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

REPLY BRIEF ON BEHALF OF APPELLANT

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A. Legal and Factual Matters Spanning Both Granted Issues.

1. The Government's evaluation of the strength of its case is not supported by the record. Unless this Court finds no error—obviating the need to assess prejudice—the weakness of the Government's case necessitates reversal.

The parties have vastly different evaluations of the strength of the Government's litigated case. Resolution of this appeal may hinge on this Court's determination of whose interpretation is more faithful to the record because the prejudice arguments for both granted issues rely on an accurate assessment of the Government's case. Whereas Appellant repeatedly characterized the Government's case as "weak" (App. Br. at 37-41, 52-58), the Government responds by arguing its "case included damning evidence that supported Appellant's convictions." Gov. Ans. at 36-39. Both cannot be true. Two points support Appellant's interpretation: (1) the lower court's characterization of the case; and (2) the Government's complete misunderstanding of the evidence against Appellant, as reflected in its discussion of Prosecution Exhibit 1.

a. Both the majority and dissent below noted the frailty of the Government's case, and the dissent would have reversed because of it.

The Air Force Court of Criminal Appeals (AFCCA) performed a robust Article 66(c), Uniform Code of Military Justice (UCMJ) review.[1] The record of trial spanned

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

over 1,000 pages and ten volumes between the court-martial and the *DuBay*[2] hearing. In a 47-page decision, neither the majority nor the dissent concluded that the Government had a strong case with "damning" evidence. *See* JA at 1-47. Quite the opposite.

In its prejudice analysis for prosecutorial misconduct, the majority plainly wrote, "[T]he evidence in favor of conviction was not overwhelming." JA at 38. Had the majority concluded the Government's case was strong with damning evidence, it would have said so at this point. It did not. The dissent went further, recognizing KC's testimony—and thus, her credibility—was all the Government had. JA at 45-47. The takeaway from the AFCCA opinion is clear: the Government's case was not strong.

The Government accused Appellant of "skew[ing]" the facts in his favor. Gov. Ans. at 37. If that were the case, the AFCCA opinion and the Government's Answer would align. They do not. The independent judicial body below could not and did not conclude the Government's case was strong. One judge would have reversed because of it. This Court's review of the record will expose the same truth: the Government's case relied exclusively on KC's vastly compromised credibility, which was only resurrected through the errors of counsel for both parties.

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

b. The Government revolved its prejudice arguments around "damning" Prosecution Exhibit 1, yet that exhibit contained conduct of which Appellant was acquitted and did not relate to the convictions.

Arguing the prosecution's case was strong, the Government authored a section entitled, "The Government's case included damning evidence that supported Appellant's convictions." Gov. Ans. at 36-39. It also referenced this "damning evidence" in its Summary of the Argument (*id.* at 23) and the reason why, in its view, defense counsel were reasonable and trial counsel's misconduct was harmless. *Id*. at 32, 58. Years since trial, the Government now fails to recognize this evidence—Prosecution Exhibit 1—relates to conduct for which Appellant was acquitted and is geographically and contextually divorced from the convicted conduct in every meaningful respect.

Some context is necessary. Additional Charge I contained five allegations of sexual assault. JA at 56, 58. Specifications 1-4 alleged sexual assaults that occurred at or near Sedalia, Missouri, or Whiteman Air Force Base, Missouri, whereas Specification 5 alleged a sexual assault that occurred at or near Perth, Australia. *Id*. Appellant pleaded not guilty to the charge and all its specifications. JA at 68-69.

Trial counsel examined KC. *See* JA 148-326. Testimony regarding Specification 5 began by discussing when Appellant travelled to Australia. JA at 171. KC admitted that Appellant's penis never penetrated her vulva. JA at 172. She called it an "attempt[]." *Id*. Trial counsel confirmed there was no penetration. *Id*.

Immediately after this testimony, trial counsel asked, "Did you have a conversation with him? I want to direct your attention to some conversations that you may have recorded of the accused." JA at 173. KC described them as "two recordings of – there's two recordings of the accused telling – talking about sexually assaulting me." *Id*. In response, trial counsel clarified by sexual assault, she meant "the attempt." JA at 174. KC agreed, and added, "Yes, and the fact that he should be doing – he should be able to have sex with me whenever he wants." *Id*. KC admitted she made this recording on her cell phone the day after the attempt. *Id*. Prosecution Exhibit 1 was admitted without objection. JA at 175.

Defense counsel moved under R.C.M. 917 for a finding of not guilty because "the one in Perth [was] an attempt." JA at 329. The military judge granted the unopposed motion as to the charged offense but said he would consider the lesser included offense of attempted sexual assault. JA at 329-30. Later, the military judge acquitted Appellant of attempt. JA at 396.

