IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

MATTHEW P. LEIPART,
Technical Sergeant (E-6),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0163/AF

Crim. App. Dkt. No. ACM 39711, Misc. Dkt. No. 2021-03

BRIEF ON BEHALF OF APPELLANT

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I.

WHETHER TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR, *INTER ALIA*, ALLOWING THE MILITARY JUDGE TO CONSIDER APPELLANT'S GUILTY PLEA WHEN DETERMINING WHETHER APPELLANT WAS GUILTY OF THE LITIGATED OFFENSES.

II.

WHETHER THE TRIAL COUNSEL'S "CLEAR ERROR" IN FINDINGS ARGUMENT—LEVERAGING APPELLANT'S GUILTY PLEA TO PROVE HIS GUILT OF THE LITIGATED OFFENSES—WAS HARMLESS BEYOND A REASONABLE DOUBT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals ("AFCCA") had jurisdiction to review Appellant's court-martial under Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c).[1] This Court now has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

Appellant was tried by a military judge alone at a general court-martial convened at Whiteman Air Force Base, Missouri, on July 2, 2018, and November 27-29, 2018. JA at 49. Appellant entered mixed pleas. JA at 68, 69. Pursuant to his pleas, the military judge found Appellant guilty of one charge and two specifications of communicating a threat, in violation of Article 134, UCMJ, 10 U.S.C. § 934; one charge and two specifications of assault consummated by a battery, in violation of Article 128, UCMJ, 10 U.S.C. § 928; and one specification of aggravated assault, also in violation of Article 128, UCMJ. JA at 396.

For the litigated offenses, the military judge acquitted Appellant of one specification of communicating a threat,[2] in violation of Article 134, UCMJ; two

[1] Unless otherwise indicated, all references to the UCMJ, the Military Rules of Evidence (Mil. R. Evid.), and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

[2] This is the only specification where someone other than KC is the named victim. JA at 58. Pursuant to R.C.M. 917, the military judge found Appellant not guilty of this specification. JA at 327-28.

specifications of sexual assault, in violation of Article 120, UCMJ, 10 U.S.C. § 920; and one specification of the lesser included offense of attempted sexual assault, in violation of Article 80, UCMJ, 10 U.S.C. § 880. *Id*. Contrary to Appellant's pleas, the military judge found Appellant guilty of one charge and two specifications of sexual assault, in violation of Article 120, UCMJ. *Id*. The military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, total forfeiture of all pay and allowances, 21 years confinement, and a dishonorable discharge. JA at 397.

Appellant filed his initial brief with the AFCCA in July 2020. He later filed a Petition for a New Trial ("PNT") based on newly discovered evidence and fraud upon the court. JA at 418. The AFCCA ordered a post-trial hearing[3] to obtain evidence regarding ineffective assistance of counsel ("IAC") allegations from the Article 66 appeal and the issues set forth in the PNT. JA at 586. Upon conclusion of that hearing and after obtaining additional briefing from the parties, the lower court completed its review. JA at 1. In a split opinion, the AFCCA affirmed the findings and sentence. JA at 45. Judge Cadotte dissented and would have set aside the sexual assault convictions and set aside the sentence. JA at 45-47. The AFCCA denied Appellant's PNT, and later denied a timely motion for reconsideration. JA at 45, 48.

[3] *See United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967) (per curiam).

Statement of Facts

1. Background.

Appellant met KC, an Australian woman, in January 2016 through an online dating platform. JA at 150. KC was a former model who earned a bachelor's degree in psychology and a juris doctor degree. JA at 177, 557. She worked for an Australian criminal defense law firm and served on a professional legal panel specializing in defending sex crimes. JA at 196. Conversely, Appellant did not possess a college degree, was five years older than KC, and had three dependents from a previous marriage. JA at 184. He lived in Sedalia, Missouri, more than 10,000 miles away from KC's residence in Perth, Australia. JA at 149, 182.

Approximately three months after connecting with Appellant online, KC visited him in the United States. JA at 151-52. She stayed for approximately two to three weeks, during which she got pregnant. JA at 153. The two married in September 2016. JA at 190. Though KC could not recall the specific date, the marriage was just a few days after KC finalized her divorce from the directing partner at her law firm. JA at 179-80, 190. At the time, KC was facing at least two complaints from former clients and was the subject of several articles in Australian newspapers covering her relationship with a former detective, who was convicted and imprisoned for unlawfully providing KC with confidential police documents regarding her clients. JA at 180-81.

2. The Court-Martial Overview and Counsel for Appellant.

Appellant's and KC's whirlwind relationship did not last. She accused him of physical assaults and threats, and in later reports, sexual offenses; these allegations form the basis of the charges and specifications referred to trial by general court-martial. JA at 53-58.

Appellant was represented by Daniel Conway, James Culp, and Captain (Capt) Charles R. Berry. JA at 59, 65-66. Mr. Conway served as lead counsel. JA at 607. Mr. Culp—who, at Mr. Conway's request, joined the defense team just three weeks prior to trial (JA at 606)—sat second chair. Capt Berry was the assigned military counsel; it was his first general court-martial. JA at 675, 677.

3. Entry of Pleas/Guilty Plea Inquiry.

Appellant pleaded guilty to communicating threats and physically assaulting KC; he pleaded not guilty to sexually assaulting her. JA at 68-69. Upon the entry of pleas, the military judge advised Appellant of the following, "By your plea of guilty you give up three important rights. *But you are giving up these three rights only with respect to those offenses to which you've pled guilty*. You still have the rights with respect to the other offenses. Do you understand that?" JA at 71 (emphasis added). Appellant responded affirmatively. *Id*.

With respect to the pled-to offenses, Appellant gave up the right against self-incrimination, the right to a trial of the facts wherein the Government must prove

guilt beyond a reasonable doubt, and the right to confront and cross-examine any witnesses called against him. JA at 72. The military judge reiterated, "Do you understand that by pleading guilty to those offenses, you no longer have those rights *with respect to those offenses*?" *Id*. (emphasis added). Appellant agreed anything he told the military judge could be used against him in sentencing. *Id*. He did not agree—at the entry of pleas or at any other time throughout his trial—that anything he said in his *Care*[4] inquiry could be used against him in contested findings.

The military judge questioned Appellant about the two threat allegations and three physical assaults. For the first threat specification, Appellant admitted to threatening to injure KC at least 20 times. JA at 83. Most were at her parent's home, but one was in a car. JA at 85. Appellant threatened to choke KC and break her bones. JA at 86. Appellant admitted, "I had told [her], 'Look me in the eye,' that I was going to kill her and choke [her] to death, 'look me in the eye and keep your head up. You let your head drop, then I will grab you.'" JA at 87. He continued, "I had said, 'Hey, I might [as] well wear that card now, abusive, I might as well be that person. You wanted an abusive husband, I'll show you abusive, fine. So that means tomorrow when your mom goes to work, you're going to give it to me, otherwise I'm going to break your finger and take it off,' referring to the ring on her finger." JA at 88. Alluding to financial manipulation, Appellant stated, "'We're going to the ATM

[4] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

tomorrow, with all your credit cards, everything, you're going to empty every last penny and you're going to give it to me.' . . . 'Every time you say no, I fucking I [sic] break something else. I'm not kidding, [KC].'" JA at 90-91. Appellant "threatened to break her bones . . . several times." JA at 92.

As to the second threat specification, Appellant admitted he threatened KC over the phone by saying, "For all I know you're fucking screwing around, and messaging other people, that's why, [KC], when I get out there, I'm going to disfigure you."[5] JA at 98. By "disfigure," Appellant meant, "I was going to come out there and then strike you, disfigure you, so that nobody would want you." *Id*. Appellant admitted, "All [he] want[ed] to do [was] take [his] fist and put it across the right side of [her] face. Right now, honestly, that's really, truly, honestly what [he] want[ed] to do." JA at 99. Appellant was "angry." JA at 106. He was "in a rage." *Id*.

The military judge also questioned Appellant regarding the three physical assaults captured in Specifications 1-3 of Additional Charge II. JA at 110-28. Specifications 1 and 3 were assaults consummated by a battery; Specification 2 was an aggravated assault with a dangerous weapon. JA at 58. As to Specification 1, Appellant admitted, on divers occasions, to becoming "enraged" and then grabbing and choking KC with his hand and arm. JA at 113-14. He was "beside [him]self.

[5] Mr. Culp told the military judge, "we definitely want to be provident to the multiple threats to hit her in the face." JA at 100.

[Appellant] grabbed her and squeezed her." JA at 116. As to Specification 3, Appellant admitted to reaching over and smacking KC in the back of the head with force. JA at 171. Finally, Appellant admitted to the aggravated assault with a dangerous weapon, a screwdriver, as detailed in Specification 2. JA at 121. Appellant held the tip of the Phillips-head screwdriver to KC's neck. JA at 125. In the manner it was used, the screwdriver could have caused death because of "how upset" he was and "the size of the screwdriver." JA at 126. Appellant admitted the screwdriver was being used as a weapon. *Id*. Appellant acted "purely out of anger and rage." JA at 127.

The military judge ultimately accepted the guilty plea. JA at 133.

4. Opening Statement.

The litigated phase of the court-martial contested all of KC's sexual allegations. The parties launched into opening statements 90 minutes after the guilty plea session. JA at 132. During Mr. Conway's statement, he directly referenced Appellant's already-accepted guilty plea to threats and assaults, leading the military judge to inquire whether the Defense was asking him to consider Appellant's pleas when adjudicating the sexual assault allegations. JA at 142-45.

