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)

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Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Senior Airman Andrew Witt, the Appellant, hereby replies to the Government's Brief (hereinafter "Gov. Br."), filed on September 6, 2022.

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.

Despite the Government's contentions to the contrary, the lower court correctly identified the plain and obvious errors trial counsel (TC) committed when he insinuated SrA Witt's panel would be responsible for any future harm committed by SrA Witt, and repeatedly emphasized how the panel's sentence would reflect on them personally and professionally. These errors contravened clear precedent requiring members to adjudge a sentence based solely upon the evidence. *See*, *e.g.*, *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017). They also violated this Court's prohibitions against making arguments calculated to inflame the passions and prejudices of the members,[1] and threatening members "with the specter of contempt or ostracism if they reject" the trial counsel's

[1] *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).

sentencing recommendation. *United States v. Norwood*, 81 M.J. 12, 21 (C.A.A.F. 2021) (quoting *United States v. Wood*, 40 C.M.R. 3, 9 (C.M.A. 1969)). Accordingly, the real focus of this case is prejudice. And to that end, the various mitigating factors undercut the Government's contention that TC's arguments, even if erroneous, were not prejudicial. (Gov. Br. at 45-56.)

1. TC's arguments run afoul of *Norwood* and *Wood*, as well as other precedent from this Court; therefore, this case does not present a matter of first impression.

The Government sanctions TC's myriad "what will you stand for" and "where will you draw the line" refrains as "proper appeal[s] to the members' senses of responsibility as the conscience of the military community." (Gov. Br. at 17.) As a starting point, however, the Government faults both SrA Witt and the lower court for citing "little law" to support their congruent positions that TC's comments were improper. (Gov. Br. at 26-27 (citing JA at 066-67).) The Government then attempts to undercut the plain error analysis by framing the matter as one "of first impression in the military courts." (Gov. Br. at 27.) The Government missteps on each account.

Both SrA Witt and the Air Force Court of Criminal Appeals (AFCCA) cited this Court's own precedent from just last year (*Norwood*), which itself cited long-standing precedent (*Wood*).[2] In applying this precedent to the facts of SrA Witt's

[2] *See* App. Br. at 26-27 (citing *Norwood*, 81 M.J. at 21 (quoting *Wood*, 40 C.M.R.

case, the AFCCA aptly concluded:

> [T]rial counsel specifically placed on the members' shoulders, both personally and professionally, the weight of the victims' families' judgment. Given the lengthy and emotional nature of the rehearing, which many of those families observed from the courtroom gallery, asking the members to consider what those understandably invested observers would think of them as a result of their sentence was an inappropriate appeal to the members' emotions for an improper purpose. While criminal sentences serve a great number of objectives, sending a message about an individual member's personal threshold for certain types of crimes to victims' relatives is not one of them.

(JA at 066.) Correspondingly, the lower court found it inflammatory how TC asked the members to consider how they would be judged by others by virtue of the sentence. (*Id*.) The AFCCA's holdings are wholly consistent with *Norwood* and *Wood*, which prohibit trial counsel from threatening members "with the specter of contempt or ostracism if they reject" the trial counsel's sentencing recommendation. *Norwood*, 81 M.J. at 21 (quoting *Wood*, 40 C.M.R. at 9).

The Government nevertheless contends that because this Court has not previously found the *specific words* used by TC in this case improper, there cannot be plain error. (Gov. Br. at 26.) This argument misapprehends this Court's reasoning from *Norwood*, *Wood*, and others. In *Norwood*, for example, it was indisputably improper for the trial counsel to ask the members to consider how

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at 9); JA at 066-67 (citing *Norwood*, 81 M.J. at 21 (quoting *Wood*, 40 C.M.R. at 9)).

they themselves would be judged for their sentence[3]—which, as the AFCCA correctly identified, was one of the errors present here. (JA at 066.) But the overarching problem was that the argument asked the members to render a sentence that was not based on the facts in evidence. *Id*. (citing *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005)). The same is largely true in *Wood*, wherein this Court's predecessor cautioned against inviting panel members to "cast aside the objective impartiality demanded of [them] . . . and judge the issue from the perspective of personal interest." 18 C.M.A. at 302. And these cases align with this Court's long prohibition against arguments calculated to inflame the passions or prejudices of a panel member, or which would divert the panel from its duty to decide the case based on the evidence. *See United States v. Causey*, 37 M.J. 308, 310 (C.M.A. 1993); *accord United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1976). This includes predicting dire consequences resulting from the panel's decision. *Causey*, 37 M.J. at 310.