The Government's misunderstanding of what this evidence stood for undermines much of its Answer. The Government made Prosecution Exhibit 1 the centerpiece of its prejudice arguments. *See* Gov. Ans. at 58 ("More importantly, KC's testimony did not stand alone at trial. The prosecution buttressed it with Prosecution Exhibit 1, a recording of Appellant that can only be described as

damning. *The significance of Appellant's statements on Prosecution Exhibit 1 cannot be understated*.") (emphasis added).

It turns out its significance was overstated. This evidence did not and could not have contributed to finding Appellant guilty of sexual assault in Missouri *a year prior*. The recording was created in Australia, shortly after the events alleged in Specification 5. JA at 174. If there was any doubt about what was being recorded, the exchange between trial counsel and KC clarified Appellant was discussing the attempt, and not the other specifications. *Id*. Appellant was not discussing anything in Specifications 1-4—the timeframe, the location, or the conduct. Simply, the recording has nothing to do with the convictions. It would be quite odd for Appellant to be acquitted of Specification 5 with this recording yet be convicted of Specifications 2 and 4 because of it.

The AFCCA recognized this. Had the majority opinion considered Prosecution Exhibit 1 to be "damning" evidence of guilt, it would have said so and utilized it as a basis to conclude any error did not materially prejudice Appellant. It did not. The dissent explicitly announced the Government's case rested *entirely* on KC's credibility. JA at 47. Necessarily, this means no piece of evidence other than KC's testimony contributed towards a finding of guilt, including Prosecution Exhibit 1. All three AFCCA judges understood this easily discernible aspect of the record.

This matters in several respects. The strength of the Government's case here is *not* a basis to argue the defense counsel's performance was reasonable or conclude that absent defense counsel's performance, the result would have been the same. Nor is it a basis to conclude that trial counsel's error was harmless beyond a reasonable doubt. To the extent this Court considers the *Fletcher* factors, the third factor—which evaluates the weight of the evidence supporting the conviction—overwhelmingly supports Appellant.[3] Prosecution Exhibit 1 is the foundation propping up the Government's Answer. Once the evidence is placed in context, most of the brief's legal arguments collapse.

At bottom, the dissent got it right. The case was entirely supported by KC's testimony. The Government offered nothing else to support the convictions. Her credibility was it. That credibility was sufficiently compromised in a variety of manners. *See, e.g.*, App. Br. at 37-41 (describing some challenges to KC's credibility). This is why the defense counsel and trial counsel errors matter. It created a world where if KC was credible as to the pled-to offenses, she must be credible as to the contested offenses. She was only credible as to the pled-to offenses because Appellant, under oath, admitted some of her allegations were true, in a situation where the military judge told him that what he said could not be used against him for other offenses. *See* JA at 71. That is why there is prejudice in this case—for either

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

issue, but particularly, the prosecutorial misconduct where the Government maintains the burden to prove harmlessness beyond a reasonable doubt. It cannot.

2. A presumption the military judge knew and followed the law cannot and does not apply in this case.

As it did below, the presumption the military judge knew and followed the law may turn the outcome of this appeal. This Court should not endorse the presumption.

a. *The presumption goes to error, not prejudice.*

The presumption is "not a prejudice argument." *See United States v. Hukill*, 76 M.J. 219, 223 (C.A.A.F. 2017). This language is clear and unequivocal and can mean little else than what it plainly says. As then-Chief Judge Erdmann wrote for a unanimous court, this makes sense because 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." *Id*. Logically, it follows that the "presumption cannot somehow rectify the error or render it harmless." *Id*. The AFCCA, therefore, erred when it utilized the presumption as to prejudice and its sole basis for finding the "clear" prosecutorial misconduct harmless beyond a reasonable doubt. JA at 36-37. Analytically, if this presumption cannot be used for prejudice per *Hukill*, and the majority opinion relied on it and nothing else, the natural finding should have been reversible prejudicial error. That is what this Court should do.

The Government only feebly attempts to distinguish *Hukill* by limiting it to a situation where the law has changed and thus the error only becomes clear in

hindsight. *See* Gov. Ans. at 55. That is not what *Hukill* says, or even implies. When the presumption cannot be used, there is nothing left upon which this Court can affirm. Only severe errors in a weak case remain.

b. *If considered, the presumption should not apply.*

"[T]he presumption must give way when there are persuasive contrary indications." *United States v. Cunningham*, __ M.J. __, 2023 CAAF LEXIS 520 at *22-23 (C.A.A.F. July 21, 2023) (Maggs, J., concurring in part and dissenting in part). Here, such indications persist. Judge Cadotte succinctly and forcefully presented the reasons why the presumption should not be used in this case. *See* JA at 46-47. Appellant elaborated further. *See* App. Br. at 41-44, 56-58.