The military judge asked Mr. Conway about his "position" on "consideration, or the factfinder being aware that there has been previous guilty pleas?" JA at 145. Mr. Conway responded that it was "appropriate" to bring it to the military judge's

attention. *Id*. The military judge then sought further clarification, asking whether "we're operating in a world where I'm aware of the previous guilty plea?" JA at 146. Mr. Conway replied, "Of course, sir; yes." *Id*. Accordingly, the military judge announced he was "aware" of the plea in his role as the military judge who accepted the guilty plea and in his separate role as the factfinder. *Id*.

The military judge never engaged in a colloquy with Appellant to determine whether Appellant understood and personally approved the decision Mr. Conway had made on his behalf.

5. The Findings Case.

At trial, KC provided the Government's lone evidence regarding the sexual offenses. Although she was unable to recall the exact dates or even months of any of these purported assaults,[6] she claimed the first attack occurred during her visit to the United States in May 2016. JA at 153-54. Despite describing Appellant as "incensed" and forceful when he penetrated her vagina with his penis against her express wishes, KC conceded that she planned to travel 10,000 miles to visit Appellant again in August 2016. JA at 154-55, 157. KC's testimony indicated this charged event allegedly occurred well outside the charged time frame.[7] *Compare* JA at 56 *with* JA at 152.

[6] JA at 154, 158, 164, 169.
[7] Appellant was acquitted of this offense. JA at 396.

KC contended that, during this subsequent trip, she endured a second sexual assault.[8] KC portrayed this assault as "so violent" and painful that she struggled to breathe at one point and believed Appellant may have "ripped" something in her.[9] JA at 159-61. She claimed Appellant called her a "bitch" and deemed it his "right" to have sex with her. JA at 161.

KC further attested that during the same August 2016 visit, Appellant sexually assaulted her a third time.[10] She alleged that Appellant penetrated her vagina with his fingers "until [they] couldn't go, like, anywhere." JA at 165. KC did not believe Appellant's actions were sexual in nature, but more "like an act of aggression or ownership." JA at 166. Afterwards, Appellant "[j]ust walked off" while KC cried and wanted "to go home so bad." JA at 167.

But KC did not go home. She instead stayed with Appellant and was purportedly sexually assaulted a fourth time.[11] KC described it as a particularly painful encounter because she had just endured an invasive medical procedure related to her pregnancy, which had left her sore. JA at 270. According to KC, Appellant once again proclaimed a right to have sex with her and continued his efforts despite her crying and begging him to stop. JA at 168-69. After ejaculating, KC claimed

[8] Appellant was convicted of this offense. JA at 396.
[9] The Government did not offer any medical evidence of injury to KC or her then-unborn child.
[10] Appellant was acquitted of this offense. JA at 396.
[11] Appellant was convicted of this offense. JA at 396.

Appellant left KC bleeding and crying, went to the bathroom, and used her face towel to wipe off his penis. JA at 169-70.

Shortly after this alleged assault, KC named her son after Appellant. JA at 171. When she returned to Australia, she not only allowed Appellant to accompany them, but she also paid for his ticket. *Id*. She also assisted him with completing her application for American citizenship so that she could live with him "until he finished his time in the military." JA at 190-91. KC alleged that, during a later visit to Australia around May 2017, Appellant attempted to sexually assault her again, but ultimately did not penetrate her.[12] JA at 172.

After Appellant returned home from Australia, and well after the purported sexual assaults, KC continued to send him complimentary and flirtatious messages. For example, she called him "the man of [her] dreams" and "amazing," praised his "sexy muscles," discussed wanting another child with him, and sent him a nude picture. JA at 257-60.

On July 31, 2017, while the pair were separated, KC told Appellant she wanted a divorce and full custody of their son. JA at 193, 264. Appellant accused KC of "kidnapping [their] son from [him]." JA at 261. The following day, KC went to the Western Australian Police to file a police report against Appellant, but apparently

[12] The military judge granted the Defense's R.C.M. 917 motion regarding the charged sexual assault and later acquitted Appellant of attempted sexual assault. JA at 329, 396.

could not because Appellant did not live in Australia. JA at 196-98. Instead, KC sought an order that would prevent him from re-entering the country. JA at 197. KC claimed that she was "really scared" of Appellant and that he had threatened to kill her and take her son. JA at 197, 306. But when Australian police asked KC to describe the "worst" offenses Appellant had committed against her, she never alleged that he sexually assaulted her. JA at 198-200.

As KC was giving her statement to Australian police, an officer filled out a form to accompany her report. JA at 198. In this form, the officer noted that KC stated, "[W]hen partner last came to Australia to visit he became paranoid that [KC] was cheating on him and has become both physically and verbally abusive toward [her]." JA at 410.

The form also includes a list of "Risk Factors" and "Behavourial Factors" with input for answers and, in some cases, additional explanatory information. JA at 410-11. According to KC's answers on this form, she indicated they had been separated for two months. JA at 411. KC also answered "No" to the question "Does the Perpetrator do/say/threaten things of a sexual nature that makes the Victim feel bad or physically hurts the Victim in some way?" *Id*. And for "Conflict over Child Contact," the indicated answer is "Unknown." *Id*. At trial, KC claimed the police never asked her about any sexual assaults. JA at 198-99, 306.

Approximately two weeks after her initial July 2017 report to Australian

authorities, KC failed to report any sexual allegations against Appellant in a statement provided to Air Force investigators. JA at 819. Instead, KC's accusations related solely to Appellant's purported conduct in Australia. JA at 820. KC also expressly denied suffering any abuse during her trips to visit Appellant in the United States. JA at 415, 820.

It was not until September 17, 2017, during an interview with the Air Force Office of Special Investigations (AFOSI), that KC mentioned the alleged sexual assaults. JA at 267. Even then, KC did not volunteer this information; rather, AFOSI asked specifically whether Appellant sexually assaulted her, and she responded in the affirmative. JA at 217. However, instead of limiting her allegations to the five charged sexual assaults, KC told AFOSI that Appellant raped her ten times. JA at 417.[13] She later increased that number to twelve. *Id.*[14]

At trial, KC attempted to explain these inconsistencies by first stating that "[i]t felt like" she was raped ten times. JA at 237. She next asserted that she "acquiesced to a number of them." *Id*. She denied outright that she ever said she had been raped twelve times and blamed the Government's transcription of her interview for this "error." JA at 238-39. Finally, KC acknowledged that while she agreed to provide AFOSI a written statement detailing her allegations against Appellant, it ultimately

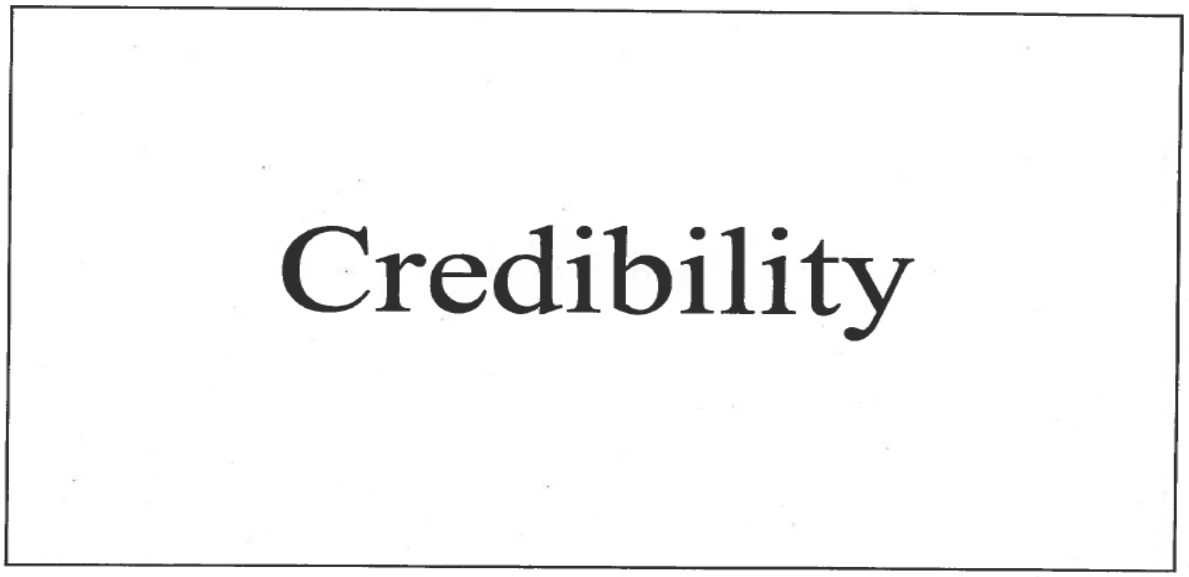
[13] at 48:10.
[14] at 50:15.

