. Likewise, these statements did not address how the date of the convicted offenses occurred after Congress had amended the UCMJ through 2017 National Defense Authorization Act (2017 NDAA).[9] JA at 305, 337. Appellant thus never discussed how this change in the law removed "stomach" and "mouth" from the list of body parts included in the definition for sexual contact under Article 120, UCMJ, and that had these offenses occurred prior to the implementation of the 2017 NDAA, he would have avoided having to register as a sex offender. JA at 305, 337; *see also* JA at 36-37.

[9] National Defense Authorization Act for Fiscal Year 2017 (2017 NDAA), Pub. L. No. 114-328, § 5430, 130 Stat. 2000, 2929 (23 Dec. 2016).

Along with advancing the Government's "pursuit of justice" theme, ATC's sentencing argument included 11 references to Appellant as a "predator" or engaging in "predatory" behavior. JA at 312-18. ATC also sought to justify his sentence recommendation of two years confinement and a dishonorable discharge by contending that the panel could not "correct 34 years of learning and bad behavior in just a few months." JA at 315. Other than the charged crimes, the Government offered no evidence of Appellant's lifetime of bad behavior.

During sentence deliberations, the panel sought clarification on how Appellant would be impacted as a federal convict and whether he would have to register as a sex offender. JA at 333. The military judge responded that Appellant would have to register as a sex offender, but that the "specific requirements are not necessarily predictable." JA at 334. The military judge further instructed how it was not the panel's "duty to try to anticipate discretionary actions that may be taken by the accused's chain of command or other authorities, or to attempt to predict sex offender registration requirements, or the consequences thereof." *Id*. Additionally, he directed that "[w]hile the accused is permitted to address these matters in an unsworn statement, these

possible collateral consequences should not be part of [the panel's] deliberations in arriving at a sentence." *Id.*

Appellate Proceedings

Appellant raised eight errors before the lower court, the granted issues among them: 1) Whether trial counsel committed prosecutorial misconduct when stating that they represented "the pursuit of justice" and arguing that justice would only be served if Appellant was convicted and adjudged a sufficient punishment, and 2) whether defense counsel were ineffective. JA at 002. This latter assignment of error involved multiple allegations, including whether "his trial defense counsel were ineffective 'for failing to include relevant collateral consequences in [Appellant's] unsworn statement,' including sex-offender registration, consequences of a federal conviction, and mandatory administrative discharge processing." JA at 021.

Appellant's defense counsel responded to the ineffective assistance allegations; however, CDC did "not recall the unsworn." JA at 049. Conversely, Appellant's military defense counsel conceded he "did not advise [Appellant] to include federal sex offender registration as part of his unsworn statement." JA at 051.

In a split decision, the lower court found "no prejudicial error" in ATC's sentencing argument, but did not provide further explanation. JA at 027. However, it found obvious error in ATC's opening request "to bring justice to" A1C M.T., as well as CTC's argument in closing that the panel's duty was to decide "whether justice will be served, or whether [Appellant] will be acquitted." JA at 027, 029. The majority was nevertheless satisfied beyond a reasonable doubt[10] that the prosecutors' statements did not result in "unjust convictions." JA at 029.

Regarding defense counsels' alleged ineffectiveness, the majority concluded that defense counsel had no duty to inform the members of collateral consequences because these consequence should not be considered in sentencing. JA at 021. It further opined that "it will not find a defense counsel ineffective for what an accused chooses to say to the sentencing authority." *Id.* (citing *United States v. Marcum*, 60 M.J.

[10] The majority analyzed the prejudice under the harmless beyond a reasonable doubt standard reasoning it was "required inasmuch as the prosecutors' argument for 'justice' can be interpreted as arguments to reduce the Government's burden of proof to something lower than proof beyond a reasonable doubt based upon the evidence and to disregard the presumption of innocence." JA at 029. (quoting *United States v. Hills*, 75 M.J. 350, 357 (CA.A.F. 2016)).

198, 209 (C.A.A.F. 2004) ("[T]he right to make an unsworn statement is personal to the accused.")). Finding no other error that materially prejudiced Appellant's substantial rights, the majority affirmed the findings and sentence. JA at 003.

In a dissenting opinion, Judge Meginley concurred that Appellant's conviction for unlawfully kissing A1C M.T. was legally and factually sufficient due to the videotape evidence. JA at 033 n. 1. He came to a different conclusion regarding Specification 2, finding it legally and factually insufficient because of A1C M.T'.'s credibility issues and her inability to articulate whether and how Appellant touched her stomach. JA at 032-35.

Judge Meginley also found trial defense counsel ineffective for failing to prepare an effective sentencing case where they declined to address sex offender registration. JA at 040. Combined with the Defense's corresponding failure "to mention that the charges [Appellant] was convicted of are no longer sex offenses under Article 120, UCMJ" (JA at 039), Judge Meginley contended that these extraordinary circumstances could have resulted in a tailored instruction from the military judge, resulting in Appellant possibly not

receiving a punitive discharge. JA at 038-40. He further noted how the Defense's silence on this "extraordinary issue" (JA at 040) provided trial counsel "ammunition to argue what can only be described as an unreasonable sentencing argument." JA at 039.

Finally, in addition to the improper arguments during findings, Judge Meginley found obvious error in the ATC's sentencing argument. JA at 043. He opined that the entirety of the Government's arguments—in findings and sentencing—were undeniable attempts to inflame the passions of the members, and further criticized how ATC called Appellant a predator 11 times and argued for a sentence of two years and a dishonorable discharge. JA at 042. Questioning whether justice was actually served in this case, Judge Meginley concluded that these unreasonable arguments materially prejudiced Appellant. JA at 043. Given that Appellant received a bad-conduct discharge, he believed there was a reasonable probability the outcome of the proceedings would have been different had there not been prosecutorial misconduct. *Id.*

Summary of Argument

The prosecutors in this case crafted a theme of "justice" that exploited their positions of trust to impermissibly impart to the panel a duty to obtain justice for the named victim. All the while, they detached such "justice" from the evidence and burden of proof, and instead equated justice to a conviction and a harsh sentence. From the beginning of trial in voir dire where the lead prosecutor introduced himself as a CTC who was "TDY to represent the United States of America in the pursuit of justice," through the sentencing argument where the ATC reminded the panel of its "responsibility to find justice in this case," the prosecutors referenced their theme of justice every time they had an opportunity to speak directly to the panel.