The Government argues that a mixed verdict indicates the military judge was not unduly swayed, because if he had, one would expect Appellant to be found guilty of everything. *See* Gov. Ans. at 56. That is not so. The military judge convicted on that which he was legally able. The testimony for Specification 1 put the allegation outside the charged timeframe. *See* JA at 56, 154. The testimony for Specification 3, more incredulous than the rest, also suffered legal defect. The specification failed to allege the necessary *mens rea*, namely, whether the act was done with intent to abuse, humiliate, harass, or degrade any person, or to arouse or gratify the sexual desires of any person. JA at 56; *MCM*, pt. IV, ¶ 45.b(4)(b)(iii). Charging defect aside, the evidence did not support that element being met, as reflected by the trial

counsel not even attempting to label it or argue it had. *See* JA at 350. Finally, after Specification 5 became an attempt via a R.C.M. 917 motion, the military judge acquitted because there was no substantial step towards commission of the target offense. What remained were two specifications that did not legally require acquittal and came down to whether the military judge believed KC. On those, he convicted.

3. Most paths lead to reversal and authorizing a rehearing as to contested findings.

Issues I and II are substantially interrelated. It is difficult to discuss one without delving into the other. In this multi-issue case, there are several analytical pathways for this Court to take. Most of them result in reversal. If defense counsel opened a very narrow door for the military judge to consider KC's failed reporting of sexual assaults compared to her actual reporting of threats and physical assaults, trial counsel went far beyond the pale by using Appellant's guilty plea inquiry to corroborate KC and backdoor her credibility. *Cf. United States v. Matthews*, 53 M.J. 465, 469 (C.A.A.F. 2000) (citations omitted) (rebuttal evidence must be within the scope introduced by the other party). If, on the other hand, defense counsel opened the door to everything, including the guilty plea inquiry—thus truly inviting trial counsel's argument—that moves Appellant's case back within the ambit of ineffective assistance of counsel (IAC).

If Appellant is entitled to relief for either issue, the Court need not address the other. *See United States v. Gilmet*, __ M.J.__, No. 23-0010, 2023 CAAF LEXIS 564,

at *3 n. 2 (C.A.A.F. Aug. 3, 2023). Taking up prosecutorial misconduct first cleanly resolves the appeal. As the AFCCA reasoned below, the error was "clear." JA at 36, 45. Invited error does not apply. JA at 37 n. 24. The error was constitutional in nature (JA at 36, 45) because "[u]sing Appellant's guilty plea inquiry . . . 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. The error was not harmless beyond a reasonable doubt. JA at 45-47.

The Government has charted a narrow path to affirmation despite these challenges. It wants this Court to find defense counsel's tactics reasonable and trial counsel's response fair, obviating the need for any prejudice analysis by striking both errors with one arrow. This Court should not endorse the Government's interpretation. Appellant's convictions are a byproduct of the individual and combined errors of counsel from both parties, including his own. It is not the right answer to hold that Appellant is entitled to no relief because his counsel's error sanctioned a worse one by trial counsel. An accused is at the mercy of the checks and balances of the adversarial system. No accused should be convicted of crimes the evidence did not support because his own counsel sunk his case and a prosecutor leveraged the blunders to support convictions.

Even after defense counsel's unreasonable decision in his opening statement, trial counsel should have avoided this tactic. As this Court has stated, "Prosecutors have a duty to refrain from improper methods calculated to produce a wrongful unsupportable conviction." *United States v. Andrews*, 77 M.J. 393, 402 (C.A.A.F. 2018) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)) (internal quotations omitted). That is what this is. Trial counsel made a calculated decision to present slides and argue what he did primarily *because* KC's credibility was the difference between conviction and acquittal. Manipulating the world where the military judge was aware of the guilty plea was the only way to restore her tarnished credibility. Appellant would not have been found guilty of the two sexual assault specifications without these errors. The findings should be set aside to let a rehearing free from error determine Appellant's guilt.

4. In this case, KC's credibility became an "essential element."

In response to both issues, the Government argues it was not improper for the military judge to consider the guilty plea for contested findings because the guilty plea did not go to "an essential element" of a contested offense. *See, e.g.*, Gov. Ans. at 22-24. In this case, that is incorrect.

For all five contested specifications, Appellant was charged with sexual assault by causing bodily harm. The first element for all specifications required penetration. *MCM*, pt. IV, ¶ 45.b.(3)(b), (4)(b). The Government presented no evidence

penetration occurred other than asking KC if it had. Whether Appellant penetrated KC's vulva is certainly an "essential element." In a case where the proof of penetration comes down to whether the factfinder believes the witness—because there is nothing else to base it on—the credibility of that witness is an "essential element." *Cf. United States v. Williams*, 37 M.J. 352, 358 (C.A.A.F. 1993) (remarking in the context of a petition for new trial, "[I]n the absence of physical evidence and direct corroboration testimony, factors affecting credibility of the alleged victim were clearly of critical importance.").