Despite these precedents, TC still sought to inflame the members' passions and to divert them away from the *actual* facts of the case by asking them to focus on what the sentence would say about them, their status as individuals and Airmen, and whether the death penalty could *ever* be adjudged if not against SrA Witt. This is perhaps best exemplified by the following remarks:

[3] 81 M.J. at 21.

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

(JA at 699-700.) Pursuant to *Norwood*, *Wood*, or any number of cases that address improper argument, TC's comments contravened well-established precedent, and the Government is mistaken to claim otherwise on appeal. But caselaw is not the only source that disproves the Government's position.

This Court's precedent is consistent with the ethical guidelines for Air Force prosecutors. Specifically, it is professional misconduct for an Air Force trial counsel to use an argument to inflame the passions and prejudices of the court members. Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 7 – Air Force Standards for Criminal Justice, Std 3-5.8(c) (Dec. 11, 2018). It is equally improper to "divert the court from its duty to decide the case on the evidence." *Id*. at Std. 3-5.8(d). And as this Court is well aware, prosecutorial misconduct occurs if a trial counsel violates "an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)

(citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, in combination with or irrespective of TC's inflammatory argument, his reference to what the sentence would say about the members as individuals or Airmen, or how the victims would view them as a result, served to divert the panel from deciding a sentence based solely on the facts of the case. Even assuming, *arguendo*, that the specific words the TC utilized have never been found improper, the context and purpose behind them represent clear and obvious prosecutorial misconduct.

2. <u>Despite the Government's characterizations, TC's various comments were improper.</u>

a. *Conscience of the community.*

After asserting that "no Court has addressed the specific arguments made in this case," the Government turns to an analysis of federal cases which have "accepted arguments that appeal to the jury to act as the 'conscience of the community.'" (Gov. Br. at 27-28.) But these cases involve civilian juries and civilian prosecutors in civilian society, not military panels and military prosecutors operating in a military setting. So not only are these federal cases non-binding, they do not accurately account for the unique pressures and hierarchy of the military environment.

In *Parker v. Levy*, 417 U.S. 733, 743 (1974), the Supreme Court observed how it "has long recognized that the military is, by necessity, a specialized society separate from civilian society." It went on to state, "Just as military society has

been a society apart from civilian society, so 'military law . . . is a jurisprudence which exists separate and apart from the law that governs in our federal judicial establishment.'" *Id*. at 744. The unique pressures of the military command and rank structure also dictate different standards in military law; for example, the expanded protections against compulsory self-incrimination found in Article 31, UCMJ, 10 U.S.C. § 831[4] and the prohibition on unlawful command influence found in Article 37, UCMJ, 10 U.S.C. § 837.

In fact, an argument that a court-martial panel speaks for the conscience of the military community, and that the sentence they adjudge will communicate where they stand as Airmen, skirts dangerously close to "attempt[ing] to coerce or, by any other means, influence the action of a court-martial . . . or any member thereof, in reaching the findings or sentence in any case." Article 37(a), UCMJ, 10 U.S.C. § 837(a).[5] This is because, within the military's specialized society and judicial construct, panel members are not akin to civilian jurors, who are selected

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[4] "Congress passed Article 31(b) 'to provide servicepersons with a protection which, at the time of the Uniform Code's enactment, was almost unknown in American courts, but which was deemed necessary because of subtle pressures which existed in military society.'" *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (quoting *United States v. Duga*, 10 M.J. 206, 209 (C.M.A. 1981)).