In reviewing the prosecutors' statements during findings, the CCA correctly concluded that "the messages the prosecutors sent the court members were that the Prosecution seeks justice for the alleged victim, and justice can only mean a conviction." JA at 027. Equating "justice" to a conviction "can be interpreted as arguments to reduce the Government's burden of proof to something lower than proof beyond a reasonable doubt based upon the evidence and to disregard the

presumption of innocence." *Id.* Where the CCA erred is in its prejudice analysis and in concluding that these statements did not inflame the passions of the members. JA at 028-30. Considering the "believability problems on [A1C M.T.'s] part . . . and the case as a whole,"[11] this Court should not be confident there was no reasonable probability that the prosecutors' misconduct might have contributed to the conviction.

The prosecutors' misconduct was not only confined to findings. During sentencing argument, ATC personally attacked Appellant, sought a sentence not based upon the actual convicted offenses, and repurposed the Government's improper "justice" theme by applying it to a wholly unreasonable harsh sentence recommendation. ATC's efforts represented yet another example of how the prosecutors were "undeniably trying to inflame the passions of the members." JA at 042. There is material prejudice in this case as this Court "cannot be confident that [Appellant] was sentenced on the basis of the evidence alone." *United States v. Norwood*, 81 M.J. 12, 21 (C.A.A.F. 2021). But for this improper argument, there is a reasonable probability that Appellant would have never been sentenced to a punitive discharge.

[11] JA at 033.

Finally, defense counsel was ineffective for failing to advise Appellant to include key facts in his unsworn statement to the members. Because of defense counsels' errors, the members were left completely unaware that should they not sentence Appellant to a punitive discharge, a mandatory administrative discharge would be initiated. The members were similarly unaware that the offenses that Appellant was convicted of were no longer sexual offenses under the UCMJ, leaving them with the mistaken impression that Appellant was convicted of serious sexual offenses. The members also did not know that despite these offenses no longer being sexual offenses, Appellant would still have to register as a sex offender. Nor were they aware of the impact registration would have personally on Appellant. Finally, because defense counsel failed to advise Appellant to address these matters, Appellant was denied the ability to have the military judge craft a tailored instruction to explain these extraordinary issues to the members. Judge Meginley was correct that "Appellant was prejudiced in this error," as evidenced by his bad conduct discharge for two relatively minor offenses that are no longer even considered sex crimes. JA at 040. But for the ineffective assistance of his counsel, there would

likely be a different sentence adjudged in this case.

Argument

I.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN THEY STATED THAT THEY REPRESENTED "THE PURSUIT OF JUSTICE" AND ARGUED JUSTICE WOULD ONLY BE SERVED IF APPELLANT WAS CONVICTED AND ADJUDGED A SUFFICIENT PUNISHMENT.

Standard of Review

Whether argument is improper is a question of law reviewed *de novo*. *Norwood*, 81 M.J. at 19 (citing *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019)). If no objection is made at trial, this Court reviews for plain error. *Id*. (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). Plain error occurs when "(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id*. at 19-20 (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (internal quotation marks omitted). If this Court finds a prosecutor's argument amounted to clear and obvious error, it then determines "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would

have been different." *Norwood*, 81 M.J. at 20 (quoting *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (citations and internal quotations marks omitted).

For constitutional errors, "'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in *Chapman* [*v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967))]." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (quoting *United States v. Jones*, 78 M.J. 37, 45 (C.A.A.F. 2018)). "[R]ather than the probability that the outcome would have been different, courts must be confident that there was no reasonable probability that the error might have contributed to the conviction." *Id.* at 462 n. 5 (emphasis in original) (citing *Chapman*, 386 U.S. at 24). The Government bears the burden for demonstrating harmlessness beyond a reasonable doubt. *Id.* at 462-63.

Where improper argument occurs during sentencing, this Court must determine whether or not it can be confident that the appellant "was sentenced on the basis of the evidence alone." *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017) (internal quotation marks and citation omitted).

Law

A trial counsel "may prosecute with earnestness and vigor . . . . But, while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Indeed, "[i]t 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." *Id.*

"Improper argument is one facet of prosecutorial misconduct." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (citing *United States v. Young*, 470 U.S. 1, 7-11, 105 S. Ct. 1038, 84 L. Ed. 2d 1(1985)). "A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument 'overstep[s] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *Norwood*, 81 M.J. at 19 (quotations marks and citations omitted).

Counsel are consistently cautioned to "limit arguments on findings or sentencing to evidence in the record and to such fair inferences as may be drawn therefrom." *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (citations omitted); *accord United States*

v. Baer, 53 M.J. 235, 237 (C.A.A.F. 2000) (citation omitted). It is thus improper for trial counsel to "suggest the panel base its decision on the impact of the verdict on society, a victim, and the criminal justice system as a whole, rather than the facts of the case." *United States v. Condon*, No. ACM 38765, 2017 CCA LEXIS 187, at *53 (A.F. Ct. Crim. App. Mar. 10, 2017) (unpub. op.), *aff'd*, 77 M.J. 244 (C.A.A.F. 2018)[12]; *accord State v. Campos*, 309 P.3d 1160, 1174 (Utah 2013) ("[R]eference to the jury's societal obligation is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society and the criminal justice system rather than the facts of the case.") (citations omitted) (internal quotation marks omitted); *Cardona v. State*, 185 So. 3d 514, 522 (Fla. 2016) ("The argument that the case is about 'justice' for the victim or the victim's family has been uniformly condemned.") (citations omitted); *Prudent v. Inch*, 2021 U.S. Dist. LEXIS 111013, at *32 n.6 (S.D. Fla. Jun. 11, 2021) (noting how the State conceded that it was improper argument to invite "the jury to seek justice for the victims by finding Petitioner guilty as charged.").