5. Prosecutorial misconduct is one aspect of the IAC prejudice.

The prejudice associated with one legal error may itself be the deprivation of another right. *Gilmet*, 2023 CAAF LEXIS 564 at *3 (violation of the Article 38(b), UCMJ, right to counsel was the prejudice in actual unlawful command influence claim). Here, the IAC prejudice can be contemplated as the prosecutorial misconduct it generated.

B. Ineffective Assistance of Counsel (Issue I).

1. *United States v. Rivera* does more to help Appellant than the Government.

The Government hitches its entire reasonableness argument to *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986). The Government interprets the opinion to "sanction" defense counsel's performance. *See* Gov. Ans. at 21, 28, 29, 31. Relying on dicta, the Government declines to acknowledge the holding of *Rivera*: this Court's

predecessor found error in informing the members about a prior guilty plea during contested findings. *Rivera*, 23 M.J. at 98. The error was harmless, however, because the evidence giving rise to the guilty plea—a note—would have been admissible in findings as to the contested specifications. *Id*. Therefore, the members would have found out about the substance during findings anyway, making the military judge's advisement of the guilty plea premature. *Id*. Moreover, unlike Appellant's case, the military judge issued strong and repeated limiting instructions to the members. *Id*. at 91, 94.

The *Rivera* defense counsel moved in limine to *prevent* the military judge from disclosing the guilty plea because "the charges were similar and the victim the same, so the risk was great that, in deliberating on the contested charges, the court members would be influenced prejudicially by the information received as to the uncontested offenses." *Id*. at 90; *see also id.* at 91 (defense counsel arguing "an unacceptably high risk existed that the court-martial members would reason improperly that, if Rivera pleaded guilty to some of these offenses, then he also must be guilty of the other, similar offenses."). In Appellant's case, Mr. Conway not only failed to request everything be kept separate, he specifically brought these otherwise-barred pleas before the factfinder and failed to recognize any relation between the pled-to and contested offenses. *See* JA at 742 (Mr. Conway not seeing the "probative value between the 128s and 120s").

The Government only cited *Rivera* for its nonbinding dicta, wherein the Court discussed a "conceivabl[e]" reason why a defense counsel *may* want to inform the members of a prior guilty plea. 23 M.J. at 95-96. That hypothetical strategy—not at issue in *Rivera*—lay in a defense counsel's potential fear that delaying informing the members of a prior guilty plea until presentencing runs the risk of the members feeling "duped" and thus adjudging a harsher sentence. *Id*. at 96. If there was any strategy Mr. Conway employed, that was not it. Being a judge alone case, the military judge would not have been surprised to enter a presentencing preceding, even if he fully acquitted Appellant as to the contested specifications. By contrast, if this were a panel case and the members acquitted, they could, in fact, feel duped. Instead of this duping rationale, Mr. Conway relegated the "spot of the moment" decision only to a desire to earn goodwill with the judge, something that is patently unreasonable under the circumstances.[4] JA at 742-44, 747.

The second aspect of Rivera's "conceivable" strategy does not apply. 23 M.J. at 95-96. Even though the *DuBay* testimony generally espoused this idea that Appellant was pleading guilty to that which he was guilty and therefore was not guilty to that which he pleaded not guilty (JA at 746), this Court can be confident that was

[4] The Government cites *United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001), for the proposition that decisions made after "thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Gov. Ans. at 26. A "spot of the moment" decision cannot be the product of thorough investigation of law and facts.

not actually part of the Defense's strategy at the court-martial. At most, there was one comment to this effect in the Defense closing; they surely did not hang their hat on bolstering their client's "innocence" by virtue of him accepting responsibility for some of the charged conduct.

The Government's suggestion that Mr. Conway could have been aware of *Rivera*, when he did not mention it in his affidavit or *DuBay* testimony despite being asked for a specific legal basis for the request, does not pass muster. Nor does it make sense that had Mr. Conway read *Rivera*, he would have made the same decision. The defense counsel in that case did the opposite of what Mr. Conway did. There is no reason that reading *Rivera* would have given him the idea that informing the military judge of the guilty plea was a good idea. It was not. Even with presumption of competence, this performance is deficient.

Finally, here, the Government itself concedes *Rivera* recognized a use of a guilty plea in contested findings which would always be impermissible: using it to establish an "essential element" of a contested offense. Gov. Ans. at 28 (citing *Rivera*, 23 M.J. at 95). In this case, KC's credibility was just that. *See* Section A.(4) *supra* (discussing essential elements).

2. *United States v. Kaiser* provides the current status of the law on advising the factfinder about prior guilty pleas for contested findings and should guide this Court's analysis.

United States v. Kaiser, 58 M.J. 146 (C.A.A.F. 2003) reinforces the essential holding of *Rivera*. There, a similar situation occurred where the members were presented a complete flyer, with both already-pled-to and soon-to-be contested offenses listed. *Id*. at 148.