[5] *Cf. United States v. Chikaka*, 76 M.J. 310, 313 (C.A.A.F. 2017) (holding that permitting an accused's commanding officer, who outranked the entire panel and was within the chain of command of at least one member, to testify about the importance of a harsh sentence, which trial counsel then used in sentencing argument, constituted "some evidence" of unlawful command influence.)

randomly from the general populace and who return to their lives after jury duty to little or no fanfare. Instead, a panel member's identity is not just known to his or her commanding officer, that officer is the one who actually selected the member to serve. Article 25, UCMJ, 10 U.S.C. § 825. By virtue of the member's authorized absence, the member's immediate command is also aware of the panel selection, as are undoubtedly the member's colleagues and subordinates. And especially in a "highly visible and intensely scrutinized capital proceeding[]," the member would understand that the outcome of his or her service would be well known upon returning to normal duties. (JA at 067.) To dispel any doubt, TC specifically reminded the panel of this fact during 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 (emphasis added).)

Given these unique circumstances, arguing that a member represents the conscience of the military community places undue pressure on the members to adjudge a sentence based on matters other than the facts of the case. Indeed, any member who is cautioned that his or her sentence communicates who that member is as an individual or Airman, or speaks for the military apparatus at large, would be hard-pressed to ignore how the sentence might affect one's personal or professional reputation, or career progression. In short, it is directly analogous to

this Court's prohibition against threatening members with the specter of contempt or ostracism. *Norwood*, 81 M.J. at 21 (quoting *Wood*, 40 C.M.R. at 9). As such, this Court should give little weight to the federal cases cited by the Government regarding the conscience of the community.

However, even in these cases, the federal courts have limited the permissible parameters of a "conscience of the community" appeal. As the Government concedes, such arguments are improper if "intended to inflame the passions of the jury." (Gov. Br. at 27-28.) Such was the case in *United States v. Johnson*, 968 F.2d 768, 770, 772 (8th Cir. 1992), wherein the Eighth Circuit Court of Appeals held the prosecutor's comment during closing argument, which "exhorted the Jurors to 'stand as a bulwark against the continuation of what Mr. Johnson is doing on the street, putting this poison on the streets,'" to be "unduly inflammatory and improper" and reversed his conviction and sentence.

In contrast, the Ninth Circuit Court of Appeals in *United States v. Koon*, 34 F.3d 1414, 1444 (9th Cir. 1994), held that the prosecutor's "conscience of the community" comment was "not designed to inflame the jury[.]" This was because "[t]he reference was not accompanied by any suggestion of the consequences of a particular verdict, *nor did the prosecutor suggest to the jury that it had a direct stake in the outcome of the case*." *Id.* (emphasis added). Accordingly, this comment was not "calculated to incite the jury against the accused." *Id*. (citation

omitted).

While the "conscience of the community" comment in *United States v. Ebron*, 683 F.3d 105, 146 (5th Cir. 2012) involved a capital sentencing argument, the prosecutor's remarks—placed in context—addressed deterrence principles: "What message would a life sentence send to *Joseph Ebron's crew and the prison community*? It would send the wrong message, without a doubt. The message would be: Carry on with your killings. No punishment will be waiting for you when you do." (Emphasis added). The Fifth Circuit Court of Appeals concluded "[t]he challenged arguments . . . were not *clear appeals to the jury's passions and prejudices*. Nor were they plainly intended to inflame the jury." *Id*. (emphasis added).

In *State v. Artis*, 384 S.E.2d 470, 499 (N.C. 1989), *vacated on other grounds*, 494 U.S. 1023 (1990), the prosecutor argued:

> The eyes of Robeson County are on you. You speak for Robeson County, and you say by your verdict how you feel about such vile acts there in the community. You send a message. You send a message to Roscoe Artis. You send a message to anyone out there in the community who would follow in his foot steps with a deed such as this.

Significantly, the Defense objected to the last remark, and the judge sustained the objection and instructed the jury to disregard it. *Id*. However, the prosecutor's preceding comments were unaffected by the objection. *Id*. In examining these prior statements, the Supreme Court of North Carolina found:

> [I]t not objectionable to tell the jury that its verdict will "send a message to the community" about what may befall a person convicted of murder in a court of justice. *What is objectionable and improper is to intimate to the jury community preferences regarding capital punishment, for these are neither evidence nor otherwise proper considerations for the sentencing jury*. The state must not ask the jury "to lend an ear to the community rather than a voice."