It is likewise improper for trial counsel to make arguments that

[12] JA at 371.

"unduly . . . inflame the passions or prejudices of the court members." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014) (citations omitted). References to a victim's suffering, in findings, may constitute inflammatory appeals to a jury's passions. *See United States v. Quesada-Bonilla*, 952 F.2d 597, 601–02 (1st Cir. 1991) (finding improper a prosecutor's comments that defense counsel described as "tantamount to calling for sympathy for a victim of a crime and a witness of a crime") (citations omitted); *Baylor v. Renico*, 2009 U.S. Dist. LEXIS 31200, at *13 (E.D. Mich. Oct. 6, 2015) ("'Appeals to the jury to sympathize with the victim constitute improper argument.'") (quoting *People v. Watson*, 245 Mich. App. 572, 591 (2001)); *cf. United States v. Rodriguez*, 581 F.3d 775, 803 (8th Cir. 2009) (holding improper a prosecutor's claim to "speak for" a victim if the comment appeals excessively to the jurors' emotions).

Counsel's words are not reviewed in isolation, but in context to the entire court-martial. *Baer*, 53 M.J. at 238 (citations omitted). Trial counsel's "word choice" can constitute improper argument when such words represent a "personal attack on the defendant," but not when they are a "commentary on the evidence." *Voorhees*, 79 M.J. at 11

(internal quotation marks omitted) (citation omitted).

Where improper argument is found, relief will be granted only if the prosecutor's misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." *Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (citations omitted). This Court weighs three factors to determine prejudice: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* at 184. Indicators of severity of misconduct include:

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

Id.

"A foundational tenet of the Due Process Clause, U.S. Const. amend. V., is that an accused is presumed innocent until proven guilty." *Hills*, 75 M.J. at 356 (citing *In re Winship*, 397 U.S. 358, 363 (1970); *Coffin v. United States*, 156 U.S. 432, 453-54 (1895)). "An accused has an absolute right to the presumption of innocence until the

government has proven every element of every offense 'beyond a reasonable doubt,' and members may only determine that the accused is guilty if the government had met that burden." *Id.* (citation omitted).

Analysis

"Prosecuting attorneys . . . wear an invisible cloak of credibility by virtue of their position; to make it explicit may too easily tip the scales." *Patriarca v. United States*, 402 F.2d 314, 321 (1st Cir. 1968). Here, the prosecutors did not merely seek to exploit their positions of trust, they impermissibly sought to impart to the panel a duty to obtain justice for the named victim, and then explicitly equated such justice to a conviction and a harsh sentence. From the moment the lead prosecutor introduced himself during voir dire as a circuit trial counsel who was "TDY to represent the United States of America in the pursuit of justice," through the sentencing argument where his colleague reminded the panel of its "responsibility to find justice in this case," the prosecutors referenced their theme of justice every time they had an opportunity to speak directly to the panel. Standing alone, each comment was improper and harmful. But when viewed collectively,

the prejudicial effect is all the more apparent—the prosecutors progressively built upon their misconduct through each stage of Appellant's court-martial, seeking to tip the scales in their favor at the cost of a fair trial.

1. Prosecutorial Misconduct During Findings

CTC announced the Government's "justice" theme at his first opportunity—voir dire. In doing so, he called attention to both his position of credibility and his interest in the case:

> Good morning, panel members. My name is [G.F.] I'm the circuit trial counsel and I'm stationed at Langley Air Force Base. I am TDY here to represent the United States of America in the pursuit of justice in this case.

JA at 066. He later utilized a similar introduction during a second round of voir dire, but added how he was confident that the ATC was "excited and privileged as well to represent the United States in this case." JA at 067. Thus, from the outset, the panel understood that G.F. was not a mere base-level prosecutor assigned to the case; rather, he was a *circuit* trial counsel who had travelled from his home station to pursue justice against Appellant on behalf of the United States. Moreover, at least two members of the panel were also made aware that the local prosecutor felt privileged to join in this pursuit for the

United States. JA at 394.

Although CTC declined to define "justice" in these introductions, his colleague addressed the omissions for him when he opened the Government's case by asking the panel to "bring justice to [A1C M.T.] by finding [Appellant] guilty." JA at 073. CTC then used a similar refrain to begin his closing argument, explicitly asking the panel to determine "whether justice will be served, or whether [Appellant] will be acquitted." JA at 242. He subsequently added that the Government's burden of proof was not "100 percent mathematical certainty" because "[i]f that were the standard, there would be no justice." JA at 264-65. And prior to each of these statements, CTC reminded the panel how he had previously spoken to them in voir dire—the origin of the Government's "justice" theme. JA at 240, 264.

Viewing these statements collectively, the CCA correctly concluded "the messages the prosecutors sent the court members were that the Prosecution seeks justice for the alleged victim, and justice can only mean a conviction." JA at 027; *cf. Norwood*, 81 M.J. at 21 ("This Court has repeatedly held that a court-martial must reach a decision based only on the facts in evidence.") (citations omitted)

(internal quotation marks omitted); *Condon*, No. ACM 38765, 2017 CCA LEXIS 187, at *53.[13] The CCA was further justified in weighing whether the prosecutors' clear and obvious errors were harmless beyond a reasonable doubt, as equating "justice" to a conviction "can be interpreted as arguments to reduce the Government's burden of proof to something lower than proof beyond a reasonable doubt based upon the evidence and to disregard the presumption of innocence." *Id.* (citing *Hills*, 75 M.J. at 357). Where the lower court erred, however, is in its actual prejudice analysis, including its summary conclusion that the prosecutors' statements would not tend to inflame the passions of the panel. JA at 028-030.