This Court approvingly cited *Rivera* and other related cases for the proposition this was error and the law "clear." *Id*. at 149; *see also United States v. Smith*, 23 M.J. 118, 120 (C.M.A. 1986) (in the usual case, no lawful purpose is served by informing members prior to findings about any charges to which an accused has pleaded guilty); *United States v. Davis*, 26 M.J. 445, 450 n.5 (C.M.A. 1988) (the practice of informing members of guilty pleas provides a fertile area for assertion of error on appeal and can serve no useful purpose). As the constitutional error invaded the accused's presumption of innocence, this Court reversed. *Id*. at 151. The advisement created an impermissible "filter" through which the members were going to view the case. *Id*. at 150.

Kaiser undermines another Government misreading of *Rivera*, an idea that an accused "*or his counsel*" could provide the necessary authorization to the military judge to inform the factfinder of prior pleas. Gov. Ans. at 31 (emphasis in original). *Kaiser* does not allow this. It plainly says, "a specific request by *the accused* on the

record." 56 M.J. at 149 (emphasis added). That is the rule this Court should reemphasize: the accused must personally request it. The Government's alternative would permit a counsel to not just unilaterally waive an accused's constitutional rights, it would allow that same unilateral decision to insulate counsel from a later IAC allegation. This type of circular logic cannot endure. This is the importance of the guidance from *Hansen*, which requires the military judge obtain specific authorization from the accused before proceeding further in this posture. *United States v. Hansen*, 59 M.J. 410, 411-12 (C.A.A.F. 2004).

Rivera and *Kaiser* are, of course, cases about military judge errors informing members of prior pleas before heading into contested offenses; they are not IAC cases. This Court, however, can use them to conclude Mr. Conway and his team performed deficiently.

3. <u>The Defense did not have to put the whole guilty plea up for consideration in order to impeach KC about what she reported and what she did not.</u>

The Government argues that the Defense could not have discredited KC's failure to report sexual assaults without alerting the factfinder to the physical assaults and threats. *See* Gov. Ans. at 21-22. That is not so.

Defense counsel could have easily cross-examined KC to the tune of, for example, "You reported he threatened you. You reported he assaulted you. But you never reported he sexually assaulted you, right?" or "Despite being asked to detail the worst thing that ever happened with Appellant, you reported threats and physical

assaults, but not sexual assaults, right?" It was completely unnecessary to allow the military judge to consider that Appellant had admitted under oath to committing the reported threats and assaults to accomplish this impeachment. It is one thing to bring up the fact that KC *reported* certain offenses, as was done (JA at 198), but it is entirely another to allow the military judge to consider those other reported offenses *actually happened*, which only became the state of affairs via the guilty plea. If trial defense counsel believed they had to allow the military judge to consider the plea to allow them the opportunity to cross-examine KC this way, that is inaccurate, unreasonable, and overcomes any presumption of competence.

4. Appellant never wanted to plead guilty to anything and maintains his counsel forced his hand to do so. This makes Mr. Conway's error that much worse.

The Government mentions that, in Appellant's affidavits, he asserted a desire to not plead guilty to anything but did so at the insistence of his counsel. Gov. Ans. at 18. It then faults Appellant for being silent as to whether he had ever expressed any disagreement to his counsel about their strategy. Gov. Ans. at 18; JA at 824-25. This makes little sense. If Appellant never wanted to plead guilty in the first place, he would surely disagree with a strategy that resulted in his guilty plea being used against him for other allegations he did not want to plead guilty to. If he did accede to defense counsel's strong suggestion as to how he should plead, it would have been done under the explicit assurances that taking the heavily corroborated threats and

assaults off the table was his best shot at being acquitted of uncorroborated sexual assault allegations.

Based on the tenor and tone of the affidavit (JA at 825), it goes without saying he would not and did not agree to his plea being considered in findings. The only way to conclusively know any different would be if the military judge engaged in a personal colloquy with Appellant to obtain his consent for how the guilty plea could be and would be used in litigated findings. *See, e.g.*, *Hansen*, 59 M.J. at 411-12. That never happened. Moreover, Mr. Conway admitted he did not talk this decision over with his defense team or Appellant (JA at 747), so there is no way for Appellant to have protested something he did not know was coming except to interrupt the military judge during trial to lodge the complaint. That, of course, would never happen and is unreasonable to expect.