Id. (citation omitted) (emphasis added).

Based on the foregoing, even applying the cited non-binding "conscience of the community" authority to the present case, TC's arguments constitute prosecutorial misconduct and were impermissible. He repeatedly conveyed to the panel that they had a "direct stake in the outcome of the case"[6] as their sentence would demonstrate their personal and professional values. (JA at 670-71, 697, 699, 704, 751.) Indeed, he pressured the members to return a death sentence because "[y]our 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.) TC also insinuated that the Air Force culture required imposition of the death penalty. Specifically, he challenged:

> Where do you draw the line? What culture do we have?

(JA at 671.)

> 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

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[6] *Koon*, 34 F.3d at 1444.

> to draw the line as an individual, and as an Airman on what you will allow? What will you allow?
>
> . . .
>
> Where you draw the line? Where? If not here, we'll never draw it ever, ever.

(JA at 699.)

> 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?

(JA at 702.)

These express references to the Air Force's culture and what "we will allow" sent the message that the Air Force supported SrA Witt's death; particularly since TC told the panel that if they found such a sentence too severe in this case, capital punishment would never be warranted. Consequently, TC impermissibly "intimate[d] to the [panel] community preferences regarding capital punishment[.]" *Artis*, 384 S.E.2d at 499. But in any event, and as the AFCCA accurately determined,[7] TC's comments were "clear appeals to the jury's passions and prejudices" and thus improper. *Ebron*, 683 F.3d at 146.

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[7] JA at 066 (finding TC's comments were "an inappropriate appeal to the members' emotions for an improper purpose").

b. *Rank and status as individuals and Airmen.*

Next, the Government claims TC's focus on the members' rank was appropriate as it merely reminded them that "the decision to vote for death is each member's *individual* decision." (Gov. Br. at 31 (citing JA at 063) (emphasis added).) However, the Government overlooks the actual statements made by TC:

> 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.)

> 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?

(JA at 699.) TC's comments were not aimed at the egalitarian nature of deliberations; rather, he framed their panel duties as a career-defining moment and implored them to send a message commensurate with their ranks and status as Airmen. This was both an inflammatory appeal to the members' passions and a comment designed to divert their focus from the facts of the case. *See United States v. Barlin*, 686 F.2d 81, 93 (2d Cir. 1982) (concluding the prosecutor improperly appealed to the jury's passion and emotion in characterizing its job as "the one occasion on which you have a duty to do something about the drug traffic in our community," and representing "one of a genre of comments which appears designed to divert rather than focus the jury upon the evidence.").

c. *Societal retribution.*

Turning to the Government's characterization of TC's arguments as "a fair cry for societal retribution," SrA Witt acknowledges that, in general, social retribution is a legitimate sentencing principal. (Gov. Br. at 32.) But contrary to the Government's contention, TC did *not* "merely ask[] the members to reflect on at what point the military's need for retribution (not to mention upholding good order and discipline) would make imposition of the death penalty appropriate." (Gov. Br. at 33.) Instead, he repeatedly challenged the members to return a verdict of death by focusing on what the panel's sentence would say about their professional and personal values, and by emphasizing that their sentence would tell the victims' families, the Air Force, and the public where they would draw the line and what they were willing to stand for. (JA at 670-704, 751.)

d. *General deterrence and good order and discipline.*

The Government posits that TC's arguments "properly argued general deterrence and upholding good order and discipline." (Gov. Br. at 34.) According to the Government, TC "was asking the members to adjudge a sentence that would not only deter others but would also maintain good order and discipline by sending a message that the military will not tolerate crimes like Appellant's." (Gov. Br. at 36.) If TC wished to make the Government's proffered argument, TC would have made that argument. Yet, he did not. In fact, not once throughout his little

over two-hour argument did TC utter the phrase "good order and discipline" or the phrase "general deterrence." (*See* JA at 670-704, 751.)

