IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ANDREW P. WITT,
Senior Airman (E-4), USAF
Appellant.

USCA Dkt. No. 22-0090/AF

Crim. App. Dkt. No. ACM 36785 (reh)

BRIEF ON BEHALF OF APPELLANT

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Issue Presented

DURING SENTENCING PROCEEDINGS, TRIAL COUNSEL URGED THE PANEL MEMBERS TO CONSIDER HOW THE SENTENCE THEY IMPOSED WOULD REFLECT ON THEM PERSONALLY AND PROFESSIONALLY, AND SUGGESTED THAT THE MEMBERS WOULD BE RESPONSIBLE FOR ANY HARM APPELLANT COMMITTED IN THE FUTURE. DID TRIAL COUNSEL'S SENTENCING ARGUMENT CONSTITUTE PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF?

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(c) (2012). This Honorable Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

Senior Airman (SrA) Andrew P. Witt was tried by a panel of officer members at a capitally-referred general court-martial convened at Robins Air Force Base, Georgia, between April and October 2005. The panel found SrA Witt guilty of two specifications of premeditated murder in violation of Article 118, UCMJ; and one specification of attempted premeditated murder in violation of Article 80, UCMJ. (JA at 416.) The panel then sentenced SrA Witt to death. (JA at 418.)

On appeal, the AFCCA set aside the sentence and authorized a rehearing

on the sentence. *United States v. Witt*, 75 M.J. 380, 381 (C.A.A.F. 2016). Upon reconsideration, however, the AFCCA affirmed the adjudged findings and sentence. *Id.* This Court subsequently specified two issues relating to the propriety of the AFCCA's reconsideration, and concluded that three judges were disqualified from participating in the reconsidered opinion. *Id*. at 384-85. This Court then vacated the lower court's reconsidered opinion and remanded the case consistent with the AFCCA's initial decision. *Id*. at 385.

The Convening Authority ordered a rehearing on SrA Witt's sentence and once again referred the case as capital. The rehearing commenced on March 23, 2017 at Fort Leavenworth, Kansas, and proceeded through numerous dates in 2017 and 2018, with the majority of the proceedings occurring at the Robert J. Dole Courthouse, Kansas City, Kansas. On July 6, 2018, a panel of officer and enlisted members sentenced SrA Witt to reduction to the grade of E-1, forfeiture of all pay and allowances, a reprimand, confinement without the possibility of parole, and a dishonorable discharge. (JA at 761.)

On November 19, 2021, the AFCCA affirmed the findings and sentence. (JA at 078.)

Statement of Facts

Background

SrA Witt confessed to killing SrA A.S. and his wife, J.S., and to stabbing

then-SrA J.K. (JA at 493-95.) SrA Witt had been friends with the married couple, but they had a falling out after he tried to kiss J.S. (JA at 487.) Although J.S. was scared to tell her husband about the attempted kiss (JA at 472), she told him on July 4, 2004, and he responded by angrily calling SrA Witt multiple times. (JA at 452-53, 464, 466, 487.) SrA A.S. threatened to ruin SrA Witt's military career by informing leadership about the kiss attempt, as well as an affair SrA Witt was purportedly having with an officer's wife. (JA at 482.) In addition, SrA A.S. and SrA J.K.—who was then present, similarly angry, and also spoke heatedly towards SrA Witt—threatened to beat up SrA Witt. (JA at 466, 469-70, 487.) SrA Witt did not respond in kind; rather, he was apologetic and said something to the effect of, "You folks should kick my ass." (JA at 454, 467, 470.)

As SrA Witt later explained to investigators, he decided to go over to SrA A.S.'s house following the phone calls to take his beating. (JA at 501, 503.) SrA Witt believed that this would make things right with his friends. (JA at 501.) However, he also took a knife with him for protection. (R. at 501, 503.)

Shortly after SrA Witt entered SrA A.S.'s house, SrA A.S. asked what he was doing there and told him to get out. (JA at 458.) At some point, SrA Witt was in the hallway and turned to walk back to the living room. (JA at 456-57.) SrA A.S. followed him and a physical confrontation ensued. (JA at 501.) SrA J.K., who was in a back bedroom with J.S., overheard the commotion and

joined the scuffle by putting SrA Witt in a headlock. (*Id.*) Prior to this headlock, SrA J.K. did not observe SrA Witt wielding a knife nor any significant injuries on SrA A.S.. (JA at 468.) SrA Witt then stabbed SrA J.K., and killed SrA A.S. and J.S. thereafter. (JA at 492-96.)

In recalling what happened, SrA Witt described how he "lost it" and was in a "dream-like" or "drunken-like" state. (JA at 498-99, 506.) He further maintained "it was all a blur." (JA at 498.)

Extenuating and Mitigating Factors

During SrA Witt's sentence rehearing, the military judge instructed the panel to consider numerous extenuating and mitigating factors. (JA at 753-55.) Among them were mental health issues—affecting both SrA Witt and his family—and a traumatic brain injury (TBI) SrA Witt suffered just four months prior to the killings.

With respect to SrA Witt's familial history, the Defense introduced evidence that multiple relatives had not only experienced significant mental health problems, but many had actually been committed to psychiatric facilities. (JA at 119, 122, 599.) As summarized by the Defense's mitigation expert, who interviewed numerous relatives and researched thousands of documents:

> [T]here were five members of Airman Witt's family whose -- where mental health providers made notes that there were paranoid features or paranoia. Four of the relatives had hallucinations. Three had psychosis or psychotic episodes. And then five of them -- when I say

> "suicide or suicidal," there's one completed suicide, one family member that committed suicide, there's another person who attempted suicide. And then three other folks when they were in the psychiatric facility, there were suicidal ideation was noted.