C. Prosecutorial Misconduct (Issue II).

1. KC is the factual overlap between the guilty plea and the contested offenses.

The Government argues there was "no factual overlap in the underlying facts" between the pled-to and contested offenses, suggesting that the guilty plea's invocation could not have affected deliberations for the contested offenses. Gov. Ans. at 48. But, of course, KC and her credibility are the crucial link between all charges and specifications. While the allegations could have perhaps been perceived as distinct and unrelated in time, place, and substance, trial counsel nevertheless

blended them together under the amorphous, and bolded, banner of KC's "**Credibility**." JA at 402. That is the essence of his improper argument; if she was credible as to the pled-to offenses, she must also be credible as to the convicted offenses. *See* JA at 355, 357, 364, 392. Simultaneously, trial counsel served to simply paint Appellant as a bad person—if he was guilty of some things, he must be guilty of all bad things. *Cf.* Mil. R. Evid. 404 (generally prohibiting evidence for this purpose). KC is the overlap; trial counsel knew it and pressed the point in argument.

2. Trial counsel's efforts were not a "fair response" to a defense invitation.

The Government contends trial counsel's conduct amounted to a "fair response" to defense counsel's actions, precluding relief on prosecutorial misconduct grounds. *See* Gov. Ans. at 41-46 (citing *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001)). "In order to determine whether or not comments are fair, 'prosecutorial comment must be examined in context.'" *Gilley*, 56 M.J. at 121 (citing *United States v. Robinson*, 485 U.S. 25, 33 (1988) (additional citations omitted)).

In context, the response was unfair. The simplest reading of Mr. Conway's opening statement, and the exchange thereafter, is that Mr. Conway forecasted the Defense would cross-examine KC about the nature of her various reports to law enforcement—and the inconsistencies or omissions among them.[5] *See* JA at 145-46.

[5] Admittedly, the Defense's tune about what they were actually doing may have changed during the appeal and the *DuBay* hearing. But at this moment in time, it

With this as the original "piercing" of the otherwise off-the-table guilty plea inquiry, it is an unfair response for trial counsel to have delved into the *substance* of Appellant's admissions in the guilty plea inquiry and argue, as a matter of fact, if KC was telling the truth about some things, she must be telling the truth about all things. That is far beyond the original invitation. To the extent the Defense's invitation morphed over time to an all-encompassing embrace of the facts supporting the guilty plea as "truth," such decisions are ineffective and require IAC relief.

3. The error was constitutional.

a. *The Government waived this argument.*

The Government claims trial counsel's error is not constitutional in nature. *See* Gov. Ans. at 47. But it made no such argument to the court below. In its Answer before the AFCCA, the Government failed to argue this error was not constitutional in nature. Rather, it argued: (1) there was no error because the argument was facially proper; (2) any improper comment was invited by defense counsel; and (3) there was no prejudice. *See Answer on Behalf of the United States*, dated Sep. 17, 2020, at 24-28. Thus, the Government waived its ability to challenge the error as non-constitutional. *See Gilmet*, 2023 CAAF LEXIS 564, at *26 (declining to entertain

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seems Mr. Conway only forecasted they would impeach KC about her reporting, and they did not request consideration of the entire plea. JA at 145 ("So to the extent, I wasn't necessarily asking you to, as the factfinder, to necessarily consider that mixed plea.).

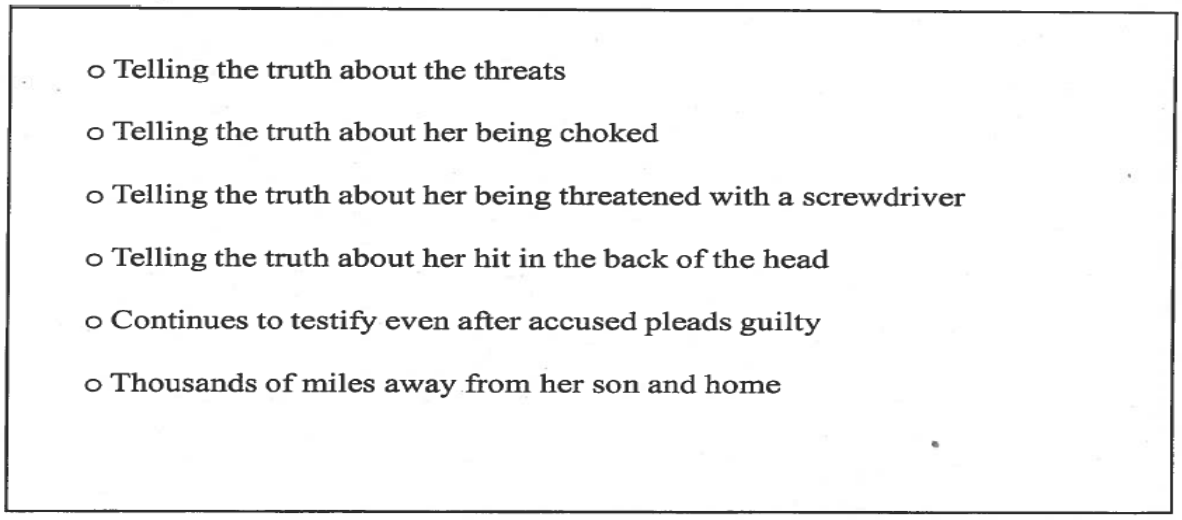
the Government's untimely argument when it was not raised below (citations omitted)).