As a starting point, Appellant respectfully disagrees with the majority's assessment that the misconduct at issue was only "moderately severe." JA at 028. The raw number of improper comments may have been moderate, but the prosecutors' conduct in repeatedly weaving their misstatements of the law throughout Appellant's trial amounts to unacceptably severe misconduct. Indeed, from the first moment they talked to the panel, the trial counsel

[13] JA at 371.

advanced their "justice" theme at every opportunity and did so in a manner that would ensure the panel took notice.

CTC began by exploiting his role as a senior prosecutor and representative of the United States, linking his TDY travel to a purported "pursuit for justice."[14] ATC followed by equating a guilty verdict to obtaining justice for A1C M.T., a blatant attempt to inflame the passions of the panel by seeking sympathy for the named victim—who he promised would soon "bravely explain to an open court" the pain she experienced (JA at 072)—while simultaneously muddling the Government's burden of proof. JA at 027. ATC also saved this comment until the end of his opening statement, thus ensuring it would remain extant in the panel's minds. The Government ultimately concluded its thematic progression by placing the responsibility for upholding justice squarely on the members' shoulders, with CTC's explicit admonishment that an acquittal simply would not suffice. In no uncertain terms, then, the prosecutors used their inherent

[14] *Cf. Voorhees*, 79 M.J. at 10 (finding improper the statements: "'I'm a senior trial counsel assigned to Peterson Air Force Base. In that capacity I travel around the world, between 200 and 250 days a year, prosecuting the Air Force's most serious cases. . . . And on behalf of the Unites State [sic] of America, I am happy to be prosecuting this case.'")

credibility to bolster and bookend their message that justice was required for A1C M.T. and from the panel, and anything less was an injustice. The impropriety of this message along with its calculated method of delivery makes the prosecutors' misconduct more than "moderately severe." JA at 028.

Turning next to the CCA's conclusions that "several measures were taken to cure the [prosecutors'] misconduct," each was insufficient to adequately demonstrate the errors were harmless beyond a reasonable doubt. *Id.* To begin, Appellant concedes that CDC addressed CTC's closing argument near the beginning of his own, wherein "he explained the correct burden of proof and that choosing justice or an acquittal was a 'false choice.'" JA at 028. Yet, considering how CTC had already built upon his inherent credibility as a prosecutor, this contrasting explanation of the law—coming from a *civilian* defense counsel who was being paid by Appellant no less—would not, standing alone, dissipate the taint of the CTC's preceding comments.

As the lower court observed, CTC notably "did not retract his earlier assertions" in rebuttal. JA at 028. He instead expressly denied

he did anything wrong by contending, "It's not a false choice." JA at 290. What is more, CTC still equated justice to a guilty verdict: "[T]he evidence in this case supports guilt beyond a reasonable doubt. That's not a false choice. That is justice." JA at 290-91. In other words, CTC tried to salvage his original point, not backtrack or correct it. And because this occurred in rebuttal, the Defense was unable to respond except through a now far too late objection. *See*, *e.g.*, *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir. 1996) (reversing a conviction based on a prosecutor's improper remarks during closing and noting, "Because the remark came during rebuttal arguments, defense counsel was unable to respond except by objection."); *United States v. Johnson*, 968 F.2d 768, 772 (8th Cir. 1992) (reversing a conviction based on prosecutor's improper comments during the rebuttal phase of closing arguments); *see also United States v. Carter*, 236 F.3d 777, 788 (6th Cir. 2001) (improper comments during rebuttal constituted "the last words from an attorney that were heard by the jury before deliberations").

Similar to *Hills*, the members were confronted with contradictory statements on the law that would have reasonably left

them confused. Rather than immediately addressing the discrepancies proffered by the parties (or indeed any of the prosecutors' earlier errors) through a *sua sponte* curative instruction, the military judge sat silently and provided only the normal instructions. *Cf. Voorhees*, 79 M.J. at 14. ("Military judges . . . . have a *sua sponte* duty to [e]nsure that an accused receives a fair trial.") (internal quotation marks and citation omitted) (emphasis in original). It is reasonable to conclude that this failure to intervene might have affected the panel, as it allowed the members to fully consider the prosecutors' various missteps in a full and uninterrupted manner, effectively embodying a judicial stamp of approval.

Further problematic with regard to the instructional issue, or lack thereof, is the composition of the panel. Specifically, the members were comprised of both officer and enlisted personnel, and all but one were serving on a court-martial panel for the first time. JA at 065, JA at 392-93, 394. Thus, unlike the panel of senior officers in *Voorhees* which this Court found was "uniquely situated to assess" the appellant's crimes in relation to the prosecutor's improper argument, the vast majority of the members here were inexperienced and

unfamiliar with the court-martial process. 79 M.J. at 13. Correspondingly, CTC's improper closing comments, in combination with the prosecutors' earlier uncured errors, were more likely to affect how the members viewed the case, applied the law, and weighed the evidence.

With respect to the lower court's own weighing of the evidence, its characterization of the strength of the Government's case as "moderate," meager though it may be, is still too generous. JA at 029. As aptly noted by the dissent, there were "believability problems on [A1C M.T.'s] part . . . and the case as a whole." JA at 033. Even more instructive, the Government secured Appellant's conviction on Specification 2 despite the fact that "[a]t no point did [A1C M.T.] state that Appellant touched her stomach *with his hand*." JA at 032 (emphasis in original). The Government likewise failed to provide any context for this alleged touching, as A1C M.T. "did not tell the court where on her stomach Appellant allegedly touched her, with what (hand, finger, or object), how long he may have touched her, or whether he touched her over or under her clothing." *Id.* Consequently, the evidence for this specification did not "so clearly favor the government

that Appellant cannot demonstrate prejudice," even if that burden remained with him. *Voorhees*, 79 M.J. at 13.