(JA at 599-600.) Among those who suffered from mental health problems was SrA Witt's maternal grandfather, who was diagnosed as a paranoid schizophrenic and spent considerable time in psychiatric care. (JA at 601-603; *see also* JA at 123-28, 129-219, 244-45.) SrA Witt's mother also possessed "borderline and paranoid traits," and was admitted to the hospital for depression when SrA Witt was about 14 years old. (JA at 604, 606.) Prior to this, she had been homeschooling SrA Witt for several years, which effectively meant that SrA Witt "was in the home 24 hours a day with a mentally ill patient." (JA at 605-606; *see also* JA at 634-35.) By this time, SrA Witt's parents had long been divorced; however, he still maintained contact with his father. (JA at 608, 631.) But his father was similarly plagued by demons (JA at 630), having apparently been rejected for military service during the Vietnam War as a "mental case." (JA at 607; *see also* JA at 629.) He was later diagnosed as bipolar with anxiety disorder, among other issues. (JA at 620, 630.)

Substance abuse also featured prominently in SrA Witt's family, with the disease striking his maternal grandmother (drugs), paternal uncle (alcohol), half-brother (alcohol), and maternal cousin (drugs and alcohol). (JA at 611-12, 614-616, 621-23, 625-27, 636-37.) It was particularly acute in his father—a long-

suffering alcoholic and drug addict who used crack cocaine during his son's visits and even smoked a crack pipe in front of him. (JA at 608, 617-19, 632-33.)

Around February 2004, SrA Witt crashed his motorcycle. (JA at 237, 639.) A medical assistant who heard the accident and went to help told investigators that SrA Witt was talking funny and not making much sense. (JA at 238, 664-65.) She added that he was acting weird, like he was drunk. (JA at 664-65.) However, this witness did not smell any alcohol when she first checked on him nor while he was in her car as she drove him to base. (JA at 665.) A fellow Airman who saw SrA Witt shortly after he returned to base similarly reported that he was acting strangely. Specifically, this Airman recalled that SrA Witt was talking slower than normal and "seemed confused or disoriented." (JA at 237.) She also observed him walking abnormally, but not in a way to suggest he was physically hurt; rather, it was in a manner "someone might walk after spinning around or dizzy." (*Id.*) After noticing these signs, and observing several injuries such as bleeding over his left eye, the Airman convinced SrA Witt to go to the hospital. (*Id.*)

Technical Sergeant (TSgt) M.M. had once dated SrA Witt, with their relationship starting around September or October 2003. (JA at 235.) However, she ended things shortly after his motorcycle accident. (*Id.*) According to TSgt M.M., SrA Witt's "behavior and personality changed in significant ways."

(*Id.*) He had transformed from "sweet, kind, and affectionate" to "aggressive, hostile, and angry." (*Id.*) He started drinking more heavily, flirted openly with other females, acted sexually aggressive, and often behaved in a strange manner—such as getting too dressed up for certain occasions. (*Id.*) TSgt M.M. also observed SrA Witt experiencing what she called "his 'weird zone,' where he seemed to be acting under some kind of influence." (*Id.*) SrA Witt told her that "when he was in this state of mind he would see the color red or blood in his mind's eye." (*Id.*) TSgt M.M. asserted that SrA Witt "was not the man he had been earlier in [their] relationship," and that "[t]here is no doubt in [her] mind that SrA Witt's behavior started to change after his motorcycle accident." (*Id.*)

R.G. also spent time with SrA Witt before and after his motorcycle accident, and similarly reported a change in his demeanor. R.G. described SrA Witt as "a wonderful, genuine, friendly, nice person," devoid of malice or rudeness prior to the accident. (JA at 641.) Thereafter, however, "he was a different Andrew." (JA at 641.) R.G. had difficulty explaining it, deeming SrA Witt to be more macho and cocky, but the change was "very obvious." (JA at 643-44.)

The Defense's forensic psychiatrist, Colonel (Col) S.M., reviewed about 12,500 pages of SrA Witt's family history, transcripts from 200 hours of phone calls between SrA Witt and others, previous Government evaluations, SrA Witt's various medical records, the extensive casefile from the original trial, and

numerous declarations from SrA Witt's appeal. (JA at 647-52.) He also met with SrA Witt. (JA at 647.) Based on this research, Col S.M. diagnosed SrA Witt with schizotypal disorder (SPD), moderate alcohol use disorder, and a mild neurocognitive disorder from his TBI. (JA at 650; *see also* JA at 220-34.) Col S.M. opined that these disorders were interconnected with overlapping symptoms, and that some conditions could aggravate others. (JA at 653-54.) Due to these conditions, Col S.M. determined that SrA Witt experienced a brief psychotic episode on the night of the murders, characterized by an inability to rationally receive and respond to external realities. (JA at 654-56.) Consequently, Col S.M. concluded that "all three of those conditions contributed to Andrew's ability to rationally think and perceive and resist the impulse to murder [SrA A.S.] and [J.S.]." (JA at 657-58.)

For his part, SrA Witt never personally blamed his mental health, family, or other issues for his actions; rather, he took responsibility for his crimes. (JA at 505-507, 586.) He waived his rights to a lawyer and to remain silent, provided oral and written confessions to investigators,[1] and helped them recover evidence. (JA at 505, 508-10.) He also cried after returning to SrA A.S.'s house (JA at 660), "sobbed uncontrollably" upon seeing pictures of the crime scene (JA at 239), and

[1] Prior to his confession, SrA Witt initially denied his criminal involvement. (JA at 505.)

repeatedly expressed remorse for what happened. (R. at 241-43, 507, 584, 588, 590, 660.) Although SrA Witt ultimately pleaded not guilty (JA at 415), he was precluded from pleading guilty due to the fact that his court-martial was referred capitally. *See* Article 45, UCMJ.

Sentencing Argument

Trial Counsel (TC) began his sentencing argument by challenging the panel:

> Colonel [V], members, when you go back into the deliberation room and you're deciding on what your sentence will be, I want to ask yourselves [sic] what will you stand for. From E-6 to O-6, as an individual, what will you stand for as an individual, as an Airman? Where will you draw the line?

(JA at 670-71.) TC repeated this challenge, in various forms ranging from "where will you draw the line" to "what will you stand for in the future," more than seventy times. (JA at 670-704.) He further asked the panel to consider the risks associated with keeping SrA Witt alive. (JA at 674-76.) TC's remarks included:

> Where do you draw the line? What culture do we have?
>
> . . .
>
> He was in uniform. Where will you draw the line?

(JA at 671.)

> Where will you draw the line?
>
> . . .