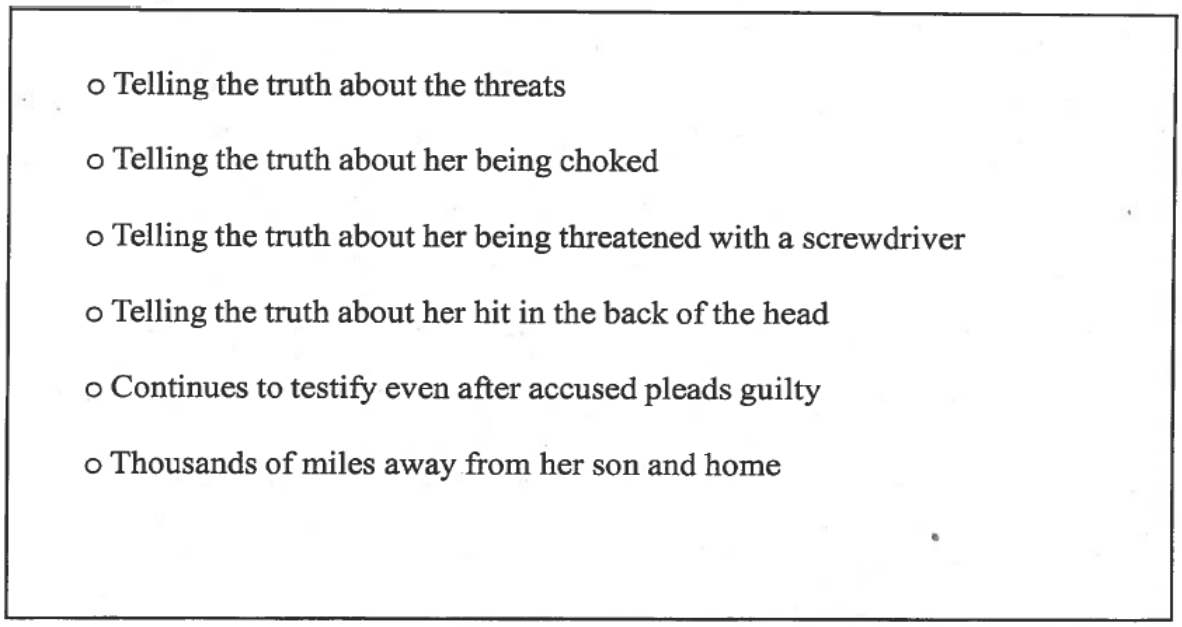
took her three months to provide it. JA at 248. KC explained that this delay was because she "had other things going on in the world" that she prioritized. JA at 248.

During the litigation, the Government repeatedly attempted to introduce Mil. R. Evid. 404(b) material regarding Appellant's prior physical abuse of KC; the military judge denied the requests. *See, e.g.*, JA at 281. Appellant did not testify in the findings case. The military judge ascertained it was his personal decision not to testify. JA at 340.

6. Closing Arguments.

During closing argument, trial counsel resurrected Appellant's *Care* inquiry by tying his admissions to KC's credibility. Trial counsel utilized PowerPoint slides in this effort, ensuring that the military judge saw the following:





JA at 402. Only the last of these six data points came from substantive evidence offered during the litigated findings proceeding; the other five came from Appellant's plea inquiry. Trial counsel further argued the following to the military judge:

> The defense counsel asked you to operate in this world where you know that he pled guilty to a number of offenses. So right now, I want to talk about how that goes towards the victim's credibility, because as you're standing here operating in this world where he has admitted to crimes against KC, the government believes you can use that in assessing her credibility on the stand. Whether or not she's telling the truth for the 120 offenses. So you know that she's telling the truth when she says the accused threatened her. You know that, Your Honor. Undeniable. You know that she's telling the truth about her being choked by the accused. Undeniable. You know that she's telling the truth about her being threatened with a screwdriver. That is undeniable. You know she's telling the truth about being hit in the back of the head by the accused. You can't deny it. You know that even after she sat right where she's sitting right now, and heard the accused plead guilty, she still continued to testify -- but she could have left. . . . I ask you to consider all of that.

JA at 355. Trial counsel later continued:

> Your Honor, it's the government's position that you really have to find her to be an evil person if you think she's going to come here and testify and lie about someone raping her. I mean, because that's what an evil person does. That she had such motivation to lie about being raped, but not lie about the other charges that the accused has pled guilty to. And so, when defense is asking you or pushing forth this theory that she's a liar. They're really saying she's a partial liar – that she's lied about some things, but not lied about others. And that makes it even more difficult for you when you're looking at her saying, "Okay. You're a liar. Well did you lie about this, but why would you lie about that?"

JA at 357. He concluded the argument with the following charge to the military judge as factfinder:

> And you have her credibility, because you can actually go back in that deliberation room and say, "I know for a fact she's telling the truth about X, Y, and Z." So that increases her credibility automatically. When you do that, Your Honor, the prosecution is confident that you will absolutely be firmly convinced -- the evidence will show -- beyond a reasonable doubt, that the accused is guilty of the remaining charged offenses in this case. Thank you, Your Honor.

JA at 364. Trial counsel returned to the theme in his rebuttal argument:

> The [Defense] believe[s], it's a good lie tree. But isn't there also a truth tree, in this case? Isn't there also bricks that were built based on credibility and truth to the witness's testimony? Let's start with those building blocks, with those roots as defense counsel talked about. The fact that she's told the truth about being threatened, that's a root. The fact that she's telling the truth about being assaulted, that's a root.

JA at 392. He continued, "[S]he apparently has told the truth, Your Honor, for everything except for the one thing, the most important thing and the worst thing for their client, the accused. And she's credible. Take that into consideration when you're thinking about how she testified, and what she's testified to, Your Honor." *Id*.

Though Mr. Conway opened and authorized the military judge to consider Appellant's guilty plea, Mr. Culp closed for the Defense. JA at 142, 366. At times, Mr. Conway answered questions from the military judge during trial counsel's argument (*see* JA at 344), but the military judge returned to one counsel, one cause and looked to Mr. Culp for further objections. JA at 352. Mr. Conway did not object to the Government's slides[15] (JA at 341); neither counsel objected to the Government argument. The military judge did not *sua sponte* ask trial counsel any questions about the slides or argument, nor did he ask defense counsel for their inputs to determine if trial counsel's evidentiary interpretation aligned with what they intended to allow through opening statement. The military judge never clarified that he would not consider the slides or argument. He also never engaged in a colloquy with Appellant—during the *Care* inquiry, following opening statement, during the introduction of evidence, or when trial counsel adopted the facts underlying the guilty plea into his closing argument—to determine if he understood the way in which his guilty plea was being considered for findings as to the litigated offenses.

7. Findings and Sentence.

The military judge convicted Appellant of Specifications 2 and 4 of Additional Charge I; he acquitted Appellant of Specifications 1, 3, and 5. JA at 396. Before the

[15] It appears defense counsel had not reviewed the slides until that moment. JA at 341.

announcement of findings, the military judge did not provide rationale for the mixed verdict on the record. He did not indicate that he was unduly swayed by trial counsel's argument, nor did he disclaim consideration of the improper argument. The military judge did not distinguish between his consideration of the fact that Appellant pleaded guilty to some offenses with the underlying conduct giving rise to those pleas. The sentence included, *inter alia*, 21 years confinement and a dishonorable discharge. JA at 397.

8. Litigation at the lower court.

Subsequent investigation disclosed that KC may have perjured herself at Appellant's court-martial. JA 418-561. While his case was pending decision before the AFCCA, Appellant petitioned for a new trial based on newly discovered evidence and fraud upon the court. *Id*. Based on the allegations in the petition and the IAC claims levied on direct appeal, the AFCCA ordered a *DuBay* hearing, and directed review of a dozen specified questions.[16] After the *DuBay* judge compelled KC's in-person testimony over her objection, and the AFCCA denied a writ of extraordinary relief from KC to overturn that decision,[17] the hearing occurred in April 2022.

9. *DuBay* Hearing.

At the *DuBay* hearing, each of Appellant's three defense counsel testified.

[16] JA at 589-90.
[17] JA at 596-99.

They independently acknowledged that, aside from a vaguely-defined desire to garner goodwill with the military judge for taking responsibility, they lacked any coherent strategy when Mr. Conway brought up the guilty plea in his opening statement. Mr. Conway and Capt Berry's testimony is set out below; Mr. Culp's testimony can be found at JA at 645-47.

Mr. Conway's Testimony

> Q. Do you recall whose decision that was?
>
> A. So that's straight me, because I think I was the one that was standing at the lectern in there . . . So we're in front of Judge Imburgia, who I had been in front of before in Guam where we had a good outcome, and very positive opinions of Judge Imburgia, and I still do. . . . So I think we were just trying to maintain some goodwill with Judge Imburgia. I had no doubt that he was going to use stuff appropriately. If I had to do that again, would I agree to that? Probably no, honestly. I've thought about that in the past, but that's one of those moments where you're standing at the lectern and it's like you've got this judge that you think highly of, that you've done litigated cases in front of, that you know him to be an academic and an intellectual, and I mean that in the nicest way. . . . So I felt like it was okay to find some goodwill with Judge Imburgia. In terms of best practices, if I had to do that again, I probably wouldn't do that, no.
>
> . . .
>
> Q. The question is: What legal theory did you have that would justify using [Appellant's guilty plea during findings] in a way that would benefit your client? What area of law would allow the judge to consider that guilty plea in a way that could potentially benefit your client in findings?
>
> A. Potentially benefit the client in findings. [. . .] I don't remember what my thought process at the time was. I can tell you that it was largely about maintaining goodwill with Judge Imburgia . . . .

. . .

