

Avoiding Improper Sentencing Argument

Cooper Millhouse & LTJG Stephen Paul

A Common Pitfall

- *United States v. Voorhees*, 79 M.J. 5, 15 (C.A.A.F. 2019)
 - "The consistent flow of improper argument appeals appeals to [C.A.A.F.] suggests that those in supervisory positions overseeing junior judge advocates are, whether intentionally or not, condoning this type of conduct."
- *Berger v. United States*, 295 U.S. 78, 88 (1935)
 - Trial Counsel "may strike hard blows, [but] he is not at liberty to strike foul ones."
- What is fair and what is foul?
- Military Judge alone sentencing for offenses after 27 December 2023?

Inappropriate Personal Attacks

- Inflaming the passions or prejudices of the panel
 - *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983): Likening adultery to heroin use and arguing that adultery showed that he was a habitual liar
 - *United States v. Barraza Martinez*, 59 M.J. 173, 175-76 (C.A.A.F. 2003): Calling the accused "almost a traitor" in the "war on drugs"
 - *United States v. Erickson*, 65 M.J. 221, 222-23 (C.A.A.F. 2007): Comparing the accused's sexual abuse of his own children to "embodiments of evil" such as Hitler, Saddam Hussein and Osama bin Laden
- Threatening the reputation of the court
 - *United States v. Witt*, 2021 WL 5411080 (A.F.C.C.A. 2021): Trial Counsel asked members to "consider how they would be judged by others by virtue of the sentence" and what it "would say about them personally"
- Closing argument errors applicable to sentencing
 - Unsupported characterizations of the accused
 - Personal attacks on defense counsel
 - Minimizing the weight of the court's responsibility

Golden Rule Arguments

- As if you were the victim
 - *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000): "Imagine being [the victim] sitting there as these people are beating him."
 - *United States v. Al-Maliki*, 787 F.3d 784, 795 (6th Cir. 2015): "It could have been you" arguments
- As if you were the victim's relatives
 - *United States v. Shamberger*, 1 M.J. 337, 378 (C.M.A. 1976): Asked the members to put themselves in the position of the husband of a gang rape victim who was forced to watch
- As if you were a future victim
 - *United States v. Marsh*, 70 M.J. 101, 105-06 (C.A.A.F. 2011): Asked the members whether they would trust the accused who was convicted of making a false official statement to "work on your airplanes" or with "the lives of those pilots"
- As if you had been the in accused's circumstances
 - *United States v. Teslim*, 869 F.2d 316 (7th Cir. 1989): Asking what you would do if "you had nothing to hide"

Golden Rule Arguments – Good to Go

- Representatives of Society
 - *United States v. Williams*, 23 M.J. 776, 779 (A.C.M.R. 1987): Determine an appropriate sanction "as representatives of society"
- Shoes of Eyewitnesses
 - No military cases on it
 - Approved in *United States v. Kirvan*, 997 F.2d 963 (1st Cir. 1993)

Irrelevant Opinions of Third Parties

- Opinions of others
 - *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989): Sentencing witnesses must not give opinions on appropriate sentences
 - Opinions on rehabilitative potential are approved
 - *United States v. Rice*, 33 M.J. 451, 453 (C.M.A. 1991): *Ohrt* violations arise from the "the subtle shift from general rehabilitation to preference for separation"
 - *United States v. Hampton*, 40 M.J. 457, 459 (C.M.A. 1994): An opinion about retention in service is an *Ohrt* violation because courts-martial can award punitive discharges
- Smuggling in hearsay
 - *United States v. George*, 1998 WL 557565 (N.M.C.C.A. 1998): expert testimony from a social worker that a therapist had described the accused as a "predatory person" smuggled hearsay into sentencing evidence
- Closing argument errors applicable to sentencing
 - Trial Counsel's opinion of the case
 - Witness vouching
 - Command policies

Facts Unrelated to Culpability

- Protected characteristics of the accused
 - *United States v. Rodriguez*, 60 M.J. 87, 88 (C.A.A.F. 2004): Argued that the accused, who was a Latino, had not stolen for "to give bread so his child doesn't starve" like in "some sort of [L]atin movie"
 - *United States v. Garza*, 20 C.M.A. 536, 537, 540 (1971): Sentencing witness testified that the accused had family who were members of the Social Workers Party, "a Marxist organization"
- Comments on constitutional rights
 - Right to plead not guilty and require the Government prove its case
 - Right to remain silent
 - Right to counsel
- Other cases or legal authority
 - *United States v. Mamaluy*, 10 C.M.A. 102, 106 (1959): Improper to reference sentences in other cases
- Unproven misconduct
 - *United States v. Zakaria*, 38 M.J. 280, 282-84 (C.M.A. 1993): Letter of reprimand concerning indecent acts with minor girls was improper during sentencing for larceny less than \$100
- Facts not in evidence
 - *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014): In rebuttal, TC asked counsel to infer from "common sense" and the "ways of the world" that a child molester had previously molested children while admitting that there was no evidence to support it

Application to Military Judge Sentencing

- The law of sentencing argument still applies to judge-alone sentencing
- *United States v. Garza*, 20 C.M.A. 536 (1971)
 - Sentencing done by judge alone after a guilty plea
 - Sentencing witness introduced evidence about the accused alleged associate with a communist organization
 - "We believe that there is at least a fair risk that the military judge was improperly influenced, albeit subconsciously, in adjudging an appropriate sentence by the inadmissible evidence."
 - "The SJA's advice that the accused was not prejudiced in light of the failure of defense counsel to object, misled the convening authority and precluded that individual from proper consideration of the record."