> What will you stand for?
>
> . . .
>
> What will you stand for?
>
> . . .
>
> Where will you draw the line?
>
> . . .
>
> What will you stand for?
>
> . . .
>
> Where will you draw the line? Where is it?

(JA at 672.)

> [Arguing that other factors did not contribute to the offenses] It was him. It was him. What will you stand for?
>
> . . .
>
> When you're deliberating on a sentence – and make no mistake, the government is asking for a sentence of death – ask yourself, "Where will I draw the line? What will I stand for?" What will you stand for? Base housing. Took one of our own. Committed in uniform. What will you allow? What will you stand for in the future?
>
> . . .
>
> What will you allow? What risk will you accept on someone else's behalf?

(JA at 673.)

> [Referencing Dr. T.R.'s risk assessment testimony] What we're trying to figure out is who - who of all these base rates, who is

> dangerous? What will we allow? Where will we draw the line?
>
> . . .

(JA at 674.)

> What's important is we want to know who. Who. Who do we need to be more worried about? Where will we draw the line? Where will you draw the line? What risk will you accept on some confinement officer's behalf? What risk?

(JA at 675.)

> [Arguing that SrA Witt's risk factors are high] What risk will you allow?

(JA at 676.)

> [After returning from a 15 minute recess] What you will stand for and what you will not. Where you will draw the line. What you will allow to exist.

(JA at 691.)

> What will you stand for? Where will you draw the line with your sentence? Where?
>
> . . .
>
> What will you stand for? Will you stand for this when you're deciding on your sentence? Will you stand for this? Will you allow it, or will you draw a line as an individual, as an Airman? Will you draw a line?

(JA at 697.)

> Your sentence has to address this. It has to. Where will you draw the line? Where? Where is it? If not here, where would you ever? If not this, where you [sic] ever? Where would death ever be appropriate if not right here, right here? From E-6 to O-6, where else

> in your career will you have the opportunity to draw the line as an individual, and as an Airman on what you will allow? What will you allow? And what risk will you accept in the future on someone else's behalf? Where you draw the line? Where? If not here, we'll never draw it ever, ever.

(JA at 699.)

> What will you stand for? Your sentence will tell it.
>
> . . .
>
> What will you stand for?

(JA at 700.)

> What will you stand for?
>
> . . .
>
> Where will you draw the line?

(JA at 701.)

> Where do you draw the line?
>
> . . .
>
> Where will you draw the line? When you weigh all that against this desperate search for mitigation, the only genuine mitigation they have is the love that his family has for him. What will you stand for? What risk will you accept on another family's behalf? On a correction officer's behalf? What will you accept? You saw his risk levels, it ain't low. What will you accept? Where will you draw a line?

(JA at 702.)

> Even when he was in their home, they didn't attack him. Why? They didn't want to get in trouble. That's the culture we build into the Air

> Force. That's the culture we build. Where will you draw the line? What will you stand for when this evil attacks that culture? What will you stand for with your sentence? Make no mistake, your sentence will tell what's right and what's wrong, and where that line is. If not here, where? If not in this case, when would you ever? When would you ever? To our own.

(JA at 702.)

> What will you stand for?
>
> . . .
>
> Who is in prison? Programs, therapy that he lies at. A rock star status. Front row Joe. A heavy. What will you stand for?
>
> . . .
>
> Where will you draw the line? What risk will you accept on someone else's behalf?
>
> . . .
>
> What risk will you accept on someone else's behalf?

(JA at 703.)

> Where will your sentence draw the line for someone else? What will your sentence stand for? What will your sentence say? What will it say?
>
> . . .
>
> What will you stand for? Where will you draw the line? Your sentence will say it. It will tell these families, it will tell where you stand as an individual, it will tell where you stand as an Airman. What will you stand for? If not this case, what case? We ask that you return a verdict, a sentence of death.

(JA at 704.) TC used PowerPoint slides during his argument, which also asked

the members "What risk will your sentence accept on someone else's behalf?" and—three times—"What will you stand for?" (JA at 396, 398-99.)

The Defense objected twice during TC's argument. The first related to trial counsel's comparison of SrA Witt's prison living conditions to SrA J.K.'s life. (JA at 703.) The second objection was to SrA Witt's purported future dangerousness, in response to TC's query: "What risk will you accept on someone else's behalf?" (*Id.*) The military judge overruled both objections. (JA at 703-04.)

Defense counsel (DC) later addressed TC's theme at the beginning of his own argument, stating how the members' job was "not to draw a line" or "say what [they] do or don't stand for," but "to make an individual moral decision based on the facts before them." (JA at 705.) DC then transitioned into the three sentencing options for SrA Witt, including how confinement for life with the possibility of parole could provide him a "second chance at life." (JA at 706.) DC next focused on the various mitigating and extenuating factors at play, arguing they warranted preserving SrA Witt's life, but eventually returned to the available sentencing options and emphasized how life with the possibility of parole was a "sentence . . . justified under the law." (JA at 749.) DC concluded by asking the panel for "[a] verdict that lets [SrA Witt] serve his time in jail, and offers him hope, and the possibility of redemption, and the possibility of change that have

[sic] been missing for 14 years." (JA at 750.)

TC responded with the following comments in rebuttal:

> Members, make no mistake about it; your sentence will send a message. It will send a message about what you as an individual, and what you as an Airman will accept. It will - it will tell everyone where you draw the line, and what you will stand for. It will.

(JA at 751.)

TC's final words to the members were:

> Anything less than the death penalty is a message you cannot send. What will you stand for?

(JA at 751.)

The Lower Court's Analysis

Applying a plain error standard of review, the lower court found error "in trial counsel repeatedly asking the members what their sentence would say about them personally." (JA at 066.) Citing this Court's analysis in *United States v. Norwood*,[2] the AFCCA concluded TC erred by "specifically plac[ing] on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment." *Id*. In addition, the court criticized TC for invoking the members' "sense of professional military standards and obligations." (JA at 067.) It opined that such a tactic seemed designed to "have the members think less about determining an appropriate sentence based upon the evidence before

[2] 81 M.J. 12, 21 (C.A.A.F. 2021).

them and more about making a public statement about how they would have their sense of personal and professional obligations be judged by others." *Id*.