Finally, with respect to the lower court's summary conclusion that the prosecutors' comments did not "have the tendency to inflame the passions of the court" (JA at 028), Appellant respectfully concurs with Judge Meginley's view: "both trial counsel were undeniably trying to inflame the passions of the members." JA at 042. With ATC expressly equating a guilty verdict to obtaining justice for A1C M.T., and CTC's explicit admonishment that an acquittal would not be justice, the Government's entire theme was an inflammatory appeal to the member's sympathies and passions. This was made all the worse because it came from two inherently credible representatives of the United States, one of whom was willing to travel from his home station in a noble "pursuit of justice" against Appellant.

The significant evidentiary deficiencies for Specification 2 should, standing alone, give this Court pause. But given the undue pressure the trial counsel exerted on the members to uphold justice, and how this pressure correspondingly muddled the burden of proof, there is a reasonable probability that the result would have been different

without the prosecutors' clear and obvious error. This Court should not be confident there was no reasonable probability that the prosecutors' misconduct might have contributed to Appellant's conviction.

2. Prosecutorial Misconduct During Sentencing

As Judge Meginley recognized in his dissent, the prosecutors' misconduct was not limited to findings. JA at 041-43. During sentencing argument, ATC personally attacked Appellant, sought a sentence not based upon the actual convicted offenses, and repurposed the Government's improper "justice" theme by applying it to a wholly unreasonable recommended sentence of two years' confinement, reduction to the grade of E-1, total forfeitures, and a dishonorable discharge. All told, ATC's efforts represented yet another example of how the prosecutors were "undeniably trying to inflame the passions of the members." JA at 042.

Starting with the personal attacks, ATC referenced Appellant's "predatory" behavior 11 times. JA at 042. Unlike *Norwood*, where there was no error because the prosecutor tied his negative characterization of the appellant to the evidence and the charged

offense, the same cannot be said here. *Norwood*, 81 M.J. at 16. Appellant did not invite A1C M.T. out on the evening in question, rather the opposite was true. JA 112-13. It was similarly not his idea to continue drinking at one bar after another, nor did he force A1C M.T. to rejoin him for yet more drinking after he safely returned her home. JA at 115-16, 120-22. And while ATC described Appellant as keeping "the well opened" by grabbing the bottle of Pisco and feeding A1C M.T. "shot after shot," the evidence adduced at trial showed a different dynamic at play. JA at 312.

A1C M.T. could not actually remember who suggested drinking the Pisco (JA at 121), but she was the one who chose the first secluded location where they could drink it. JA at 120-24, 182. Thereafter, instead of retreating to her dorm following an interlude to purchase cigarettes (JA at 123), and having consumed just one shot of the liquor by this point (JA at 183), A1C M.T. chose a *second* secluded location to park and drink more Pisco. JA. at 123, 182, 186. She also never testified that she objected to Appellant providing her alcohol upon their arrival; on the contrary, she conceded that she wanted to be there to talk about her issues and decompress. JA at 124-26.

Even after they returned to A1C M.T.'s dorm, wherein Appellant purportedly kissed A1C M.T. and touched her stomach without her consent, his actions are hardly indicative a predator exploiting his prey. The kiss itself was brief, a mere "peck on the lips" (JA at 043), as apparently was the stomach touch. *See* JA at 034 (Judge Meginley noting how, "If Appellant did in fact touch [A1C M.T.'s] stomach, the evidence suggests it probably occurred in a fairly narrow timeframe at or around the time he told his first sergeant he was cleaning up [her] vomit."). Moreover, while ATC called it "predatory behavior" for Appellant to follow A1C M.T. into the bathroom and lock the adjoining door (JA at 313), Appellant's explanation for wanting to ensure the door was locked from the other side was not unreasonable. JA at 136. In any event, there was no evidence he assaulted A1C M.T. in the bathroom or otherwise utilized the location to take advantage of her.

As Judge Meginley emphasized, ATC also sought to portray Appellant as someone with "Thirty-four years of learning bad behavior." JA at 42. But the evidence at trial soundly contradicts this characterization. The Government offered no history of disciplinary problems or prior convictions. Appellant's backstory instead included

how he earned a bachelor's degree in native Peru, immigrated to America to find new opportunities, and joined the Air Force "to earn the privilege to be here." JA at 306-07. Further, the Government was unable to rebut the positive opinions of Appellant's character witnesses, who agreed he possessed strong rehabilitative potential. JA at 397-98, 401-02; *see also* JA at 343-48

Given how "[t]here was no evidence – none – of [Appellant's] lifetime of 'bad behavior,'" Judge Meginley surmised that ATC's attempted rationalization was an effort "to bargain with the members by asking for an unreasonably high sentence in the hopes it would drive up the ultimate sentence." JA at 042-43. Judge Meginley also questioned the Government's ultimate motivation:

> A dishonorable discharge and a year in jail for a peck on the lips, and another year in jail for touching [A1C M.T.'s] stomach (with no context), indicates trial counsel were not seeking a punishment based on the offenses of which Appellant was convicted; they were seeking a punishment as if to save face for losing the gravamen offense.

JA at 043. Considering the facts and circumstances behind the convicted offenses, the lack of aggravating evidence, and the presence of mitigating and extenuating factors, to include Appellant's remorse and strong background, Judge Meginley's accusations against trial

counsel are not unfounded, and he was correct to question whether the prosecutors were "uphold[ing] the integrity of the military justice system." JA at 043 (quoting *Voorhees*, 79 M.J. at 15).