Additionally, "a severe sentence may better assist in maintaining good order and discipline than a lenient sentence, *yet not be a proper sentence*, because it neglects other interests to be promoted by sentencing." *United States v. Mabe*, 30 M.J. 1254, 1269 (N-M.C.M.R. 1990) (McLeran, J. and Strickland, J., concurring) (emphasis added). One of the five principles of sentencing, and the first the military judge listed to SrA Witt's panel, was "(1) Rehabilitation of the wrongdoer[.]" (JA at 251.) The members were instructed that "the weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within [the panel's] discretion." (JA at 251.). Therefore, when deliberating on SrA Witt's sentence, the members were free to consider whether their sentence would enable SrA Witt's rehabilitation. To be clear, all three sentencing choices in SrA Witt's case—including a life sentence with the possibility of parole—constituted a "severe sentence," as acknowledged by every member on SrA Witt's panel during voir dire. (*See* App. Br. at 39.) Thus, despite the Government's claim to the contrary, *any* sentence handed down by his panel would be a "severe sentence."

e. *The threat of contempt or ostracism was calculated to inflame the passions of the members.*

The Government urges this Court not to infer the "most damaging

meaning," from TC's arguments. (Gov. Br. at 34, 37) (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 646-47 (1974).) Yet, the Government recognizes that TC's "line-drawing and standing-for argument" was his theme. (Gov. Br. at 47, 48.) Furthermore, SrA Witt is not alone in his belief that TC's argument was impermissible. The AFCCA unanimously found TC's comments improper. (JA at 066.) The AFCCA held that "[a]sking members to consider how they would be judged by others by virtue of the sentence they mete out amounts to 'an inflammatory hypothetical scenario with no basis in evidence' and is improper." (JA at 066) (citing *Norwood*, 81 M.J. at 21.)[8]

Moreover, the AFCCA determined that TC's decision to emphasize that the members' sentence would tell everyone,[9] with particular focus on the victims' families,[10] where the members drew the line and what they stood for was "an inappropriate appeal to the members' emotions for an improper purpose." *Id*. The AFCCA found error when TC "invoked [the members'] professional roles" and emphasized that their sentence "would make individual statements about each member's sense of professional miliary standards and obligations." *Id.*

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[8] Contrary to the Government's claim, TC's argument is distinctly different from the Government's argument in *United States v. Loving*, 41 M.J. 213, 292 (C.A.A.F. 1994), which focused on the "vindication of wrongs[.]" (*See* Gov. Br. at 39.)
[9] JA at 751.
[10] JA at 704.

According to the Government, TC "did not posit any hypothetical to the members. He did not assume anyone would ask [the members] about the sentence imposed, no less a military co-worker." (Gov. Br. at 37.) In advancing this argument, the Government ignores that SrA Witt's rehearing was a "highly visible and intensely scrutinized capital proceeding[]." (JA at 067.) Rather than a hypothetical military co-worker, the members were faced with living, breathing examples in the form of the victims' families, many of whom were present in the courtroom gallery during the rehearing.[11] TC invoked "the specter of contempt"[12] when he placed "the weight of the victims' families' judgment"[13] on the members' shoulders. (JA at 066.)

3. <u>The standard of review for TC's improper risk of future harm argument is *de novo*.</u>

In SrA Witt's opening brief, he contended that defense counsel (DC) preserved an objection to TC's argument concerning the panel's responsiblity for any future harm caused by SrA Witt. (App. Br. at 27.) The Government counters that DC "did not object with sufficient specificity to preserve a claim that trial counsel improperly suggested the members would be responsible for Appellant's future harm." (Gov. Br. at 25.) It then characterizes DC's objection as "more

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[11] *See* JA at 066 (noting that many of the members' families were present for the rehearing).
[12] *Norwood*, 81 M.J. at 21 (quoting *Wood*, 40 C.M.R. at 9).
[13] JA at 704, 751.

akin to a ‘facts not in evidence’ objection,” rather than relying on the actual objection levied by DC—“improper argument.” (*Compare id. with* JA at 704.) An examination of the facts is illuminating.