> Q. . . . I'm trying to understand what the goodwill is that you're getting at, because when you ultimately allow the judge to consider the *Care* inquiry, there's no limitations on how he is going to consider that; no spillover discussions. You just – at that point, you agreed to allow that to be considered in the findings portion of trial. Do you recall that?
>
> A. Yeah, I do. I do recall doing that, and if I had to do it again, I wouldn't do that . . . .

JA at 742-744.

Mr. Conway further testified that he made the decision to allow the military judge to use the *Care* inquiry for findings without discussing it with his defense team or Appellant. JA at 747. Mr. Conway then stated, "[I]f I had to do it again, I would probably take breaks and talk about it a little bit." *Id*. Mr. Conway averred it was "kind of a spot of the moment decision." *Id*.

Capt Berry's Testimony

> Q. Do you recall making a strategic decision to actually use that in the findings portion of the trial?
>
> A. No – [] that was the most bizarre thing of all of this. I don't understand why he said that.
>
> Q. Why who said what?
>
> A. Why – Why Mr. Conway said yes, we want you to consider the guilty plea for the purpose of findings of this. I have no idea why he said that. I thought, I mean, you know, and I think this made . . . it in the clemency because I told the clemency attorney, hey, raise this issue. Because I don't know why. I mean, I had this memory of like turning to Mr. Culp sitting at the table being like I'm confused. I thought we were just – I

> thought that the strategy is that if he pleads guilty we don't want him to consider it, right? I mean, because the issue with the guilty plea is that if he's using that – if the judge is using that for findings, then she's – KC is immediately corroborated, because she's made all these allegations. Now she's being corroborated by the guilty plea, and so I have no idea.

JA at 699.

10. The AFCCA Opinion.

As to Appellant's IAC claim, the AFCCA distinguished between "awareness" of the guilty plea and "consideration" of the same, suggesting the former was acceptable while the latter would not under these circumstances. JA at 18. Though defense counsel's post-trial explanations were "weak," the AFCCA declined to decide whether their performance was constitutionally deficient. JA at 20. Instead, it concluded Appellant failed to demonstrate prejudice in the absence of evidence the military judge misused the guilty plea. *Id*. The prejudice analysis did not address the weakness of the Government's findings case. *Id*.

The AFCCA divided as to Appellant's related prosecutorial misconduct claim, but only with regards to prejudice. The majority opinion agreed with Appellant that trial counsel committed a "clear error when he used Appellant's guilty pleas and providence inquiry to bolster his argument that Appellant was guilty of the contested sexual offenses." JA at 36. It noted, "[U]sing Appellant's guilty plea or providence inquiry as evidence with regard to a contested offense would be wholly improper and facially a violation of Appellant's Fifth Amendment rights." JA at 18 (citing *United*

States v. Flores, 69 M.J. 366, 368-69 (C.A.A.F. 2011)). Whatever "agreement" the Defense made with the military judge to be aware of the plea was not an invitation to "use Appellant's guilty pleas and his sworn statements during the providence inquiry as evidence of his guilt." JA at 36. This would have "in effect, compelled Appellant to incriminate himself in the trial in a manner contrary to the military judge's explanations to Appellant and to the protections of the Fifth Amendment, and for which purpose Appellant never explicitly agreed." JA at 37.

Although the majority found this constitutional error harmless beyond a reasonable doubt—again without commenting on the weakness of the Government's findings case—one judge could not. JA at 37, 45-47. Judge Cadotte would have set aside the sexual assault convictions and the sentence because he was "unable to conclude that there was no reasonable possibility that the error contributed to Appellant's conviction." JA at 45.

Additional facts are included, as necessary, below.

Summary of Argument

The attorneys for both parties committed grievous errors, independently and collectively contributing to Appellant's multiple unwarranted convictions for sexual assault and the resulting 21-year sentence to confinement. Appellant is entitled to relief from this Court because: (1) but for the defense counsel's deficient

performance, there is a reasonable probability of a different result[18] (acquittal on both remaining sexual assault allegations); and (2) trial counsel's clear constitutional error was not harmless beyond a reasonable doubt.[19]

Issue I - IAC

Appellant made damaging admissions under oath that he threatened to injure and disfigure KC on multiple occasions, choked her, smacked her in the head, and held a screwdriver to her neck. Mr. Conway spontaneously decided to allow the military judge to consider this when deliberating on findings for otherwise uncorroborated sexual assault allegations involving the same victim. This decision was constitutionally deficient for at least two reasons.

First, whether to invoke Appellant's right to remain silent as to the contested offenses was Appellant's decision, *not* defense counsel's. Statements made under oath in the *Care* inquiry are akin to testimony; without his consent Appellant was compelled, in essence, to testify against himself. Mr. Conway usurped Appellant's right to remain silent and erroneously waived the right on Appellant's behalf regarding the most serious charged offenses. Because he could *never* make that decision without client consent—consent he did not have—this decision could *never*

[18] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).
[19] *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019).

be reasonable, tactical, or strategic.[20] Thus, it was deficient. Second, even reviewing the reasons offered by defense counsel after the fact, the performance fell well below that which is expected of even fallible counsel. The post-hoc justifications provided by counsel included (1) a desire to earn goodwill with the judge, and (2) Appellant taking responsibility in the guilty plea somehow suggested that he was not actually guilty to that which he pleaded not guilty. These explanations, which the AFCCA called "weak" (JA at 20), are so unreasonable that they overcome the presumption of competence. The performance was constitutionally deficient.

Prejudice can be understood in at least three dimensions. The first is the utter weakness of the Government's findings case on the litigated specifications, which centered around otherwise uncorroborated allegations of sexual assault and a complaining witness with compromised credibility. Evaluating the underlying substance of the guilty plea is the only thing that could have gotten the military judge to convict on two specifications of sexual assault. Second, as Judge Cadotte concluded in his dissent (JA at 45-47), although military judges are presumed to know and follow the law, this military judge should not enjoy that presumption. Third, the IAC prejudice cannot be fully understood without delving into Issue II; defense counsel's deficient performance emboldened trial counsel to commit

[20] If Mr. Conway had consent, it should have triggered a re-opening of the guilty plea for an additional colloquy between the military judge and Appellant. This did not happen.

prosecutorial misconduct in the first place.

Issue II – Prosecutorial Misconduct

Trial counsel exploited "this world where [the military judge knew] that [Appellant] pled guilty" to bolster KC's otherwise questionable credibility by arguing that if she was credible as to the pled-to offenses, she must be credible as to the contested offenses, too. JA at 355. He used prepared PowerPoint slides to drive that point home, showing careful and methodical planning to convince the military judge that KC's compromised credibility—really the only issue in the litigated case—was still intact enough to convict. JA at 402. Not just a passing reference, trial counsel coupled Appellant's previously-accepted plea with his final request to the military judge to convict Appellant, similar to that which this Court found indicative of prejudice in an even less stringent non-constitutional prejudice analysis. *Cf. United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F. 2022) (finding prejudice when, at the climax of sentencing argument, trial counsel connected a request to sentence the accused to the maximum punishment with erroneous victim impact video).

This bizarre exchange provoked a majority of the AFCCA to find the prosecutorial misconduct a "clear error" of constitutional dimension. JA at 36. But in finding such clear error harmless beyond a reasonable doubt, the majority failed to evaluate the weakness of the Government's case. As such, it declined to address

how the Government reinforced the crux of its case—KC's credibility—by importing Appellant's sworn statements from the *Care* inquiry. This clearly indicated a lack of harmlessness and likewise failed to uphold the standard the Supreme Court announced in *Chapman v. California*[21] and that this Court has endorsed time and again.[22] Judge Cadotte, however, could not conclude the same considering the weakness of the Government's case and the centrality of the constitutionally offensive theme in trial counsel's closing argument. JA at 45-47. A proper application of the *Chapman* standard requires reversal because there is at least a possibility—indeed, a likelihood—the error contributed to these convictions.

The Fifth and Sixth Amendments—as well as precedent interpreting those amendments—provide a legal basis for relief for either granted issue. That said, Issue II is the cleanest and simplest path for this Court to resolve the appeal. The error is clear and obvious, and the Government cannot come close to satisfying *its* burden to prove the error was harmless beyond a reasonable doubt. This Court should set aside and dismiss the litigated findings and set aside the sentence.

[21] 386 U.S. 18, 24 (1967).
[22] *See, e.g., United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016); *United States v. Prasad*, 80 M.J. 23, 29 (C.A.A.F. 2020).

Argument

I.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE FOR, *INTER ALIA*, ALLOWING THE MILITARY JUDGE TO CONSIDER APPELLANT'S GUILTY PLEA WHEN DETERMINING WHETHER APPELLANT WAS GUILTY OF THE LITIGATED OFFENSES.

Standard of Review

Allegations of ineffective assistance are reviewed *de novo*. *United States v. Palacios-Cueto*, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law

1. Ineffective Assistance of Counsel.

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *See United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). To establish that IAC occurred, an appellant must prove both that the defense counsel's performance was deficient, and that the deficiency caused prejudice. *Strickland*, 466 U.S. at 698. The burden is on the appellant to demonstrate both deficient performance and prejudice. *United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466

U.S. at 686. "The goal of a just result is not divorced from the reliability of a conviction." *Lafler v. Cooper*, 566 U.S. 156, 169 (2012) (citation omitted). This Court looks to "combined efforts of the defense team as a whole" rather than the performance of individual counsel. *United States v. Adams*, 59 M.J. 367, 371 (C.A.A.F. 2004) (citations omitted).