Part and parcel with ATC's "unfathomable recommendation" (JA at 043) was his continued use of the Government's "justice" theme: "[Y]ou all [have] a duty, you all [have] a responsibility to find justice in this case. And there is no justice without an appropriate punishment." JA at 313. He added how it was his job, or rather a duty which he held "in the highest regard," to explain "trial counsel's sentence recommendation." *Id.* This purportedly appropriate sentence—which ATC mislabeled as "the government's recommended sentence" rather than his own, thus further raising the specter of whether he was improperly trading on his position as a representative of the United States Government[15]—included two years of confinement and a dishonorable discharge. JA at 317-18. Although the panel later rejected this proposed sentence in favor of the maximum grade reduction, 90 days hard labor, and a bad conduct discharge (JA at 336),

[15] In a similar vein, ATC noted the sincere hopes of "the government, trial counsel" that two years of confinement would help Appellant reintegrate into society. JA at 317.

the imposition of this latter punishment—with its attendant lifetime stigma—demonstrates how the Government's collective actions prejudiced Appellant.

The ATC closed his sentencing argument with yet another inflammatory appeal to the members, arguing:

> [A] sufficient punishment that will bring justice here to this case, and that will bring some form of closure to [A1C M.T.] for all that she has [] endured in this year-and-a-half nightmare . . . [is] two years of confinement, reduction to the grade of E-1, and a dishonorable discharge.

JA at 317-18. This statement again reminded the members of their duty to bring justice to A1C M.T. It explicitly equated justice with the Government's harsh sentence recommendation, detached from any evidence to support it, and were the last words the Government imparted to the panel.

The sentencing argument was designed to inflame the passions of the panel and was so littered with improper argument that this Court "cannot be confident that [Appellant] was sentenced on the basis of the evidence alone." *Norwood*, 81 M.J. at 19 (quoting *Marsh*, 70 M.J. at 107 (internal quotation marks omitted) (citation omitted)). Given that Appellant was sentenced to a bad-conduct discharge for two

relatively minor sex offenses, there is a reasonable probability that the outcome of the proceedings would have been different had the Government not committed prosecutorial misconduct.

Conclusion

The prosecutors' disturbing misconduct was pervasive throughout trial, utilized to great effect at each crucial phase where the parties were permitted to directly address the panel members. The Government impermissibly tethered "justice" to a conviction—irrespective of the evidence presented to the members. There was a complete lack of curative measures to correct the misconduct and the evidence was far from overwhelming. As the dissent noted, but for the prosecutor's inflaming the passions of the members throughout trial, it is probable that there would be a different outcome in this proceeding.

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

II.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE.

Standard of Review

This Court reviews claims of ineffective assistance of counsel *de novo*. *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021) (citing *United States v. Captain*, 75 M.J. 99, 102 (C.A.A.F. 2016).

Law

To prevail on an ineffective assistance of counsel claim, an appellant must prove "'that the performance of defense counsel was deficient and that the appellant was prejudiced by the error.'" *Scott*, 81 M.J. at 84 (quoting *Captain*, 75 M.J. at 103 (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984))). "To establish the element of deficiency, the appellant first must overcome a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and must show specific defects in counsel's performance that were unreasonable under prevailing professional norms." *Id*. (citations omitted) (internal quotation marks omitted). "At the sentencing phase, ineffective assistance may occur if trial defense counsel either 'fails to investigate adequately the possibility of evidence

that would be of value to the accused in presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before the court-martial.'" *Id.* (quoting *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998)).

To establish prejudice from the deficiency, "the appellant must demonstrate 'a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different.'" *Scott*, 81 M.J. at 84 (quoting *Strickland*, 466 U.S. at 694). At sentencing, prejudice can occur even where the Defense presents mitigating evidence, provided that "'there is a reasonable probability that there would have been a different result if all available mitigating evidence had been exploited by the defense.'" *Id.* at 84-85 (quoting *United States v. Akbar*, 74 M.J. 364, 438 (C.A.A.F. 2015)).

At the time of Appellant's court-martial, Air Force Instruction (AFI) 36-3208[16] required commanders to initiate administrative discharge processing for members found to have committed sexual assault. JA at 385-87. The definition of "sexual assault" included

[16] AFI 36-3208, *Administrative Separation of Airmen*, (dated July 9, 2004, incorporating through Change 7, July 2, 2013).

abusive sexual contact. JA at 386, ¶5.55.1. Although commanders also had the option of processing a discharge waiver, the burden lay with the member to prove retention was warranted under a set of limited circumstances. JA at 387-88, ¶ 5.55.3.1, ¶ 5.55.3.2.1, ¶ 5.55.3.2.2. Even if a member met these specific retention criteria, commanders were still required to consider the impact of the sexual assault on the victim as well as the victim's views on retention. JA at 388, ¶5.55.3.2.2. If a commander ultimately supported a member's retention, the Special Court-Martial (SPCM) authority had the ability to disapprove the waiver. AFI 36-3208, ¶ 6.63.2. And if the SPCM supported retention, the General Court Martial (GCM) authority had to approve. *Id.* at ¶6.12.

Being convicted of abusive sexual contact, in violation of Article 120, UCMJ, carries a Code 120-DF in the Defense Biometric Identification System. *See* Department of Defense Instruction (DoDI) 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority*, Table 6, at 84 (dated March 11, 2013, incorporating Change 4, August 19, 2020). DoDI 1325.07 provided:

> A Service member who is convicted in a general or special court-martial of any of the offenses listed . . . *must* register

> with the appropriate authorities in the jurisdiction . . . in which he or she will reside, work, or attend school, upon leaving confinement, or upon conviction if not confined.

JA at 390, ¶ 1 (emphasis added). Further, the DoDI stated:

> A Service member convicted of any offenses listed . . . or convicted of offenses similar to those offenses listed . . ., shall be advised that the individual jurisdictions in which the offender might live, work, or attend school may require registration for offenses not listed . . . . Each registration jurisdiction sets its own sex offender policy and laws.

JA at 390, ¶ 3.