The AFCCA further found that "[t]rial counsel compounded his error by repeatedly asking the members how much risk they would personally accept by virtue of the sentence they adjudged." (JA at 066.) It reasoned that SrA Witt's risk for future misconduct was an "appropriate consideration" but "the suggestion that the members would be personally responsible for any such misconduct was not." *Id.* The lower court then concluded that this argument was improper as it "would lead observers to question whether an accused was sentenced based upon his or her actual offenses or upon the members' desire to be free from blame." *Id*.

Despite these errors, the AFCCA held that there was no prejudice. *Id*. It primarily based its rationale on the panel's unanimous decision to sentence SrA Witt to life without the possibility of parole; a finding it opined demonstrated a "clear rejection" of TC's recommended death sentence. *Id*. The lower court further noted the brutality of the offenses and how SrA Witt's "own trial defense counsel did not make a plea for a sentence including eligibility for parole, which is a strong indication that Appellant's own defense team saw the true debate in the case as being between life and death—not whether parole should be available." *Id*.

Summary of the Argument

TC's sentencing argument blatantly sought to inflame the passions and prejudices of the panel, repeatedly asking the members to consider how the sentence they adjudged would reflect on them personally and professionally. These arguments coerced the panel members into rendering a more severe sentence based on concerns that they would be adversely judged by the victims' family, the Air Force, and the public for the sentence they imposed. To make matters worse, TC interspersed his improper arguments with repeated queries to the members regarding the risk they were willing to take on someone else's behalf; in effect, pressuring the members to adjudge a sentence based on fear, apprehension, and feelings of guilt rather than on the evidence presented.

The AFCCA correctly found error in TC "repeatedly asking the members what their sentence would say about them personally," as it "placed on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment." (JA at 066.) TC's description of the "sentencing process as a once in a career 'opportunity' to 'draw the line as an individual, and as an Airman'" improperly "shifted the members' focus from determining an appropriate sentence for Appellant to using the sentencing proceedings as an opportunity to make individual statements about each member's sense of professional military standards and obligations." (JA at 067.) Further, the

AFCCA appropriately recognized by "injecting capital proceedings with the specter that individual members might be personally responsible for some indeterminate future harm," TC's arguments "would lead observers to question whether an accused was sentenced based upon his or her actual offenses or upon the members' desire to be free from blame." (JA at 066.)

Where the AFCCA erred was in its prejudice analysis, finding that because the panel unanimously rejected TC's call for the death penalty, the members were not influenced by the improper argument. (JA at 067.) In reaching this flawed conclusion, the AFCCA mistakenly determined that SrA Witt's defense team was focused on life versus death and, as such, they made no plea for SrA Witt to receive a sentence allowing for the possibility of parole. (*Id.*) However, the AFCCA failed to credit DC's argument in which he asked the panel to provide a sentence which "offers him hope, and the possibility of redemption" after explaining that life with the possibility of parole was a sentence "justified under the law." (JA at 749-50.) The Defense presented evidence of 26 mitigating factors, along with evidence of SrA Witt's rehabilitative potential. (JA at 582, 753-55.) The weight of this evidence, combined with the pervasiveness of TC's inflammatory arguments and the complete absence of any curative measures, does not support the sentence adjudged.

Argument

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT THAT WARRANTS RELIEF WHEN HE URGED THE PANEL MEMBERS TO CONSIDER HOW THE SENTENCE THEY IMPOSED WOULD REFLECT ON THEM PERSONALLY AND PROFESSIONALLY, AND SUGGESTED THAT THE MEMBERS WOULD BE RESPONSIBLE FOR ANY HARM APPELLANT COMMITTED IN THE FUTURE.

Standard of Review

If an accused objects to an improper argument, this Court reviews the issue *de novo*. *Norwood*, 81 M.J. at 19 (citing *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019)). In doing so, this Court analyzes whether the error materially prejudiced the appellant's substantial rights. *Id*. (citing Article 59, UCMJ; *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

If there is no objection, this Court reviews for plain error. *Norwood*, 81 M.J. at 19. Plain error occurs when (1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id*. (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011)). "[M]aterial prejudice to the substantial rights of the accused occurs when an error creates an unfair prejudicial impact on the court members' deliberations. In other words, the appellant must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Lopez*,

76 M.J. 151, 154 (C.A.A.F. 2017) (internal quotation marks and citations omitted).

In assessing prejudice, the Court will look "at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007) (citing *Fletcher*, 62 M.J. at 184). This determination is based on "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence to support the [sentence]." *Norwood*, 81 M.J. at 19 (citing *Voorhees*, 79 M.J. at 12). Indicators of severity of misconduct include:

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

Fletcher, 62 M.J. at 184.

Law

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

81 M.J. at 19 (quotations marks and citations omitted).

"When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Although a trial counsel may request a severe sentence, it is improper to "threaten the court members with the specter of contempt or ostracism if they reject [this] request." *Norwood*, 81 M.J. at 21 (citation and internal quotation marks omitted). "Arguing an inflammatory hypothetical scenario with no basis in evidence amounts to improper argument that [this Court has] repeatedly, and quite recently, condemned." *Id*. (citing *Voorhees*, 79 M.J. at 14-15.).

Counsel are consistently cautioned to "limit arguments on findings or sentencing to evidence in the record and to such fair inferences as may be drawn therefrom." *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (citations omitted); *accord Baer*, 53 M.J. at 237 (citation omitted). It is thus improper for trial counsel to "suggest the panel base its decision on the impact of the verdict on society, a victim, and the criminal justice system as a whole, rather than the facts of the case." *United States v. Condon*, No. ACM 38765, 2017 CCA LEXIS 187, at *53 (A.F. Ct. Crim. App. Mar. 10, 2017) (unpub. op.), *aff'd*, 77 M.J. 244 (C.A.A.F. 2018)[3]; *accord State v. Campos*, 309 P.3d 1160, 1174 (Utah 2013)

[3] JA at 788.