2. Deficient Performance.

When evaluating deficient performance, this Court begins with a presumption of competence. *See Gilley*, 56 M.J. at 124 (citations omitted). "Defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." *Datavs*, 71 M.J. at 424 (citations omitted). In reviewing the decisions and actions of trial defense counsel, this Court does not second-guess strategic or tactical decisions. *See United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993) (citations omitted). Only in those limited circumstances where a purported "strategic" decision is unreasonable or based on inadequate investigation is there a foundation for finding ineffective assistance of counsel. *See United States v. Davis*, 60 M.J. 469, 474-75 (C.A.A.F. 2005).

3. Prejudice.

"[A] challenger must demonstrate a reasonable probability that, but for counsel's deficient performance the result of the proceeding would have been

different." *Palacios-Cueto*, 82 M.J. at 327 (citing *Strickland*, 466 U.S. at 689, 694) (internal quotation marks and brackets omitted). The prejudice element of an IAC claim focuses "on the question whether counsel's performance renders the result of the trial unreliable or the proceedings fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (citations omitted).

4. Waiver of the Right to Remain Silent.

"When and if to testify"—and thus whether to waive the right against self-incrimination—"is a decision to be made by the accused and his or her attorney." *United States v. Jenkins*, 54 M.J. 12, 21 (C.A.A.F. 2000) (Crawford, C.J., concurring in the result). In the guilty plea context, an "accused entering a guilty plea waives several of his constitutional rights. These constitutional rights include the right to trial by jury, the right to confront one's accusers, and the privilege against compulsory self-incrimination. They derive from express constitutional text and . . . are central to the American perception of criminal justice." *United States v. Hansen*, 59 M.J. 410, 411 (C.A.A.F. 2004) (citations omitted). "[I]f there is to be a waiver of these rights, it 'must be an intentional relinquishment or abandonment of a known right or privilege.'" *Id*. (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "The record must also demonstrate the military trial judge or president personally addressed the accused, advised him that his plea waives his right against self-incrimination, his right to a trial of the facts by a court-martial, and his right to be confronted by the witnesses

against him; and that he waives such rights by his plea." *Id*. (citing *Care*, 40 C.M.R. at 253) (internal quotations omitted). "That waiver is not to be presumed from a silent or inadequate record." *Id*. at 412 (citation omitted).

5. Presumption Regarding Military Judges.

A military judge is "presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted). This presumption is "not a prejudice argument. The presumption is that military judges will correctly follow the law, which would normally result in no legal error, not that an acknowledged error is harmless. The presumption cannot somehow rectify the error or render it harmless." *United States v. Hukill*, 76 M.J. 219, 223 (C.A.A.F. 2017).

Analysis

1. Defense counsel performed deficiently.

a. Mr. Conway's unilateral decision cannot be strategic, tactical, or objectively reasonable because only Appellant could authorize the use of his plea inquiry.

This Court need not engage in a detailed evaluation of the reasons for Mr. Conway's unilateral decision to permit the military judge to consider the horrific conduct discussed in the guilty plea. This is because it was not—and could never be—Mr. Conway's decision to make. As such, it could never form the basis of a reasonable, tactical, or strategic attorney decision.

This error is bound in the Fifth Amendment right of a criminal defendant to remain silent and not be forced to testify against himself. If an accused intends to plead guilty, thereby necessarily waiving the right to remain silent, that decision is personal to him or her and such waiver must be knowing, intelligent, and voluntary. *Hansen*, 59 M.J. at 411. The military judge—initially—correctly advised Appellant he was giving up that right only with respect to the offenses to which he was pleading guilty. JA at 71-72. Appellant expressed he understood. In fact, the takeaway was that his admissions *could not* be used against him for the litigated phase of his trial. But Mr. Conway's "spot of the moment decision" permitted an opposite outcome. JA at 747. It is bad enough that Mr. Conway never discussed his decision to permit the factfinder's consideration of the guilty plea with his Defense team. Had he done so, he would surely have encountered resistance—even the relatively inexperienced Capt Berry understood how such information could adversely affect Appellant's defense. JA at 699. More importantly, however, Mr. Conway never obtained Appellant's consent. JA at 747. As even the lower court acknowledged when it analyzed trial counsel's clear error, this effectively "compelled Appellant to incriminate himself." JA at 37.

In sum, Mr. Conway had no authority to unilaterally waive Appellant's right to remain silent as to the contested offenses. It could never have been reasonable, tactical, or strategic in the absence of client consent. If there is a legitimate strategy

behind it, that needs to be communicated to the client so he or she can make their own informed decision to exercise or waive the right.[23] This Court should accordingly label Mr. Conway's off-the-cuff decision "deficient performance" and turn to prejudice.

b. Assuming Mr. Conway was authorized to make this unilateral decision, it fell measurably below the standard expected of even fallible attorneys.

To the extent this Court considers counsel's reasons for Mr. Conway's decision, he fell measurably below the standard expected of even fallible counsel. As a starting point, the lower court correctly characterized defense counsel's explanation for their performance as "weak." JA at 20. There should be no dispute that Mr. Conway's "spot of the moment" decision to allow the military judge to use Appellant's guilty plea during findings was deficient. JA at 747. Mr. Conway himself admitted he would not do it again (JA at 742), while Capt Berry—a novice trial defense counsel—found the decision confusing and "bizarre." JA at 699. A separate, and relatively junior, attorney who represented Appellant in clemency was similarly critical of Mr. Conway's decision, noting it bolstered KC's otherwise uncorroborated testimony. JA at 812. Mr. Culp—who Mr. Conway brought on the

[23] Though not dispositive on the question of defense counsel's deficient performance, once Mr. Conway made the snap-judgment call, the military judge had a responsibility to conduct a colloquy with Appellant to determine if he agreed to such use of the guilty plea. *See Hansen*, 59 M.J. at 412. He did not. This fact should be considered later when evaluating the presumption that the military judge knew and followed the law absent evidence to the contrary.

case for his experience—was not even consulted as to this monumental trial decision. JA at 747. At the *DuBay*, Capt Berry noted the decision flew in the face of the reason to enter mixed pleas in the first place. JA at 699 (remarking KC was "immediately corroborated.").

Mr. Conway could not identify a specific rule or legal theory that would have allowed the military judge to limit his consideration of the guilty plea and *Care* inquiry to just "appropriate" matters. *See, e.g.*, JA at 743 (Mr. Conway discussing how he trusted the military judge "not to use it inappropriately."). Mr. Conway further did not appear to recognize the potential danger of his choice, as he did not see the "probative value between the 128s and 120s."[24] JA at 742. The linkage between the assaults and threats with the sexual offenses was obvious. Appellant admitted to numerous appalling threats, including injury and disfigurement, as well as physically assaulting KC. The sexual assault convictions manifest the same aspects of dominance and control.[25] Mr. Conway himself ultimately conceded that there was no spillover instruction and no apparent limitations in how the military judge could consider those matters—reasons he would not make the same decision again. *Id*. None of the explanations provided for in the affidavits or at the *DuBay*

[24] Conversely, both Capt Berry and Appellant's clemency attorney—both very junior judge advocates—were well aware of how the plea bolstered KC's otherwise uncorroborated testimony. JA at 699, 812.

[25] The acquitted offenses, however, each suffered from insurmountable legal or factual defects. *See infra* at 43-44.

demonstrate Mr. Conway understood he was handing the military judge the otherwise inadmissible corroboration to KC's claims or unilaterally surrendering Appellant's constitutional right to silence.

To be sure, pleading guilty to the heavily corroborated non-sex offenses and pleading not guilty to the uncorroborated sex offenses is a reasonable decision a defense counsel could endorse. But Mr. Conway's deficient decision undid the benefit the mixed plea could have provided, making it even worse than if Appellant had pleaded not guilty to everything. Indeed, had Appellant pleaded not guilty across the board, trial counsel would never have felt empowered to argue, and use slides to support the argument, that KC was credible because Appellant's own admissions under oath to the military judge just days before proved as much.

Seemingly, with the original mixed-plea decision, the Defense *did* want to take all the pled-to conduct off the table. *See* JA at 699 (Capt Berry stating he "thought that the strategy is that if he pleads guilty we don't want them to consider it, right?"). That is why Mr. Culp told the military judge, at a time where it looked as if the plea could be improvident, "we definitely want to be provident to the multiple threats to hit her in the face." JA at 100. Mr. Culp *did not* want the substance of the threats and assaults being considered by the factfinder. Mr. Conway's rogue decision changed everyone's sight picture on what this case would be. And it certainly changed trial counsel's strategy. *See* Issue II.

Two final points require consideration. First, Mr. Conway affirmatively did not object to trial counsel's closing argument slides. JA at 341. This non-objection also constitutes IAC. If there was ever an argument that Mr. Conway only intended the factfinder to be "aware" there was a plea, but not to consider the conduct admitted to by the plea, this subsequent deficient decision blows that out of the water. The slides put counsel on notice of what trial counsel intended. It was incumbent on Mr. Conway, at that point, to clarify what "being aware" meant to the Defense. The affirmative failure to object is an indication he agreed with full consideration of everything at the findings stage, something that is patently unreasonable and a presumption of competence cannot save.