"[A]n accused's right to make an unsworn statement 'is a valuable right . . . [that has] long been recognized by military custom' and that has been 'generally considered unrestricted.'" *United States v. Grill*, 48 M.J. 131, 132 (C.A.A.F. 1998) (quoting *United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1991)). "A collateral consequence is '[a] penalty for committing a crime, in addition to the penalties included in the criminal sentence.'" *United States v. Talkington*, 73 M.J. 212, 215 (C.A.A.F. 2014) (quoting *United States v. Miller*, 63 M.J. 452, 457 (C.A.A.F. 2006)). Collateral consequences may be referenced in an unsworn statement. *Id.* at 216. Collateral consequences referenced in an accused's unsworn statement have typically included sex offender registration (*see, e.g.*, *id.* at 212), and being administratively

discharged. *See, e.g.*, *United States v. Tschip*, 58 M.J. 275 (C.A.A.F. 2003)).

In *United States v. Rosato*, this Court held that the military judge erred by preventing the appellant from presenting information about an Air Force rehabilitation program, which he deemed to be an "irrelevant collateral consequence." 32 M.J. at 95-96. This Court stated, "appellant was effectively precluded from communicating to the members the full depth of his commitment to 'soldier his way back' to productive service." *Id.*

In *United States v. Talkington*, this Court reaffirmed an accused's right to "mention sex offender registration in his unsworn statement." 73 M.J. at 217 (citations omitted). However, it also noted that "the military judge had discretion to 'temper' the unsworn statement with 'appropriate instructions.'" *Id.* (quoting *United States v. Barrier*, 61 M.J. 482, 484 (C.A.A.F. 2005)). The discretion in "whether to instruct upon such 'collateral' matters is broad," but the military judge "must give legally correct instructions that are tailored to the facts and circumstances of the case." *Id.* (quoting *United States v. Duncan*, 53 M.J. 494, 499 (C.A.A.F. 2000)). The Court also distinguished sex

offender registration from the loss of retirement benefits, observing that "there is no causal relation between the sentence imposed and the sex offender registration requirement." *Id.* at 217. "Whether Appellant received no punishment or the maximum available punishment he would be required to register as a sex offender based on the fact of his conviction alone." *Id.* Conversely, "the loss of military retirement benefits is one possible result of the *sentence itself*, as opposed to the *conviction*." *Id.* (emphasis in original) (citation omitted).

Finally, this Court clarified in *United States v. Tyler*, that if unsworn statements are part of the evidence in the record, counsel may comment on them in sentencing argument. 81 M.J. 108, 112-13 (C.A.A.F. 2021).

Analysis

Defense counsel were ineffective for their multiple errors regarding Appellant's sex offender registration requirement. These errors included failing to advise Appellant to reference his pending sex offender status in his unsworn statements, failing to advise Appellant to also reference the change in the law that removed his convicted offenses from the list of mandatory registerable sex offenses, and

failing to seek a tailored instruction from the military judge explaining this extraordinary latter fact. Similarly, defense counsel were ineffective for failing to advise Appellant to reference the mandatory administrative separation he would face if a punitive discharge were not adjudged, and failing to attempt to admit such evidence during sentencing.

Although Appellant posits that each of these deficiencies provides a sufficient basis to set aside his sentence, he respectfully asks this Court to consider whether defense counsel's overall performance in sentencing "might have been defective within the meaning of *Strickland* [466 U.S. 668], even though individual oversights or mistakes standing alone might not satisfy *Strickland*." *United States v. Loving*, 41 M.J. 213, 252 (C.A.A.F. 1994), *aff'd* 517 U.S. 748 (1996).

1. Mandatory Administrative Separation

As a predicate matter, the lower court erred when it opined that "mandatory administrative processing" was an improper matter for consideration in sentencing. JA at 21. Unlike certain consequences that occur as a result of a conviction, the administrative separation process the Air Force would have employed for Appellant was directly

correlated to whether he received a punitive discharge. As such, it was akin to the loss of retirement benefits—a matter this Court has consistently found relevant for sentencing—because it was "one possible result of the sentence itself, as opposed to the conviction." *Talkington*, 73 M.J. at 217 (citations omitted).

This is not to say that *any* potential administrative separation following a court-martial is relevant for sentencing purposes. For example, administrative separations initiated at the discretion of a commander may be less relevant to the sentencing authority. But where, as here, an accused faces a mandatory separation process if a punitive discharge is not adjudged, there is a direct and causal relation with the sentence.[17] Consequently, it is matter that can be properly considered by the sentencing authority, just like the loss of retirement

[17] As discussed in the Law section *supra*, AFI 36-3208 permitted waivers from its mandatory separation policy under limited circumstances. However, given the various impediments to obtaining such waivers—including proving that all six retention criteria were met, and procuring approvals from the victim, commander, SPCM authority, and GCM authority—Appellant respectfully posits that the waiver process was illusory in general, and never an option for him due to A1C M.T.'s continued animosity against him. *See, e.g.*, JA at 111 (A1C M.T. testifying that she still felt "dirty" due to Appellant's conduct), JA at 136 (A1C M.T. accusing Appellant of lying to her), JA at 137 (A1C M.T. claiming that her dignity was destroyed).

benefits, and it was unreasonable for Appellant's defense counsel to not even attempt to provide this information to the panel. *See Scott*, 81 M.J. at 84.

Even assuming, *arguendo*, this Court concludes that defense counsel had no obligation to try to introduce the mandatory administrative separation policy as substantive evidence, counsel were nevertheless deficient for failing to advise Appellant to reference the information in his unsworn statements. Had they done so, they could have in turn asked for a tailored instruction from the military judge explaining the unique situation. Indeed, as articulated by Judge Meginley in his dissent regarding Appellant's sex offender status, this Court's holding in *Talkington* would permit such a scenario. JA at 040. And even if the military judge declined to provide the requested instruction, it would preserve the issue for the appellate courts. *Id*.