The Government had another chance to contest the nature of this error. *See Answer to Supplement to the Petition for Grant of Review*, dated June 8, 2023. There, with full knowledge Appellant requested review of whether the error was harmless beyond a reasonable doubt—thus making clear the error was framed constitutionally—the Government again failed to challenge the nature of the error. This Court should not entertain the argument.

b. *The AFCCA correctly determined* United States v. Flores *controls.*

On the merits, trial counsel's misconduct was indeed constitutional, namely, the error violated Appellant's Fifth Amendment right to avoid self-incrimination. The AFCCA agreed, relying on *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011). *See* JA at 36-37. The Government attempts to draw a fine distinction between *Flores* and this case because the prosecutor in *Flores* "directly" referenced the guilty plea whereas the Government believes trial counsel here was less direct. Gov. Ans. at 47.

It is difficult to understand how the following closing argument demonstrative is not a direct reference to the guilty plea:



JA at 402. The only way one can convert KC's allegations into "the truth" is via Appellant's admissions under oath in the guilty plea inquiry because no other evidence offered in the contested case demonstrated the convicted misconduct occurred. Without incorporating the guilty plea, they are still accusations and no more.[6]

If the inference from this demonstrative aid were not clear enough, the text of the argument itself is plain. Trial counsel explicitly invoked the guilty plea: "[Y]ou'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." (emphasis added). JA at 355. This *directly* invited the military judge to use the guilty plea to

[6] The same goes for Defense Exhibit C. Although the military judge admitted this evidence substantively as a prior consistent statement, KC's prior statement merely corroborates herself. Appellant's guilty plea corroborating KC as to contested offenses is something entirely different.

determine an "essential element" and thereby convict, despite the military judge previously advising Appellant that incriminating statements could not be used against him for contested specifications. *See* JA at 71.

4. *Chapman* is the correct prejudice standard, and its application requires reversal.

a. *This Court should not overrule* Tovarchavez.

The Government requests this Court overrule *United States v. Tovarchavez*, 78 M.J. 458 (C.A.A.F. 2019). *See* Gov. Ans. at 51. Borrowing from another brief before this Court,[7] the Government requests a monumental change in military appellate practice—placing the prejudice burden on Appellant for unpreserved constitutional errors—without consideration of the *stare decisis* factors. This Court should decline the Government's invitation and apply *Tovarchavez* as written. As in *United States v. Long*, there is no reason to revisit this rule in Appellant's case because he suffered material prejudice to his substantial rights under any standard. 81 M.J. 362, 371 (C.A.A.F. 2021). If this Court determines *Tovarchavez* should be re-examined, Appellant respectfully requests that question be specified for briefing to give it the attention it deserves.

[7] *See Brief on Behalf of the United States* at 31, *United States v. Cole*, USCA Dkt. No. 23-0162/AF (C.A.A.F. filed Sep. 5, 2023).

b. *The Government displaces* Chapman *for* Fletcher.

The Government declines to cite or reference *Chapman v. California*, 386 U.S. 18 (1967), a single time in its brief. This is concerning, considering its standard has been fully implemented into military justice jurisprudence.[8] Instead, the Government analyzes *Fletcher* as if it were an alternative to *Chapman*. Gov. Ans. at 53-59. It is not. The improper argument in *Fletcher* was non-constitutional in nature, and thus, was tested to determine whether the comments, "taken as a whole, were so damaging that [this Court] cannot be confident that the members convicted the appellant on the basis of the evidence alone." 62 M.J. at 184.

The test for constitutional error rests in *Chapman*, asking whether there is *any possibility* the error might have contributed to the findings. 386 U.S. at 24. This is more generous to an appellant than *Fletcher's* test for good reason. Appellate courts appropriately guard constitutional rights with sharpened focus. *See United States v. Brison*, 49 M.J. 360, 361 (C.A.A.F. 1998) (in the First Amendment context, "When the Government makes speech a crime, the judges on appeal must use an exacting ruler."). This Court, at the Government's suggestion, should not dilute the *Chapman* test to that which was announced in *Fletcher*.

[8] As of October 13, 2023, *Chapman* has been cited by military appellate courts 437 times.