Second, Mr. Culp argued for the Defense in closing. He did not object to trial counsel's clearly improper argument. That, too, is deficient and ineffective. Perhaps it was because Mr. Conway and Mr. Culp were not on the same page. Capt Berry certainly was not, as the two civilian counsel effectively pushed him to the side. The point of law remains: IAC assesses the whole team, not an individual. *Adams*, 59 M.J. at 371. If Mr. Culp was condemned by Mr. Conway's original sin, he still should have objected to the argument. Appellant maintains that non-objection is itself deficient performance because trial counsel far exceeded the bounds that anyone in that courtroom likely foresaw. Mr. Culp's non-objection showed he too was asleep at the wheel at the pinnacle of the court-martial, perhaps focused on his soon-to-come

closing argument and not the constitutionally improper and inflammatory prosecutorial misconduct.

As will be discussed below in Issue II, although non-objection to an argument may be considered as some indication of minimal prejudice,[26] it cannot be the case when the non-objection comes from counsel who are themselves—or associated with—ineffective counsel. If they had been effective, they never would have allowed it in the first place. If anything, the continued non-objections show continued deficiencies from multiple members of the Defense team.

This Court can and should consider all of this to determine the presumption of competence has been overcome and defense counsel's performance was constitutionally deficient.

2. Absent the deficient performance, there is a reasonable probability of a different result.

The most glaring prejudice is trial counsel's decision to leverage that ineffective error to revive KC's diminished credibility in a case with uncorroborated allegations of sexual assault. This Court will necessarily have to consider all of Issue II to appreciate the full extent of the prejudice resulting from defense counsel's errors. The harmless beyond a reasonable doubt analysis for the prosecutorial misconduct informs whether there is a "reasonable probability that, but for counsel's deficient

[26] *Gilley*, 56 M.J. at 123.

performance the result of the proceeding would have been different." *Palacios-Cueto*, 82 M.J. at 327. After all, it is highly unlikely trial counsel would have utilized the same tactic but for the defense counsel's deficient decision. As detailed below, the deficient performance supported the unsupportable convictions.

a. Objectively, the Government's findings case was weak.

This Court must consider what the majority opinion below did not: the overwhelming weakness of the Government's litigated case. Had the lower court confronted these shortfalls, it would have been compelled to find prejudice. The relative strength or weakness of the Government's case (free of error) is frequently the single most important inquiry to determine whether, based on this record, a reasonable probability exists that the result of the proceeding would have been different absent the error. *Cf. Edwards*, 82 M.J. at 247 (commenting that prejudice calculations in a findings scenario routinely evaluate the quantum of "proof of guilt").

The evidentiary weaknesses in the Government's case are crucial when examining trial defense counsel's ineffectiveness. Judge Cadotte recognized, "The entirety of the Government's case on the contested specifications rested on the testimony of KC. Consequently, her credibility was essential to the Government's case." JA at 47. Trial defense counsel's deficient performance handed the prosecution the chance to repair KC's otherwise irreparably damaged credibility and thus tipped the balance against Appellant. It was made a focal point of trial counsel's

argument (JA at 355, 357), coupled with a final sendoff to the military judge to find Appellant guilty (JA at 364), and returned to in rebuttal argument (JA at 392).

Without defense counsel's error, there is at least a reasonable probability that the military judge would have harbored sufficient doubts about the credibility of KC's otherwise uncorroborated sexual assault allegations to fully acquit Appellant as to the contested offenses. As detailed above, the record of trial—and specifically KC's testimony—is replete with motives to fabricate, prior inconsistent statements, and biases. There were child custody and divorce issues, prior lies and inconsistent statements, and professional misconduct as an attorney bearing on her veracity as a witness. Throughout her cross-examination, KC consistently blamed others for the circumstances she found herself in. She refused to take personal responsibility for anything that tended to call her claims into question, to include the lack of detail in her initial report against Appellant, the professional misconduct allegations against her in Australia, and the nature of her relationship with Appellant.

Moreover, the police instructed KC to tell them "the worst things that he's done, why you're fearful of him coming" so that they could keep him out of the country. JA at 197. In response, KC described threats and physical assaults, but made absolutely no mention of any sexual assaults. JA 410-11. Thus, KC, a seasoned criminal defense attorney with specialized knowledge in sexually-based crimes, failed to allege *any* sexual assaults had occurred despite allegedly fearing for her life

and knowing that her claims might achieve her objective of keeping Appellant from entering the country. And when confronted with the police's intake form indicating that she claimed she was *not* a victim of sexual violence, KC denied ever being asked the question even though other sections of the same form revealed that she had provided responsive information. JA at 290-91. Later, when speaking with military law enforcement, KC expressly denied suffering any abuse when visiting Appellant in the United States.[27] JA at 415, 820.

In the absence of being allowed to consider the guilty plea, the military judge would also reasonably doubt a sexual assault claim when the accuser chose to name her son after the man who repeatedly sexually assaulted her, particularly when those assaults took place *during* her pregnancy. Certainly, the trauma from such horrific assaults would be aggravated by having to forever refer to the child borne of that pregnancy by the assailant's name. That KC personally paid thousands of dollars to travel from Australia to Missouri *after* these alleged sexual assaults further compounds the speciousness of her claims. When combined with the numerous inconsistencies and contradictions in her story, the military judge would have been left with unsupportable accounts, but for the introduction of the guilty plea into the deliberation.

[27] The two sexual assaults of which Appellant was ultimately found guilty allegedly occurred in the United States.

Further supporting a finding of prejudice, the two sexual assault convictions included claims of force and control, ones that sound an awful lot like the threats and assaults Appellant admitted to under oath. The military judge heard accounts, *inter alia*, of an "enraged" Appellant who threatened to injure KC at least 20 times, promised to disfigure her face and break her bones, smacked her on the back of the head, choked her multiple times, and held the cold metal pointed tip of a Phillips head screwdriver to her neck in such a manner that it could have caused death or serious bodily harm. *See supra* at 5-8. By comparison, the underlying conduct for Specification 2 alleged Appellant was "so violent" and caused so much pain that KC struggled to breathe at one point and believed Appellant may have "ripped" something in her. JA at 161. Consistent with the power and control theme emanating from the guilty plea session, KC claimed Appellant called her a "bitch" and deemed it his "right" to have sex with her. *Id.* Similarly, the underlying conduct for Specification 4 was that, according to KC, Appellant once again claimed it was his right to have sex with her and continued his efforts despite her crying and begging him to stop. JA 168-69. After ejaculating, KC testified Appellant left KC bleeding and crying, went to the bathroom, and used her face towel to wipe off his penis.[28] JA at 169-70.

Mr. Conway's decision in opening statement flies in the face of repeated

[28] *See infra* at 43-44 (explaining the mixed verdict as to litigated findings).

attempts to keep Mil. R. Evid. 404(b) evidence from being admitted in the first place. *See, e.g.*, JA at 271. It is obvious why the Defense opposed the introduction of this evidence. The guilty plea paints an unflattering picture of Appellant, or at least, who the military judge thought Appellant was in light of the plea. There is a reasonable probability that, absent being able to consider the underlying plea, the military judge would have been compelled to acquit. This is not mere consideration *that* Appellant pleaded guilty as a method of taking responsibility—something that would still only be relevant in presentencing and not findings—it is a substantive consideration of the *content and conduct* which made Appellant's plea provident. It was Appellant's admissions, under oath, that made KC credible, when she otherwise was not.

b. A military judge alone trial does not insulate the IAC claim.

Instead of addressing the weakness of the Government's case, the AFCCA's IAC prejudice analysis entirely hinged on "the absence of evidence that the trial judge misused Appellant's guilty pleas." JA at 20. This legal analysis is faulty. That this is a military judge alone trial cannot insulate the error from a corresponding finding of prejudice. *See Hukill*, 76 M.J. at 223 (clarifying this presumption goes to error, not prejudice). If the presumption went to prejudice, it would mean virtually every legal error in a military judge alone trial is uncorrectable on appellate review. That cannot be. It also, plainly, does not make sense. If a military judge allows erroneous evidence or argument, he or she cannot be later presumed to have cabined

deliberations by considering the proper matters and disregarding improper matters. After all, the military judge thought the evidence or argument was proper in the first place, or else, it would not have been admitted or allowed.

Assuming, however, this Court considers the presumption when determining prejudice as the majority opinion recently did in *Cunningham*,[29] while military judges are presumed to know and follow the law, "the presumption must give way when there are persuasive contrary indications." *Cunningham*, 2023 CAAF LEXIS 520 at *22-23 (Maggs, J., concurring in part and dissenting in part). The military judge should not enjoy the presumption in this case because he permitted the use of the underlying conduct from the guilty plea inquiry as substantive evidence of guilt, in violation of Appellant's right to remain silent as to the contested offenses, without so much as engaging in a personal colloquy with Appellant to determine if he agreed to such use. *Hansen*, 59 M.J. at 411-12. As Judge Cadotte urged below, and this Court should adopt, the presumption that the military judge knew and understood the law should be overcome. JA at 46-47.