In sum, there was no risk in either attempting to introduce evidence on the Air Force's mandatory administrative separation policy, or having Appellant reference it in his unsworn statements. Likewise, there was no tactical reason for failing to take such actions, particularly given that mandatory separation proceedings are

analogous to loss of retirement benefits and thus relevant for sentencing. But the consequences of defense counsels' inaction ensured that the panel would never have the opportunity to consider this information. This left them with the erroneous belief that should they not adjudge a punitive discharge, Appellant would remain in the Air Force. In turn, the members had just two choices regarding Appellant's Air Force future: punitively separate him for relatively minor sex offenses, or risk having him returned to duty—a no doubt sobering thought given ATC's repeated attacks labeling him a "predator." JA at 312-18. Defense counsels' errors were consequently unreasonable, and there is a reasonable probability that had the panel known its sentence would determine whether Appellant was subject to mandatory administrative separation proceedings, he would not have received a bad conduct discharge.

2. Sex Offender Registration

Appellant stands in the extraordinary position of being convicted of two Article 120, UCMJ, offenses whose commission occurred *after* Congress saw fit to remove his charged conduct from the punitive article's statutory scheme. *See* JA at 036-37. But for the delay in the

implementation of the 2017 NDAA, Appellant would have been charged under a different UCMJ provision, if at all. JA at 037-38. This would have correspondingly averted his mandatory registration as a sex offender (*id.*)—"a particularly severe penalty" that may represent "the most significantly stigmatizing and longest lasting effect arising from the fact of conviction." *Talkington*, 73 M.J. at 218 (Baker, C.J., concurring). Inexplicably, Appellant's unique circumstances were never addressed at his court-martial, nor did his defense counsel ever advise him to present such information. JA at 049, 051. This means the panel responsible for adjudging an appropriate sentence for a "half-second kiss and an indeterminate stomach touching" (JA at 042) never had a full sight picture of the true severity of the convicted offenses and "perhaps unreasonably believed Appellant had committed serious sex offenses." JA at 040. No reasonable defense attorney would have desired such a scenario, and it was deficient for the counsel here to overlook Appellant's silence on these matters.

As acknowledged by Judge Meginley, it may at first seem illogical to hold counsel responsible for an accused's failure to include information in an unsworn statement that a military judge will later

instruct the panel to disregard. JA at 040. However, he accurately observed that "the language in *Talkington* does not advise military judges to instruct members they are to disregard sex offender references." *Id.* Rather, it allows a military judge to exercise "broad" discretion in "choosing whether to instruct on such 'collateral' matters," and further authorizes a military judge to "temper [an] unsworn statement with appropriate instructions." *Id.* (citation omitted). Defense counsel thus could have and should have advised Appellant to reference his "extraordinary issue" (*id.*) in his unsworn statements, and then sought a tailored instruction from the military judge.

Defense counsels' deficiency on these points is buttressed by the fact that there was absolutely no risk in either course of action—the military judge would have erred had he precluded Appellant from referencing this information in his unsworn statements,[18] and the Defense would have preserved the issue for appellate review had the military judge declined to provide the requested instruction. JA at 040. Moreover, the members' interest in this type of information was clear,

[18] *See*, *e.g.*, *Talkington*, 73 M.J. at 217 ("Appellant was permitted to mention sex offender registration in his unsworn statement.") (citations omitted).

as they paused their sentence deliberations to ask about the implications to Appellant as a federal convict and whether he would have to register as a sex offender. JA at 333.

Had Appellant been advised to earlier provide this information to the panel—perhaps to include how his nonconsensual touching of an adult female in two areas Congress no longer views as intimate, may forever affect his employment and housing opportunities, or ability to visit locations such as schools or playgrounds—the members would have possessed the information they desired to adjudge an appropriate sentence. Without it, however, they were left with not only the standard instruction that they should not consider sex offender registration as part of their deliberations, but the belief that Appellant was "permitted to address these matters in an unsworn statement" and declined to do so. JA at 334. The former result is iniquitous given Appellant's unique circumstances, and the latter is a mistake because his counsel never advised him on the subject (JA at 049, 051) despite its clear importance to him, as evidenced by his clemency submission. JA at 041, n.10. The panel consequently may have erroneously believed that Appellant did not view sex offender registration as

particularly important, which in turn may have affected their adjudged sentence.

As an additional and more generalized matter, this Court should decline to adopt the lower court's reasoning that "it will not find a defense counsel ineffective for what an accused chooses to say to the sentencing authority." JA at 21. While it may true that the right to an unsworn statement belongs to the accused, and that a defense counsel cannot necessarily preclude the inclusion or exclusion of information in such statements, counsel nevertheless have an obligation to provide guidance on this issue. Indeed, it would be ineffective for a defense counsel to fail to caution against referencing information likely to *increase* an adjudged sentence just as it is failing to recommend the inclusion of information likely to *decrease* a sentence. Defense counsel have an obligation to act in a client's best interest; a *laissez-faire* approach to unsworn statements does not satisfy this obligation and risks stripping accused of their right to effective assistance of counsel.

In sum, Judge Meginley was correct that "Appellant's failure to mention the change in the law and sex offender registration mattered, as it prevented the military judge from having the opportunity to craft

a tailored instruction based on this extraordinary issue." JA at 040. He was further correct that "Appellant was prejudiced in this error," as evidenced by his bad conduct discharge for two relatively minor offenses that are no longer even considered sex crimes. JA at 040.

Conclusion

There is a reasonable probability that the result of the sentencing proceeding would have been different if the panel members were presented with information concerning the above-stated matters. The members were unaware of significant information that not only effected Appellant, but allowed the offenses to be painted in a light that made them appear much more serious than they were. This was a direct result of defense counsels' deficient performance in failing to present evidence in mitigation, and failing to advise Appellant to include these matters in his unsworn statement. The right to make an unsworn statement is a valuable right that was eroded in this case due to defense counsels' deficiencies. Given the facts in this case, Appellant was materially prejudiced. Had the members known about the change in the law, about the effects of the sex offender registration, and that Appellant would have been discharged regardless of the adjudged

sentence, it is probable that Appellant would not have been sentenced to a punitive discharge.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the sentence.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on March 10, 2022.

CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

This brief complies with the type-volume limitation of Rule 24(c) because it contains 12,120 words.

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

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