("[R]eference to the jury's societal obligation is inappropriate when it suggests that the jury base its decision on the impact of the verdict on society and the criminal justice system rather than the facts of the case.") (citations omitted) (internal quotation marks omitted); *Cardona v. State*, 185 So. 3d 514, 522 (Fla. 2016) ("The argument that the case is about 'justice' for the victim or the victim's family has been uniformly condemned.") (citations omitted). This Court recently emphasized that "a court-martial should not consider how *the sentence* would affect the victim." *United States v. Palacios Cueto*, __ M.J. __, No. 21-0357, 2022 CAAF Lexis 517 at *29 (C.A.A.F. Jul. 19, 2022) (citing *United States v. Davis*, 39 M.J. 281, 283 (C.M.A. 1994)).

Trial counsel may include sentencing philosophies in argument, including general deterrence and societal retribution. R.C.M. 1001(g). However, it is error for trial counsel to make arguments that unduly inflame the passions of the court members. *United States v. Halpin*, 71 M.J. 477, 481 (C.A.A.F. 2013) (citations omitted). Members are therefore "not to be asked to fashion their sentence 'upon blind outrage and visceral anguish,' but upon 'cool, calm consideration of the evidence and commonly accepted principles of sentencing." *Baer*, 53 M.J. at 237 (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)). Counsel's words are not reviewed in isolation, but in context of the entire court-martial. *Baer*, 53 M.J. at 238 (citations omitted). Care is necessary in "determining

whether a trial counsel's statement is improper or has improper connotations" and "a court should not lightly infer" the most "damaging meaning" from an "ambiguous remark" when there is a "plethora of less damaging interpretations." *Palacios Cueto*, 2022 CAAF Lexis 517 at *25 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)).

Where improper argument occurs during sentencing, this Court must determine whether or not it can be confident that the appellant "was sentenced on the basis of the evidence alone." *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017) (internal quotation marks and citation omitted). This Court has recognized that it is "harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence than it is to show that an error did not have a substantial influence on the findings." *United States v. Edwards*, __ M.J. __ , No. 21-0245, 2022 CAAF LEXIS 283, at *21 (C.A.A.F. Apr. 14, 2022). This is due to the "broad spectrum of lawful punishments that a panel might adjudge," as opposed to the "binary decision to be made with respect to the findings (guilty or not guilty)." *Id.* Additionally, "it is much more difficult to compare the 'strengths' of the competing sentencing arguments than it is to weigh evidence of guilt." *Id.*

Analysis

During the sentencing proceeding, TC sought to inflame the passions of the

panel by suggesting they would be responsible for any future harm by SrA Witt, and that their sentence would reflect upon them both personally and professionally. The lower court rightly found error in these aspects of TC's argument; however, it incorrectly determined the panel was unaffected. TC's plainly erroneous comments were plentiful and prejudicial, and this Court should not be confident that SrA Witt was sentenced on the basis of the evidence alone.

1. Trial counsel committed plain error when he repeatedly urged the panel members to consider how the sentence they imposed would reflect on them personally and professionally.

SrA Witt acknowledges the applicable standard of review is plain error for TC's argument regarding how the sentence the members imposed would reflect on them personally and professionally. The AFCCA correctly applied this standard to find error when TC "repeatedly ask[ed] the members what their sentence would say about them" both personally and professionally. (JA at 066.) Likewise, this Court should find TC's comments plainly erroneous.

TC fervently and repeatedly equated the members' sentencing responsibilities to their duties as service members, arguing that their adjudged punishment would send a message regarding who they were as Airmen and what they would be willing to stand for in the Air Force. (JA at 670-71, 673, 697, 699.) TC was thus drilling into the members that they had a moral responsibility as Airmen to adjudge a death sentence and that, if they failed to do so, there would

be no line an accused could cross that would warrant capital punishment. This argument is plainly improper because it relies on a combination of fear, outrage, and the members' sense of duty rather than a "cool, calm consideration of the evidence and commonly accepted principles of sentencing." *Baer*, 53 M.J. at 237 (internal quotations omitted) (citation omitted).

A court-martial panel is entrusted to represent the community at large in arriving at an appropriate sentence for an accused; however, it is quite another thing to imply that the members would not be fulfilling their duties as Airmen if they fail to adjudge a particular sentence. This is especially true where trial counsel suggests that such a failure will result in the Air Force losing its culture and potentially encouraging future violence by failing to draw a line for other would-be offenders. *Cf. Belford v. Collins*, 567 F.3d 225, 234 (6th Cir. 2009) (concluding that a prosecutor must not "fan the flames of the jurors' fears by predicting that if they do not convict . . . some . . . calamity will consume their community.") (citation omitted).

Equally problematic was TC's refrain of "What will you stand for?" and "Where will you draw the line?", which he reiterated more than seventy times throughout his argument. (JA at 670-704.) TC placed these repeated catchphrases in the context of the military community,[4] and he directly tied this line of argument

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[4] *See*, *e.g.*, JA at 671 ("Where will you draw the line? This occurred on base, in

to the Air Force culture.[5] TC confirmed this connection when he argued "From E-6 to O-6, where else in your career will you have the opportunity to draw the line as an individual, and as an Airman on what you will allow?" (JA at 699.) In the final paragraph of TC's argument, he again reiterated this theme, arguing "What will you stand for? Where will you draw the line? Your sentence will say it. It will tell these families, it will tell where you stand as an individual, it will tell where you stand as an Airman." (JA at 704.)

This constant exhortation pressured the members to base their sentencing decision on how others would view them, and how their sentence would tell the victims' families, the Air Force, and the public where they stand. This theme is patently similar to trial counsel's improper argument in *Norwood*, coercing the members to impose trial counsel's requested punishment out of concern for how they would be judged for the sentence they imposed. 81 M.J. at 19 ("[W]hen you all return to your normal duties . . . . [A]nd someone asks you . . . . 'Wow, what did [Appellant] get for that?' Do you really want your answer to be 'nothing at all'?"). This Court found the argument in *Norwood* amounted to "an inflammatory hypothetical scenario with no basis in evidence" and was plain error

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base housing[.]").

[5] *See*, *e.g.*, JA at 671 ("Where do you draw the line? What culture do we have?" and "He was in uniform. Where will you draw the line?").

as trial counsel "threaten[ed] the court members with the specter of contempt or ostracism if they reject[ed] [trial counsel's] request." *Id.* at 21 (quoting *United States v. Wood*, 40 C.M.R. 3, 9 (C.M.A. 1969)).