Appellant cannot be faulted for a lack of affirmative evidence the military judge misused the plea. That suggestion fails to account for the secret and closed nature of deliberations. *See* R.C.M. 921. Rare would be the case where the military

[29] *United States v. Cunningham*, __ M.J. __, 2023 CAAF LEXIS 520, *12 (C.A.A.F. July 21, 2023).

judge opens his deliberations to spectators and talks to himself out loud about what and why he is considering or declares on the record that he was improperly swayed by a particular argument of trial counsel. *Cf. Cunningham*, 2023 CAAF LEXIS 520 at *21-22 (Maggs, J., concurring in part and dissenting in part) (in a sentencing context, recognizing "absent a highly unusual express statement by a sentencing authority about sentencing deliberations, the record of a case almost never will reveal the actual extent to which improper evidence or unsworn statement influenced the sentence"). As Appellant could surely never bring such evidence to an appellate authority, the unremarkable absence of such evidence should not be held against him.

Next, the mixed verdict as to the contested specifications is *not* an indication the military judge appropriately compartmentalized proper and improper matters. All three acquittals have legal and/or factual explanations that cannot be ignored. As to Specification 1, the testimony indicated any charged act occurred well outside the charged time frame, and although the military judge denied the Defense's motion to dismiss pursuant to R.C.M. 917 on this basis (JA at 340), he *sua sponte* returned to his concerns about the "on or about" language not capturing the charged conduct in a colloquy with trial counsel during closing argument. JA at 461. As to Specification 3, that uncorroborated allegation was so incredulous in nature that no rational factfinder would have believed Appellant came into a kitchen, walked up to KC, digitally penetrated her for no apparent reason, and left. JA at 165-66. Finally, as to

Specification 5, the military judge granted an unopposed R.C.M. 917 motion as to the charged sexual assault and submitted the lesser included offense of attempted sexual assault to himself to consider as factfinder. JA at 329. For this specification, the Government offered Prosecution Exhibit 1, a recording which *at best* indicated Appellant attempted a sexual assault. But there was no overt act in furtherance of that attempt. Thus, the military judge was required to acquit.

Absent the military judge being able consider the heinous pled-to offenses, which strike a glaring similarity to the convicted sexual assault specifications, there is a reasonable probability Appellant would have been fully acquitted as to the contested specifications. If this Court cannot conclude Appellant met his burden with respect to IAC prejudice, the prejudicial prosecutorial misconduct—enabled by deficient performance—is a separate basis upon which Appellant is entitled to relief.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt for Specifications 2 and 4 of Additional Charge I and the Charge, and set aside the sentence.

II.

THE TRIAL COUNSEL'S "CLEAR ERROR" IN FINDINGS ARGUMENT—LEVERAGING APPELLANT'S GUILTY PLEA TO PROVE HIS GUILT OF THE LITIGATED OFFENSES—WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Standard of Review

Prosecutorial misconduct and improper argument are reviewed *de novo* and where no objection is made, this Court reviews for plain error. *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *Id*. "[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard . . . ." *Tovarchavez*, 78 M.J. at 460 (citations omitted). The Government bears the burden to demonstrate the clear or obvious error is harmless beyond a reasonable doubt. *Id*. at 462 n. 6. This Court reviews the issue of whether a constitutional error was harmless beyond a reasonable doubt *de novo*. *United States v. Kreutzer*, 61 M.J. 293, 299 (C.A.A.F. 2005).

Law

1. Prosecutorial Misconduct.

Prosecutorial misconduct "can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, [for example] a constitutional

provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (citation omitted). "Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful conviction." *Id*.

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

United States v. Stellato, 74 M.J. 473, 491 (C.A.A.F. 2015) (citing *Berger v. United States*, 295 U.S. 78, 88, (1935)).

"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 (1985)). "A prosecutor proffers an improper argument amounting to prosecutorial misconduct when the argument oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (citations omitted) (alterations from original). "Improper comments may not only violate an R.C.M. but also may result in a constitutional violation." *Palacios-Cueto*, 82 M.J. at 333.

2. <u>The Use of Prior Guilty Pleas for Litigated Findings.</u>

A "plea of guilty to one offense may not be the basis for inferring the existence

or nonexistence of a fact or element of another offense." R.C.M. 920(e), Discussion. In a court-martial where the accused has pleaded guilty to some but not all of the charged offenses, neither the guilty plea itself nor any related statements as to one offense may be "admitted to prove any element of a separate offense." *Flores*, 69 M.J. at 369. "To do so would compel an accused to incriminate herself in the separate criminal proceeding." *Id*. at 370. "In a guilty plea context, a military judge who has advised an accused that she is waiving her right against self-incrimination only to those offenses to which she is pleading guilty cannot later rely on those statements as proof of a separate offense." *Id*. at 368 (citation omitted).

3. The Invited Error Doctrine.

The invited error doctrine prevents a party from creating error and then taking advantage of a situation of his own making on appeal. *See United States v. Martin*, 75 M.J. 321, 325 (C.A.A.F. 2016) (citations omitted) (alterations from original). An appellant does not waive the right to appeal an issue where the purported waiver is based on the defense counsel's performance concurrently alleged to be ineffective. *Cf. United States v. Gooch*, 69 M.J. 353, 355 n. 2 (C.A.A.F. 2011) ("[A]n appellant cannot waive a claim of ineffective assistance of counsel where waiver is based on the very advice he asserts was ineffective."). In the context of "rebuttal evidence" the "scope of rebuttal is defined by evidence introduced by the other party." *United States v. Matthews*, 53 M.J. 465, 469 (C.A.A.F. 2000) (citations omitted).

4. Harmless Beyond a Reasonable Doubt.

"The inquiry for determining whether constitutional error is harmless beyond a reasonable doubt is whether, beyond a reasonable doubt, the error did not contribute to the [accused's] conviction or sentence." *Prasad*, 80 M.J. at 29 (citations omitted).

The harmless beyond a reasonable doubt standard "is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *Tovarchavez*, 78 M.J. at 460 (citing *Chapman*, 386 U.S. at 24). "[W]here a court cannot be certain that the [error] did not taint the proceedings or otherwise contribute to the defendant's conviction or sentence, there is prejudice." *Prasad*, 80 M.J. at 29 (citing *United States v. Williams*, 77 M.J. 459, 464 (C.A.A.F. 2018); *Hills*, 75 M.J. at 357) (alterations from original). "Where constitutional error contributes to a conviction, the conviction cannot stand. *Id*. (citations and internal quotations omitted).

When this Court has considered the harmless beyond a reasonable doubt standard in a *Hills* context—erroneous propensity instructions—it has evaluated the strength of the Government's case. *Prasad*, 80 M.J. at 29-30 (citing *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017) (finding prejudice when the Government did not offer "overwhelming" evidence so the Court could not "rest assured" the conviction was sound)). "[W]here the Government's case is weak, this Court cannot know whether the [error] may have tipped the balance in the [factfinder's] ultimate

determination and thus will find that any error was not harmless beyond a reasonable doubt." *Prasad*, 80 M.J. at 30 (citations omitted) (alterations from original). "Likewise, where it is merely 'certainly possible' that the accused was convicted solely based on properly admitted evidence, this Court will not conclude that a [constitutional] error was harmless." *Id*. (citation omitted). In *Prasad*, this Court reversed because the Government's case was not "overwhelming;" thus, the Government was unable to meet its burden to prove the constitutional error was harmless beyond a reasonable doubt. *Id*.

Chapman itself emphasizes this rigorous prejudice standard and how hard it is for the Government to meet its burden. There, the state prosecutors "continuously and repeatedly" argued that the failure of co-defendants to testify meant all "inferences from the facts in evidence had to be drawn in favor of the State." 386 U.S. at 25. Even though the case presented "a reasonably strong circumstantial web of evidence against petitioners," the Supreme Court concluded, "it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions." *Id*. at 25-26.

Analysis

1. Trial counsel committed clear constitutional error.

The lower court was correct to label the error as "clear." JA at 36. It is clear error to use Appellant's own words from the guilty plea session against him as evidence of guilt for a separate offense. The military judge twice confirmed Appellant was only giving up his right to remain silent *as to the offenses he was pleading guilty*. JA 71-72. But trial counsel directed the military judge—the factfinder—to consider Appellant's guilty plea colloquy to revive KC's punctured credibility in a case where her credibility was the linchpin of the case. In contrast to Mr. Conway's decision to spontaneously alter the entire landscape of the trial in opening statement, trial counsel did not make an off-the-cuff comment in closing. Rather, he made a calculated decision to make the guilty plea the argument's focus.

The slides show as much. JA at 402. They, as a matter of course, must have been created before ever walking into the courtroom to deliver argument. As counsel provided closing argument on the morning of November 29, 2018, it is reasonable to conclude the slides were made the night before, or sometime close to it. That means trial counsel, in careful deliberation as to how best to produce a conviction in light of the star witness's credibility being the crux of the case, concluded Appellant's guilty plea was the surest way to repair KC's shaken credibility.

The slides show an intent to leverage and capitalize on the plea, and then go

far beyond the fact that Appellant pleaded guilty to literally incorporate the content and conduct giving rise to the plea. Trial counsel explicitly argued the guilty plea "goes towards the victim's credibility." JA at 355. He continued:

> So you know that she's telling the truth when she says the accused threatened her. You know that, Your Honor. Undeniable. You know that she's telling the truth about her being choked by the accused. Undeniable. You know that she's telling the truth about her being threatened with a screwdriver. That is undeniable. You know she's telling the truth about being hit in the back of the head by the accused. You can't deny it.

Id. This error is clear, obvious, and constitutional in nature.