DC’s objection to “improper argument” followed TC’s pointed question, “What *risk will you accept* on someone else’s behalf?” (JA at 703 (emphasis added).) Rather than arguing that SrA Witt was likely to pose a risk, TC explicitly placed SrA Witt’s alleged future dangerousness and the risk of future harm on the panel’s shoulders. (JA at 703.) Recognizing this impropriety—albeit belatedly—DC objected. (*Id*.) The miliary judge then overruled the objection. (JA at 704.) “To require counsel for either side to identify all available arguments in support of his or her objection is unnecessary in a context where the military judge is presumed to know the law and follow it . . . [this Court does] not require such elaboration to preserve error on appeal.” *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005). Accordingly, “this is not a case where counsel has shouted ‘hearsay,’ and only later has come to a conclusion as to the basis for that objection.” *Id.* When placed in the context of TC’s argument that the members would be responsible for any future harm committed by SrA Witt, DC’s objection sufficiently preserved his claim on appeal.

4. <u>TC's warning that the panel members would be responsible for any harm SrA Witt committed in the future was plainly and obviously erroneous.</u>

SrA Witt respectfully reiterates that, even under a plain error standard of review, TC's cautionary comments regarding SrA Witt's alleged future dangerousness constituted plain and obvious error. (App. Br. at 28.) Conversely, the Government endorses TC's argument of "what risk [the members' would] accept" on another's behalf, asserting that "trial counsel never stated or implied the members would be personally responsible for [SrA Witt's] future harm if they spared his life." (Gov. Br. at 42.) Yet, that is *exactly* what TC did and what the lower court found when evaluating his arguments. (JA at 066 (finding "[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.").) Nor were TC's comments the result of "improvisation,"[14] during his argument. Instead, TC's "what risk will you accept" argument was "carefully constructed,"[15] as he reiterated some variation of this argument eight times and included "What risk will your sentence accept on someone else's behalf" in his sentencing PowerPoint slides. (*See* App. Br. at 30; JA at 399.) While the Government suggests that TC "did not elaborate on what that non-descript risk would be[,]"[16]

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[14] *Donnelly*, 416 U.S. at 647.
[15] *Id.* at 646.
[16] Gov. Br. at 42.

it is apparent, in the context of a double homicide court-martial, the risk TC was propounding was SrA Witt committing another murder.

Notably, the prosecutors in the Government's cited cases did not directly intimate to the jury that they would be *personally responsible* for any future harm committed by the defendant. (*See* JA at 066.) Consequently, TC's recurrent "what risk will *you* allow" arguments were more flagrant. (Gov. Br. at 42 (citing *State v. Compton*, 726 P.2d 837, 844-45 (N.M. 1986) ("you cannot give this man the chance to hurt someone else"); *Brooks v. Kemp*, 762 F.2d 1383, 1411-12 (11th Cir. 1985), *vacated on other grounds*, 478 U.S. 1016 (1986) ("[w]hose daughter will it be next time?").)[17] The fact that TC *could* have made a permissible future dangerousness argument does not render his improper future dangerousness argument permissible. As the lower court correctly observed, "Although trial counsel could properly ask the members to sentence Appellant in such a way as to specifically deter him from committing future misconduct and to protect society, it was entirely inappropriate to tell the members they would be accepting the risk of a future victim by sentencing Appellant to something less than death." (JA at 066.)

[17] The Government also analogizes TC's argument to "the metaphorical reminder to the members that, 'the buck stops with you today[.]'" (Gov. Br. at 43 (quoting *Brooks*, 762 F.2d at 1412).) Reminding the members that they "must make the ultimate decision" (*id.*) is markedly different than telling them they are personally accepting the risk that SrA Witt would commit future harm.

As a final point, the Government criticizes SrA Witt for his reliance on *Belford v. Collins*, 567 F.3d 225, 234 (6th Cir. 2009), wherein the Sixth Circuit held it improper to "fan the flames of the jurors' fears by predicting that if they do not convict . . . some . . . calamity will consume their community." (Gov. Br. at 41.) Specifically, the Government contends that *Belford* is inapt because it addressed a findings argument, and that sentencing involves different interests. (*Id.*) But SrA Witt's position is consistent with the views of this Court, which itself relied favorably on *Belford* in its analysis of an improper sentencing argument in *United States v. Marsh*, 70 M.J. 101, 106 (C.A.A.F. 2011).