TC's repeated argument that the members' sentence would be subject to the judgment of the victims' families, their fellow Air Force members, and the broader community merely served to inflame the emotions of the members. Similar to *Norwood*, the argument that the members' sentence would send a message about "where they stood" and "where they drew the line" threatened the court members with contempt or ostracism. This is especially true in the context of "highly visible" and "intensely scrutinized capital proceedings." (JA at 067). These arguments therefore amounted to plain error.

2. <u>Trial counsel similarly erred when he suggested the panel members would be responsible for any harm SrA Witt committed in the future.</u>

As a predicate matter, the lower court erred in applying the plain error standard to TC's improper argument regarding SrA Witt's implied risk to others and whether the panel could accept "the risk of a future victim by sentencing Appellant to something less than death." (JA at 066.) DC objected to this argument and was overruled by the military judge. (JA at 703-04.) Although this objection came after TC's previous similar comments (JA at 062 n.41), it was nevertheless preserved in the record and the error survived without amelioration. (JA at 704.) Accordingly, this Court should review this particular aspect of TC's

argument *de novo* to determine whether the military judge erred in overruling DC's objections. *See Norwood*, 81 M.J. at 19.

Nonetheless, even under a plain error standard of review, TC's arguments that the panel members would be responsible for any future harm committed by SrA Witt represent plain and obvious error. While it may have been appropriate for the members to consider SrA Witt's risk of future misconduct, it was improper for TC to submit to the members that unless they returned a death sentence, they would be responsible for any possible future harm. This argument does not fit any proper sentencing philosophy such as specific or general deterrence. Instead, TC's suggestion amounted to another "inflammatory hypothetical scenario with no basis in evidence." *Id*. at 21.

This comment is analogous to trial counsel's inflammatory argument in *United States v. Frey*, 73 M.J. 245, 249 (C.A.A.F. 2014), where trial counsel argued, without any evidence in support, that the appellant would be likely to molest other children in the future. This Court condemned trial counsel's improper argument, emphasizing that "[t]hough this comment comprises three sentences in eight pages of sentencing argument, one is hard pressed to imagine many statements more damaging than the implication that someone who has been convicted of molesting a single child will go on to molest many more." *Id*. Here, rather than focusing on the actual offenses and any aggravating or mitigating

factors, TC infused his sentencing argument with the threat that the members would be *personally* responsible for SrA Witt's future wrongdoing. In other words, TC implied that the members would be responsible for the future actions of the very individual who had committed two premeditated murders, and an attempted premeditated murder. This implication is even more damaging than the implication this Court found improper in *Frey* given the nature of the offenses in SrA Witt's case. This Court should therefore have grave doubts that the members sentenced SrA Witt based on the evidence, versus their concern of being blamed for his potential future misconduct.

3. Trial counsel's conduct was severe, there were no curative measures by the military judge, and the weight of the evidence does not support the sentence.

As discussed above, TC's errors were varied and plentiful. Although the military judge had a *sua sponte* duty to ensure SrA Witt received a fair trial, he allowed TC's erroneous argument and then failed to provide any curative instructions. *Voorhees*, 79 M.J. at 14 (citing *United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018)). Accordingly, this Court must now determine whether it can be confident that SrA Witt "was sentenced on the basis of the evidence alone." *Pabelona*, 76 M.J. at 12. For various reasons, this Court should have no such confidence.

Turning to the severity of TC's errors, the first factor to consider is the "raw numbers – the instances of misconduct as compared to the overall length of the argument." *Fletcher*, 62 M.J. at 184. TC repeated his challenge of "where will you draw the line" and "what will you stand for" more than seventy times in his sentencing argument. (JA at 670-704.) And he reiterated his enquiry of "what risk will you accept" eight times. (JA at 673, 675, 676, 699, 702, 703.) He also prominently displayed these messages in his PowerPoint slides. (JA at 396, 398, 399). TC's sentencing argument lasted a little over two hours, spanning almost 34 pages of the record of trial. (JA at 670, 689, 691, 704.) Accordingly, TC's misconduct was remarkably more severe than the errors this Court recently found to be non-prejudicial in *Palacios Cueto*, where trial counsel made only six erroneous statements. 2022 CAAF Lexis 517 at *30. In addition, unlike the trial counsel's references to "justice" in *Palacios Cueto*, TC's improper statements here were not ambiguous. *Id* at *28-29. The intimation that the members would be judged by the victims' families, the Air Force, and the public for their sentence was clear, as was TC's warning that the members would be responsible for any future harm caused by SrA Witt. There is simply no "less damaging" interpretation of TC's arguments. *Donnelly*, 416 U.S. at 647. More than 78 instances of improper argument during a two-hour argument is severe misconduct, especially considering that this Court found a singular instance of similar

misconduct warranted reversal as to the sentence in *Norwood*. As in *Norwood*, SrA Witt was prejudiced by TC's severe misconduct.

Further establishing the severity of TC's errors is the fact that these improper comments were spread throughout his sentencing argument. TC began his argument by challenging the panel with "what will you stand for. From E-6 to O-6, as an individual, what will you stand for as an individual, as an Airman? Where will you draw the line?" (JA at 670-71.) This theme, along with his warning about what risk the panel would accept, was repeated at least 22 additional times before a 15-minute comfort recess during the middle of the argument. (JA at 671-689.) As soon as the members returned from that recess, TC continued his refrain of "[w]hat you will stand for and what you will not. Where you will draw the line. What you will allow to exist." (JA at 691.)

The inflammatory comments then persisted throughout the second half of TC's argument, up to TC's very last statements to the members at the end of the argument. (JA at 691-704.) Then, in a rebuttal that was only 16 lines long in the verbatim transcript, TC stated "what will you stand for" and "where will you draw the line" three additional times. (JA at 751.) In fact, this theme was so important to TC's argument that he chose to conclude his comments by emphasizing, "Anything less than the death penalty is a message *you cannot send*. What will you stand for?" (*Id.*) (emphasis added). Here, as in *Fletcher*, TC's flawed

argument was not isolated but permeated his entire sentencing argument. 62 M.J. at 184. Not only was the content of TC's improper arguments similar to the "inflammatory hypothetical scenario with no basis in evidence" in *Norwood*, the arguments in this case were far more pervasive than the singular argument this Court found prejudicial, thus demonstrating substantial harm to SrA Witt. 81 M.J. at 21.