On the issue of error, the only question becomes whether this clear and obvious error survives appellate scrutiny because the defense counsel "invited" it. *Martin*, 75 M.J. at 325. As a starting point, the Government raised this issue before the lower court. The AFCCA rejected it. *See* JA at 37 n. 24 ("We are not persuaded."). That is precisely because the invited error doctrine cannot exist to prevent an appellant from raising an issue on appeal when *an ineffective counsel* is the one who invited the error. *Cf. Gooch*, 69 M.J. at 355 n. 2. To hold otherwise would generate a gaping hole where appellants cannot get relief for the harm of an error caused by constitutionally ineffective counsel, at trial or on appeal. The invited error doctrine can only have viability if the complained-of error was invited for a legitimate tactical or strategic reason, which by definition, would take it outside the ambit of a colorable IAC claim in the first place, or if the invitation comes personally at the request of the

accused, which would be required here for the use of the *Care* inquiry per *Hansen*, 59 M.J. at 411-12. Neither happened here.

As the AFCCA concluded, whatever the Defense invited, they did not invite this. JA at 36. Trial counsel took his constitutionally improper argument outside the scope of whatever it was the Defense intended. *Cf. Matthews*, 53 M.J. at 469 (rebuttal evidence must be within the scope of that which it is rebutting). On the facts of Appellant's case, this doctrine does not serve as a barrier to relief. And *even if* the defense really did issue a no-holds-barred consideration of the guilty plea for any purpose—thus making trial counsel's use "within the scope" of the invitation—Appellant necessarily succeeds in his IAC claim under Issue I.

2. The constitutional error was not harmless beyond a reasonable doubt.

The facts and arguments giving rise to the IAC prejudice analysis in Issue I are relevant for this Court's consideration here as well.[30] Appellant maintains he satisfied his burden to demonstrate that, absent the deficient performance, there is a reasonable probability of a different result. At the very least, the Government has not met *its* burden to prove the prosecutorial misconduct was harmless beyond a reasonable doubt—the most onerous burden in appellate practice. As this Court has noted:

[30] For example, the weakness of the Government's findings case and the military judge alone forum matter here as well.

> The tests for determining constitutional harmless error and for determining prejudice under an ineffective assistance analysis are substantially different: the burden falls on different parties (the Government vs. the appellant); the burdens themselves are different (possibility vs. probability); and different considerations are given to the quality and weight of the evidence of guilt in each test. In applying the two tests, it is therefore not unreasonable or illogical to come to two different conclusions, even in a single case.

Kreutzer, 61 M.J. at 300-01.

This Court cannot be certain the error did not taint the proceedings or otherwise contribute to the defendant's conviction or sentence. *See Prasad*, 80 M.J. at 29. Thus, the error is not harmless beyond a reasonable doubt, there is prejudice, and the convictions cannot stand. *See id*. *Chapman* itself provides the answer for this Court. There, despite "reasonably strong" evidence against the petitioners, the Supreme Court *still* found it "impossible" to conclude the constitutional error did not affect the convictions. 386 U.S. at 25-26. Here, the Government's case was far from overwhelming or reasonably strong.

Judge Cadotte's analysis in dissent properly applied the Supreme Court's decision in *Chapman* and this Court's decision in *Tovarchavez.* He was "unable to conclude there was no reasonable possibility that the error contributed to Appellant's conviction." JA at 45. Judge Cadotte recognized the "entirety of the Government's case on the contested specifications rested on the testimony of KC;" therefore, "her credibility was essential to the Government's case." JA at 47. Moreover, trial counsel's use of the guilty plea was a "central pillar" of the improper argument. JA

at 47. In addition to the error in argument, the dissent found "significant" trial counsel's demonstrative slides that "focused on the use of Appellant's pleas in evaluating KC's credibility." JA at 45.

By contrast, the majority's analysis is lacking. It "considered the three *Fletcher* factors,"[31] but declined to provide any substantive analysis. JA at 37. It similarly cited the harmless beyond a reasonable doubt standard but did not engage with the volumes of case law discussing it. Notably, this Court's decisions in *Hills*, *Guardado*, *Prasad*, *Williams*, and *Tovarchavez supra* establish just how onerous of a burden harmless beyond a reasonable doubt is. Yet, the lower court's majority did not reference any of these cases. Even without citation, the majority's conclusory opinion determined the clear error was harmless beyond a reasonable doubt without engaging the facts that would support such a conclusion. Though the *Fletcher* factors do not control the analysis for constitutional error—*Chapman* does—they can still illustrate whether the Government has met its burden. Had the majority opinion explicitly analyzed the factors, it would have concluded the misconduct was severe, the military judge offered no curative measures, and the Government's case was weak.

The majority's use of the term "overwhelming" is key. First, it noted the *Fletcher* factors "do not overwhelmingly favor the Government." JA at 37. The

[31] *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005).

majority later wrote, "Although the evidence in favor of conviction was not overwhelming . . . ." JA at 38. The word "overwhelming" has been crucial in this Court's harmless beyond a reasonable doubt jurisprudence. *See, e.g., Prasad*, 80 M.J. at 29-30. Only when the Government's evidence is "overwhelming" may this Court "rest assured" the conviction is untainted by the constitutional error. *Guardado*, 77 M.J. at 94. For the reasons explained in Issue I, the Government's case was devastatingly weak in the absence of the substance of the guilty plea being used to revive KC's credibility. Without any corroboration to her allegations, her veracity was the only difference between a conviction and an acquittal. Trial counsel understood this, which is why he made the decisions he made. Without resuscitating her credibility, the case was dead.

The *way* trial counsel used the guilty plea highlights the prejudice. Not only were the slides and discussion thereof a prominent feature of his initial argument, he returned to that theme and coupled it with his request that the military judge find Appellant guilty of the charge and all specifications right before sitting down. JA at 364. This Court has found an erroneous request at the crescendo of an argument to be "material," thus, weighing in favor of a finding of prejudice even for a non-constitutional error. *See Edwards*, 82 M.J. at 248. If, in that case, trial counsel's leveraged use of the error was prejudicial as to *sentencing* argument under a baseline Article 59(a), UCMJ, prejudice standard, it must likewise be prejudicial for a *findings*

argument when the Government's burden on appeal is that much higher based on the constitutional nature of the error.

The sole remaining issue is whether the presumption that the military judge knew and followed the law overcomes the clear error and prejudice in this case. It does not. First and foremost, this military judge presumption goes to error, not prejudice. *See Hukill*, 76 M.J. at 223. The majority opinion below rested its entire prejudice conclusion on this military judge presumption (JA at 37), but that is not consistent with this Court's precedent. Indeed, *Hukill*—which the lower court did not cite—is dispositive on this point.

But even if this Court is willing to consider whether the presumption can be utilized for prejudice despite *Hukill*'s clarity, it should decline to apply that presumption here. Judge Cadotte considered the presumption, yet found it overcome due to "clear evidence to the contrary" that the military judge "knew and followed the law." JA at 47. The military judge had at least three opportunities to demonstrate the presumption should endure. First, when defense counsel permitted him to consider the guilty plea, the military judge should have engaged with Appellant directly to determine if he consented to such use. *See Hansen*, 59 M.J. at 411-12. That did not happen. Second, when trial counsel's slides indicated a clear intent to delve into the substance of the guilty plea as opposed to merely reference that it happened, the military judge should have intervened. *See id.* He did not. And when

trial counsel repeatedly erred by invoking the guilty plea, the military judge should have made clear what he was considering and what he was not. *See id.* But again, the military judge was silent. This silence was all the more notable given that he otherwise showed a willingness to delve into relevant issues during argument when he *sua sponte* queried trial counsel on the charged timeframe. The reasonable inference from the military judge's repeated and comparative silence is he *did* impermissibly consider Appellant's *Care* inquiry.

Recently, Judge Maggs—joined by Judge Hardy—recognized that although military judges are presumed to know and follow the law, "the presumption must give way when there are persuasive contrary indications." *Cunningham*, 2023 CAAF LEXIS 520 at *22-23 (Maggs, J., concurring in part and dissenting in part). Judge Maggs also indicated it would be the "highly unusual" case where evidence in the record shows the military judge actually gave undue weight to improper argument. *Id.* at *21. Deliberations are secret. Announcements of the findings are not coupled with the reasons for the findings. The "evidence to the contrary" that the military judge knew and followed the law is his repeated decision to allow this entire ordeal to affect the proceedings without clarification or colloquy.

Clarification would have helped. Additional inquiry of the parties would have shored up the presumption. Curative measures or *sua sponte* indicators about what would be considered could militate in favor of endorsing the presumption in this case.

None of that happened. As Judge Cadotte urged, the presumption the military judge knew and followed the law should not apply in this case; when it is discarded, the Government cannot meet its burden to prove the clear constitutional error was harmless beyond a reasonable doubt.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt for Specifications 2 and 4 of Additional Charge I and Charge, and set aside the sentence.

CONCLUSION

This Court has before it a consummated IAC claim, prejudicial in its own right, exacerbated by trial counsel's calculated decision to boldly venture into misconduct of constitutional import. This uncommon fact pattern rests on an exceedingly aggravating underlying guilty plea and an exceptionally weak findings case. For either of these issues, this Court should not be confident Appellant's sexual assault convictions are untainted by constitutional error. In sum, there is not just a *reasonable probability* (Issue I) or a mere *possibility* (Issue II) the errors contributed towards the finding—which is all the law requires—there is an inordinate likelihood they did.

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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 August 21, 2023.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 13,979 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

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