True, the *Fletcher* factors may inform the *Chapman* calculation, but to the extent they are considered, this Court must always draw back to *Chapman* for what constitutional prejudice means, asking whether there is *any possibility* the error affected the outcome. If there is, reversal is required. *United States v. Prasad*, 80 M.J. 23, 29-30 (C.A.A.F. 2020). This Court must hold the Government to this standard. Reversal is required.

c. *Even so, the Government's* Fletcher *analysis is wrong.*

The first *Fletcher* factor weighs in Appellant's favor: the prosecutorial misconduct was severe. *See Fletcher*, 62 M.J. at 184 (identifying five sub-factors for severity). The misconduct is spread over multiple pages of the closing argument. *See* JA at 355, 357, 364, 392. Trial counsel's lingering PowerPoint slides exacerbated the improper argument. *See* JA at 402. In comparison to the whole argument, the "credibility" section was the only one where trial counsel discussed something other than KC's testimony—the lone evidence he had. This shows its value. A mere recitation of the testimony, without more, was not going to produce a conviction. He needed to save her credibility any way possible. The guilty plea was the answer to that question.

The misconduct spread through the main argument and rebuttal. The trial only lasted three days; this is not an instance of an isolated comment lost in two weeks of litigation. Rather, credibility was the hallmark of the argument, leveraged at its

pinnacle. The deliberations lasted about two-and-a-half hours, a factor of little importance here. Finally, the trial counsel never had to abide by any rulings of the military judge, who sat silently and listened while trial counsel repeatedly emphasized his point. Dismissing trial counsel's actions as minimal, the Government declines to comment on the decision to pair his final request to convict Appellant on this constitutionally infirm basis. Basic notions of primacy and recency in argument demonstrate just how valuable trial counsel felt this argument was to obtain a conviction. *See United States v. Edwards*, 82 M.J. 239, 248 (C.A.A.F. 2022). If it was not the most important thing he had, he would not have closed with it.

The second factor—curative measures—also weighs in Appellant's favor. The military judge offered none. When trial counsel seemed to argue for the greater offense in Specification 5, with a PowerPoint slide to support it, the military judge *sua sponte* intervened to remind trial counsel it had become an attempt via R.C.M. 917. JA at 351. But moments later, when trial counsel delved into the guilty plea, silence. JA at 255. If anything, this juxtaposition shows the military judge *did* consider trial counsel's argument.

As to the final *Fletcher* factor, the Government closes its Answer with a repeated miscalculation of the strength of the Government's case, relying on "damning" Prosecution Exhibit 1, the importance of which "cannot be understated." Gov. Ans. at 58. Throughout its Answer, the Government discusses the evidence as

if it were using a legal sufficiency standard, and if any rational factfinder could have convicted, the findings are sound. *See, e.g.*, Gov. Ans. at 37-38 (discussing how counterintuitive behaviors like delayed reporting and naming a child resulting from an alleged sexual assault after the assailant are not fatal to a prosecution).[9] Although a conviction can be *legally sufficient* in the face of this evidence, that is something entirely different than whether the case is strong enough to find prosecutorial misconduct harmless beyond a reasonable doubt. That latter standard—the one before the Court in this case—inverts the legal sufficiency paradigm.

Nor does the Government's statement that the "factfinder never received evidence that suggested KC's character for truthfulness should be questioned" align with the record. *Id*. The factfinder received testimony about KC receiving confidential police communications from a detective with whom she was having an adulterous relationship, and that detective going to prison for doing just that. *See* JA at 179-181. That KC would be complicit in this criminal activity calls her truthfulness into question, and did in fact do so, to the point where the AFCCA ordered a *DuBay* hearing to determine, in part, whether she perjured herself or otherwise committed fraud at Appellant's court-martial. *See* JA at 589.

[9] It also noted the permissibility of expert testimony regarding counterintuitive behaviors to assist a panel, but the Government offered no such testimony in this case. *See* Gov. Ans. at 37 n. 8.

Reviving KC's credibility with the guilty plea was the only chance at any conviction on the contested allegations. Trial counsel knew it and unjustifiably acted to obtain the guilty finding by leveraging Appellant's guilty plea as an unauthorized crutch after it had otherwise lain dormant since the start of the contested case. Trial counsel abandoned his purpose to seek justice on behalf of the sovereign, and instead took actions to "win" the case. *See Berger*, 295 U.S. at 88.

CONCLUSION

This Court cannot be confident Appellant's convictions are free from constitutional error. Findings of guilty must be the product of legal and competent evidence, beyond a reasonable doubt. Article 51(c)(1), UCMJ. Such a requirement is "fundamental" to a fair trial and rooted in the constitutional guarantee of due process. *Kaiser*, 58 M.J. at 150. Whether it be the errors of defense counsel, trial counsel, the exceptionally thin findings case the Government offered—or any combination thereof—this Court cannot "rest assured" Appellant's convictions are sound. *United States v. Guardado*, 77 M.J. 90, 94 (C.A.A.F. 2017). With such uncertainty, the appropriate result is to set aside and dismiss the affected findings, set aside the sentence, and let a rehearing free of error determine Appellant's guilt.

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 Additional Charge I, and set aside the sentence.

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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 October 13, 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 6,961 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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