Additional factors to consider in determining the severity of the misconduct include the length of the trial, the length of the panel's deliberations, and whether trial counsel abided by any rulings from the military judge. *Fletcher*, 62 M.J. at 184. From the time the members were impaneled, SrA Witt's sentencing rehearing spanned a total of 16 days before the court was closed for deliberations.[6] The members' deliberations lasted just around eight hours total.[7] The military

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[6] The members were impaneled and began to hear the case on June 11, 2018. (JA at 443.) The members continued to hear evidence from June 12-15, 2018, June 18-22, 2018, June 26-29, 2018, and July 2, 2018. (JA at 450, 504, 537, 565, 574, 592, 597, 609, 628, 646, 661, 662, 666, 668.) The members were not present on June 25, 2018 while the military judge received motions arguments in an Article 39(a), UCMJ, session. (JA at 645.) The members received sentencing instructions and heard sentencing arguments from counsel on July 3, 2018. (JA at 669.)

[7] The court was closed for deliberations at 0919 on July 5, 2018. (JA at 756.) The members deliberated for approximately two and a half hours before taking a lunch recess at 1152. (JA at 757.) After lunch, the members deliberated for an additional three and a half hours before recessing for the evening. (JA at 758-59.) On July 6, 2018, the members deliberated from 0835 until 1013 before announcing their sentence. (JA at 760-61.)

judge issued only two rulings regarding the propriety of trial counsel's sentencing argument. (JA at 703-04.) As he overruled both defense objections, there were no rulings for trial counsel to abide by.

Turning to the measures adopted to cure the misconduct, it is apparent that "[p]rompt and effective action by the [judge] *may* neutralize the damage by admonition to counsel or by appropriate curative actions to the [panel]." *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990) (emphasis added). Here, as in *Norwood*, the military judge and SrA Witt's trial defense counsel did not take adequate action to address this issue. *Id.* Although DC objected to TC's inflammatory argument about SrA Witt's purported "future risk," the military judge overruled the objection and undertook no action to ameliorate TC's errors. (JA at 703-04.) Through his ruling, the military judge signaled to the members that TC's argument was fair commentary on the evidence presented. In other words, "the military judge's failure to sustain the defense's immediate and well-founded objection to the trial counsel's argument did not ameliorate the problem one whit." *Frey*, 73 M.J. at 253 (Ohlson, J., dissenting).

As to TC's ubiquitous coercion in the form of arguing "what will you stand for" and "where will you draw the line," while there was no objection from trial defense counsel, the military judge had a "*sua sponte* duty to [e]nsure that an accused receives a fair trial." *Norwood*, 81 M.J. at 21 (quoting *Voorhees*, 79 M.J.

at 14-15) (alterations in original). The military judge failed to fulfill that duty, and provided only the standard sentencing instructions regarding argument from counsel:

> During argument, trial counsel may recommend that you consider a specific sentence in this case. You are advised that the arguments or the trial counsel and his or her recommendations are only his or her individual suggestions and may not be considered as the recommendation or opinion of anyone other than such counsel.

(JA at 670.) This standard instruction failed entirely to "convey[] a sufficient sense of judicial disapproval of both content and circumstances needed to dispel the harm in the core of the prosecutor's statements." *Simtob*, 901 F.2d at 806 (finding the trial judge's generalized comments addressing arguments he found improper were insufficient to cure the harm).

Notably, "[t]he Supreme Court, in *Donnelly*, also established that curative instructions are not in fact cure-alls, noting that 'some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate the effects.'" *United States v. Hornback*, 73 M.J. 155, 162 (C.A.A.F. 2014) (Baker, C.J., and Ohlson, J., dissenting) (quoting *Donnelly*, 416 U.S. at 644). Here, unlike in *Hornback*, the military judge failed to provide *any* curative instructions addressing trial counsel's improper arguments. This failure, likely detrimental in a typical case, was catastrophic in SrA Witt's case, given that it occurred during

a capitally referred sentencing rehearing when SrA Witt's very life was on the line.

Additionally, after more than four hours of total argument from TC and DC, the military judge did not repeat the standard sentencing instructions or provide any tailored guidance to the members to reiterate that their sentence should be based solely on the evidence and his instructions. Far from leaving "no stone unturned in ensuring that the members considered only admissible evidence[,]"[8] the military judge's silence ensured the members would deliberate on their sentence, all the while considering: (1) what their sentence would say about them personally and professionally; (2) how others would view them for the sentence they imposed; and, (3) their alleged responsibility for any potential future harm committed by SrA Witt. Therefore "there was a total lack of curative measures to redress this misconduct," and SrA Witt was prejudiced by TC's improper arguments. *Norwood*, 81 M.J. at 21.

Finally, the weight of the evidence does not support the sentence of life without the possibility of parole. As a starting point, the AFCCA's conclusion that the Defense's case was focused on life or death, rather than an opportunity at parole—which helped convince the court there was no prejudice—is not entirely accurate. (JA at 067.) While DC was primarily (and justifiably) concerned with

[8] *Hornback*, 73 M.J. at 161.

saving SrA Witt's life, he nevertheless discussed the various sentencing options available to the panel, including life imprisonment with the possibility of parole. (JA at 705.) He stressed, "the law lays out what it considers to be three just punishments. Nowhere does the law tell us what punishment must be given. That's your job. . . . They are all just." (JA at 705.) DC then emphasized, if the members preserved the option of life in prison, SrA Witt could have a "second chance at life." (JA at 706.) DC repeated this entreaty at the end of his argument, emphasizing how life with the possibility of parole was a "sentence . . . justified under the law" (JA at 749.) He then asked the panel for "[a] verdict that lets [SrA Witt] serve his time in jail, and offers him hope, and the possibility of redemption, and the possibility of change that have [sic] been missing for 14 years." (JA at 750.)