5. <u>A sentence to life without the possibility of parole was not a foregone conclusion due to the mitigating factors presented in SrA Witt's case; thus, TC's severe prosecutorial misconduct was prejudicial.</u>

In discussing the *Fletcher* factors,[18] specifically the severity of TC's misconduct, the Government opines that "[d]efense counsel's failure to object to trial counsel's argument is 'some measure of the minimal impact of [the] prosecutor's improper argument." (Gov. Br. at 46) (quoting *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001).) According to the Government, the failure to object demonstrates the "minimal impact" of TC's arguments and was a "tactical decision" on the part of SrA Witt's defense counsel. (Gov. Br. at 46-47) (citing *Darden v. Wainwright*, 477 U.S. 168, 182 (1986).) At least two factors

[18] 62 M.J. at 184.

dispel this notion.

First, in this capitally referred court-martial, SrA Witt was not represented by learned counsel.[19] More so than their less experienced brethren, such counsel would be mindful of this Court's admonition that defense attorneys owe a duty to clients "to object to improper arguments early and often." *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018). Second, defense counsel likely did not fully appreciate the impropriety of TC's misconduct at the time because this Court had yet to decide *Norwood*—a case directly analogous to the present.

The Government next targets SrA Witt's assertion that there were no curative measures,[20] as it argues that since the standard instructions were provided, such measures were taken. (Gov. Br. at 49.) This argument is premised, in part, on this Court's recent holding in *United States v. Palacios Cueto*, __M.J. ____, No. 21-0357, 2022 CAAF LEXIS 517, at *32 (C.A.A.F. Jul. 19, 2022). However, SrA Witt's case is distinguishable in several aspects. First, *Palacios Cueto* did not involve a capitally referred murder trial. *Id.* at *1 (noting appellant was convicted of two specifications of abusive sexual contact). In a case where life or death literally hangs in the balance, as it was for SrA Witt, curative measures are all the more important. Second, most of the alleged errors in

[19] *See United States v. Akbar*, 74 M.J. 364, 399 (C.A.A.F. 2015) (holding that military defendants in capitally referred cases are not entitled to learned counsel).
[20] App. Br. at 35.

Palacios Cueto occurred during the findings portion—voir dire, opening statements, and closing arguments—with one instance occurring in TC's sentencing argument. *Id*. at *28-29. Both the AFCCA and this Court found persuasive how the military judge provided "correct instructions before and *after* closing arguments regarding the burden of proof, the presumption of innocence, and making findings based on the evidence." *United States v. Palacios Cueto*, No. ACM 39815, 2021 CCA LEXIS 230, at *51-52 (A.F. Ct. Crim. App. May 18, 2021) (unpub. op.) (emphasis added); *Palacios Cueto*, 2022 CAAF LEXIS 517, at *31-32. Here, the military judge provided the standard instructions before sentencing arguments commenced, but he did not repeat these instructions after more than *four hours* of total argument by TC and DC. *See* App. Br. at 35. Therefore, the panel was left to ponder TC's 78 instances of misconduct without any ameliorative action by the military judge.

Next, the Government claims that "the weight of the evidence supporting the sentence . . . was overwhelming." (Gov. Br. at 50.) The weight of the evidence supporting SrA Witt's *convictions* may have been overwhelming, but the same is not true for his sentence. Prior to deliberating on SrA Witt's punishment, the panel was instructed that "a death sentence may not be adjudged unless all of the court members find, beyond a reasonable doubt, that one or more aggravating factors existed" and that they "may not adjudge a sentence of death unless [they]

unanimously find that any and all extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances." (JA at 259, 263.) While the Government alleged four different statutory aggravators, the panel unanimously rejected the death penalty. (JA at 246.) Thus, even if the panel found any of the statutory aggravators proven beyond a reasonable doubt, they likely did not find the aggravating circumstances substantially outweighed SrA Witt's *26* extenuating and mitigating circumstances. This would have precluded them from even adjudging a death sentence, leaving them vulnerable to TC's pervasive improper arguments and influencing them towards the most severe remaining punishment available.