The Defense's sentencing case likewise included witnesses who discussed SrA Witt's rehabilitative potential. For example, a licensed clinical social worker with more than 30 years of experience with inmates at the Fort Leavenworth Disciplinary Barracks (FLDB) testified that SrA Witt had progressed well in various treatment programs and had excellent rehabilitation potential. (JA at 580, 583, 585.) And while he did not equate this potential to a reintegration into society, he nevertheless discussed how rehabilitative programs generally ensure someone "can be productive once they leave the institution." (JA at 582.) Other

witnesses confirmed that participation in rehabilitative and educational programs assist with parole and clemency submissions (JA at 591, 596), and one of SrA Witt's instructors at the FLDB testified that she did not view him as a threat. (JA at 594.)

In addition, there were a host of mitigating factors supporting SrA Witt's opportunity at parole included in the military judge's instructions:

> 1. Evidence that Senior Airman Andrew Witt had no prior criminal history.
>
> 2. Evidence that Senior Airman Andrew Witt had positive enlisted performance reports.
>
> 3. Evidence that Senior Airman Andrew Witt had no disciplinary paperwork during his time in service.
>
> 4. Evidence that Senior Airman Andrew Witt lacked significant violent incidents prior to, or following, the commission of the crimes.
>
> 5. Evidence that Senior Airman Andrew Witt's upbringing was influenced by mental health disorders on his mother's side, to include relatives with psychosis, schizophrenia, and his own mother's depression.
>
> 6. Evidence that Senior Airman Andrew Witt's upbringing was influenced by addictive disorders on his father's side, to include his father's use of cocaine and struggles with alcohol during Senior Airman Witt's formative years.
>
> 7. Evidence that Senior Airman Andrew Witt suffered from schizotypal personality disorder.
>
> 8. Evidence that Senior Airman Witt suffered from moderate alcohol use disorder.

9. Evidence that Senior Airman Witt suffered a traumatic brain injury 4 months before the charges.

10. Evidence that Senior Airman Witt was suffering from a brief, psychotic episode when he committed the murders.

11. Evidence that Senior Airman Witt confessed to investigators.

12. Evidence that Senior Airman Witt cooperated with investigators.

13. Evidence that Senior Airman Witt has accepted responsibility for his crimes.

14. Evidence that Senior Airman Witt has expressed remorse for his crimes.

15. Evidence that Senior Airman Witt has adjusted positively to confinement.

16. Evidence that Senior Airman Witt is not a risk of future violence.

17. Evidence that Senior Airman Andrew Witt has participated in therapy and rehabilitative programs at the United States Disciplinary Barracks.

18. Evidence that Senior Airman Witt performs consistently well at his library detail at the United States Disciplinary Barracks.

19. Evidence that Senior Airman Andrew Witt contributes positively to the prison culture at the United States Disciplinary Barracks.

20. Evidence that Senior Airman Andrew Witt spent 10 years in maximum custody, in a cell for 23 hours a day.

21. Evidence that Senior Airman Andrew Witt has rehabilitative potential.

22. Evidence that Senior Airman Witt has positive character qualities, including compassion, kindness, patience, studiousness, work ethic, and a desire to better himself, as demonstrated by the

testimony of defense witnesses, including inmates at the USDB, his family, and other witnesses called by the government and defense.

23. Evidence that Senior Airman Witt loves his family.

24. Evidence that Senior Airman Andrew Witt is loved by his family.

(JA at 753-55.) But even if this Court were to disbelieve particular Defense theories or mitigating factors, there was no evidence adduced at trial indicating SrA Witt's crimes were truly representative of who he was as a person, or that he was so evil or irredeemable that he should be afforded no opportunity at parole.

To be sure, the AFCCA was correct that SrA Witt's crimes were brutal and resulted in tragic consequences. (JA at 067.) No party at trial argued otherwise, nor did the Defense contend that his crimes did not warrant a significant sentence. However, a life sentence with the mere possibility of parole remains a serious punishment—a fact notably and readily acknowledged by each member of the panel. (JA at 420, 422, 424, 426, 428, 430, 432, 434, 436, 438, 440, 442.) Because the panel uniformly possessed such views, they certainly *should* have given great consideration to this option; an option that was consistently undermined by TC's vehement and largely improper argument.

To the extent the panel's unanimous decision represented a "clear rejection" of TC's recommendation, this fact does not necessarily mean the panel was unaffected by TC's improper argument. (JA at 067.) Given the numerous mitigating and extenuating factors—which outnumbered the aggravating factors

26 to 11 (JA at 753-55)—the panel rightly concluded that a death sentence was not justified. Accordingly, their decision came down to life imprisonment with or without the possibility of parole. The wide-ranging scope and pervasiveness of TC's improper argument could easily have tilted the balance, and this Court should not be confident the panel sentenced SrA Witt on the evidence alone.

As this Court recently opined, it is more difficult to determine that an improper sentencing argument did not have a substantial influence on a sentence than to determine that an error did not have a substantial influence on findings. *Edwards*, 2022 CAAF LEXIS 283, at *21. The panel in this case had a range of options for sentencing, and there were many variables that played into their sentencing decisions, not least of which were the contrasting alleged aggravating and mitigating factors. While this may make it difficult to weigh the strengths of the competing sentencing arguments in this case, the severity of TC's misconduct and lack of any measures to cure these pervasive errors tip the scales to show that SrA Witt was prejudiced.

Conclusion

TC's recurrent plea for the members to consider how the sentence they adjudged would reflect on themselves personally and professionally had no basis in evidence and served no proper sentencing objective. TC's additional insinuation that, if the members did not impose the death penalty, they would be

responsible for any future harm committed by SrA Witt, further functioned to inflame the passions and prejudices of the panel members. These improper arguments were severe due to their prevalence and ubiquity, there were no measures taken to cure the misconduct, and the weight of the evidence presented in SrA Witt's sentencing rehearing does not support the sentence adjudged.

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

Respectfully Submitted,

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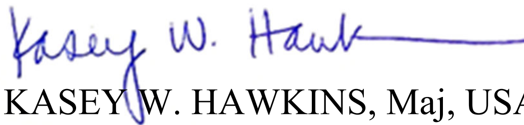
CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on August 5, 2022.

CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

This brief complies with the type-volume limitation of Rule 24(c) because it contains 9,625 words.

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



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