In discussing SrA Witt's sentence, the Government asserts that "[t]here can be no prejudice when it was a foregone conclusion that Appellant was, at a minimum, going to be sentenced to life without the possibility of parole." (Gov. Br. at 52.) This Court should find this argument unavailing, as confinement for life with the possibility of a parole was an authorized sentence for SrA Witt's offenses. (JA at 253.) And all members agreed during voir dire that life in prison was a "severe punishment." *See* App. Br. at 39. To suggest that a sentence to confinement for life without the possibility of parole was a "foregone conclusion," is analogous to suggesting that the panel had "an inelastic predisposition toward the imposition of a particular punishment based solely on the nature of the crime

or crimes for which [SrA Witt] [was] to be sentenced if found guilty." *Military Judge's Benchbook*, Department of the Army Pamphlet 27-9, at 56 (Feb. 29, 2020).

The members were required to adjudge a sentence based upon the aggravating and mitigating circumstances presented to them, *not* to adjudge a sentence based solely on the fact that SrA Witt had committed serious offenses. While the Government contends that "trial counsel's argument did not sway a single member to vote for death," this Court cannot be so certain that TC's argument did not increase the severity of SrA Witt's sentence. As the Government concedes—after rejecting the death penalty—the panel was left with only two options. (Gov. Br. at 52.) In discussing these two options, the Government immediately discounts confinement for life as a viable option, stating "Appellant's crimes were so brutal and senseless, and the chance of future dangerous was sufficiently strong, the members would have had to 'abdicate their common sense' to rationally think the possibility of parole was appropriate." (Gov. Br. at 54.) (quoting *Dunlop v. United States*, 165 U.S. 486, 500 (1897).) Yet, the military judge instructed the members on 26 mitigating factors—many of

which were not presented[21,22] or would not have existed (or existed to the same extent) at the time of his first hearing[23] when his panel adjudged the death penalty. (JA at 753-55.) Notably, during his rehearing, SrA Witt introduced significant mitigating evidence of his family history of mental health issues, his own mental health issues, his behavior changes after his motorcycle accident, his rehabilitative potential, and evidence demonstrating that he was *not* a risk of future violence. (*See* App. Br. 4-8, 36-39.) To suggest that these mitigating factors would *never* lead the panel to recommend SrA Witt be given a chance at the mere possibility of parole implies that mitigating factors have little role in capital sentencing, and that these factors would never influence a panel's sentence. The fact that the Air Force's capital sentencing proceedings specifically include mitigating factors demonstrates this is not the case.

These mitigating factors outnumbered the Government's aggravating evidence 26 to 11. (JA at 753-55.) Yet, the panel adjudged the worse of the two

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[21] *See United States v. Witt*, 72 M.J. 727, 756 (A.F. Ct. Crim. App. 2013) (finding defense counsel ineffective for "(1) fail[ing] to investigate evidence deriving from the appellant's hospitalization and subsequent behavioral changes after a motorcycle accident four months prior to the commission of the murders;" (2) "fail[ing] to investigate and obtain mental health records pertaining to the hospitalization of the appellant's mother at an inpatient mental health facility;" and "(3) "fail[ing] to investigate and develop evidence of remorse through Deputy Sheriff LF.") As a result of these errors, SrA Witt's sentence was set aside. *Id.* at 775.
[22] *See* App. Br. at 37-38 (mitigating factors 5, 6, 7, 8, 9, 14).
[23] *See* App. Br. at 37-39 (mitigating factors 4, 15, 16, 17, 18, 19, 20, 21, 22).

options authorized—confinement for life without the possibility of parole—after TC repeatedly asked them to consider how their sentence would reflect on them personally and professionally and intimated the panel would be personally responsible for any future harm committed by SrA Witt.

Due to the severity and prevalence of TC's improper arguments, the lack of measures taken to cure TC's comments, and the significant mitigating factors present in SrA Witt's case, this Court cannot be confident that he was sentenced on the evidence alone.

WHEREFORE, SrA Witt 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 September 16, 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 6,501 words.

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

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