IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Specialist (E-4) **BRENDEN C. DOYLE,** United States Army, Appellant	**BRIEF ON BEHALF OF APPELLEE** Docket No. ARMY 20230116 Tried at Fort Polk,[1] Louisiana, on 8 November 2022 and 9 March 2023, before a general court-martial convened by the Commander, JRTC and Fort Polk, Louisiana, Lieutenant Colonel Scott Z. Hughes, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error[2]

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY PERMITTING A WITNESS TO TESTIFY ON MATTERS IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSITITUTION AND R.C.M. 1001 AT SENTECNING AS AGGRAVATION EVIDENCE.

II. WHETHER THE GOVERNMENT MADE IMPROPER ARGUMENT AT SENTENCING.

[1] Fort Johnson.

[2] Appellant raises issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982); however, they lack merit. If this court determines the issues are meritorious, the government requests an opportunity to submit supplemental pleadings.

Statement of the Case

On 9 March 2023, a military judge, sitting as a general court-martial, convicted appellant, Specialist [SPC] Brenden C. Doyle [appellant], pursuant to his plea, of one specification of domestic violence in violation of Article 128b, Uniform Code of Military Justice, 10 U.S.C. § 928b [UCMJ]. (R. at 90). The military judge sentenced appellant to reduction to the grade of E-1, confinement for fifty-five months, and a bad-conduct discharge. (R. at 176; Statement of Trial Results).

On 20 April 2023, the convening authority took no action on the finding and sentence. (Action). On 23 June 2023, the military judge entered judgment of the court. (Judgment).

I

I. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY PERMITTING A WITNESS TO TESTIFY ON MATTERS IN VIOLATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSITITUTION AND R.C.M. 1001 AT SENTECNING AS AGGRAVATION EVIDENCE.

Statement of Facts

A. Background and crime.

Appellant and Ms. [redacted] married in June 2021 shortly after she learned she was pregnant with [redacted], their son. (Pros. Ex. 1). When Ms. [redacted] met appellant, she was already the mother of a young daughter, [redacted]. (Pros. Ex. 1).

In June 2021, appellant deployed to Afghanistan. (Pros. Ex. 1, p. 1, 2). He returned from Afghanistan by mid-October 2021. (Pros. Ex. 1, p. 2). Ms. [redacted] gave birth to [redacted] on [redacted] October 2021. (Pros. Ex. 1, p. 2).

Around November 2021, appellant conducted internet searches for "when will you know if your baby has shaken baby syndrome," "shaken baby syndrome symptoms," and "what can happen to a baby if they get shaken too much." (Pros. Ex. 4, R. at 103-108).

On 25 February 2022, appellant cared for [redacted] on the couch in the downstairs portion of their house. (R. at 34). [redacted] was approximately four months old at the time. (R. at 34). [redacted] started to cry, and appellant violently grabbed his son by the torso with his hands and started shaking him. (R. at 34, Pros. Ex. 1, p. 2). He then flipped [redacted] over, threw a towel on the couch, and stepped quickly to a trash can to dispose a diaper. (Pros. Ex. 1, p. 2).

Ms. [redacted] sleeping in the upstairs of the house, awoke to the sound of her son screaming. (Pros. Ex. 1, p. 2). She received a blink notification on her phone, opened the application, and saw of a video of appellant violently gripping and shaking [redacted] (Pros. Ex. 1, p. 2). She ran downstairs to confront appellant, who denied abusing his son and claimed he was using a technique to help [redacted] pass gas. (Pros. Ex. 1, p. 2).

B. Defense objection at sentencing.

During the government's sentencing case, the trial counsel attempted to elicit testimony about appellant's November internet searches concerning shaken baby syndrome and its consequences. (R. at 103). The defense objected to this evidence, initially arguing that it lacked relevance and was not part of the stipulation of fact. (R. at 103). The government counsel argued that the evidence demonstrated that appellant "looked into this. He knows how bad it is, but yet he's still doing it in the video." (R. at 104). The defense further argued that whatever search appellant made in November 2021 did not have a relevant connection to the events of February 2022 and that it was too remote in time to satisfy Rule for Court-Martial [R.C.M.] 1001. (R. at 107). The military judge overruled the objection and allowed the government to introduce Pros. Ex. 4 and the testimony of Mrs. [redacted] concerning the November internet searches. (R. at 107).

Standard of Review

"This court reviews "a military judge's decision to admit evidence for an abuse of discretion."" *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2020)(quoting *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)). "A military judge abuses his discretion when he admits evidence based on an erroneous view of the law." *Id.* (quoting *United States v. Barker*, 77 M.J. 377, 384 (C.A.A.F. 2018)).

Law and Argument

The military judge did not abuse his discretion when he admitted appellant's internet search history from November 2021 because the evidence clearly falls within R.C.M. 1001(b) and the probative value of the evidence was not outweighed by the danger of unfair prejudice or other factors under Military Rule of Evidence [Mil. R. Evid] 403.

A. The evidence was proper aggravation evidence.

Rule for Court-Martial 1001(b)(4) authorizes the prosecution to introduce aggravation evidence —that is, evidence "to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). This type of evidence "assists the sentencing authority to place the offense "in context, including the facts and circumstances surrounding the offense."" *United States v. Halfacre*, 80 M.J. 656, 660 (N. Ct. Crim. App. 2020)(quoting *United States v. McCrary*, 2013 CCA LEXIS 387 (A.F. Ct. Crim. App. May 7, 2013) (unpublished op.)); *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982); *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001); *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006). The evidence must not be "so attenuated from the offense" to be "unfairly prejudicial, irrelevant, or merely inflammatory." *Halfacre*, 80 M.J. at 660.

As the Navy court in *Halfacre* highlighted, evidence in aggravation may be "some course of conduct" acts by the accused. *Halfacre*, 80 M.J. at 660. Courts

have allowed the government to introduce evidence of uncharged misconduct of similar circumstances because they detail the depth of an appellant's crimes. *United States v. Mullens*, 29 M.J. at 400-401 (finding that the stipulated evidence was appropriate sentencing aggravation). For example, in *Shupe*, the Court of Appeals for the Armed Forces [CAAF] reviewed aggravation evidence in a drug conspiracy and found it properly admitted. *United States v. Shupe*, 36 M.J. 431, 436-437 (C.A.A.F. 1993). Even though the court specifically found that the evidence was not part of the conspiracy to which the *Shupe* appellant pled guilty, the court nevertheless determined that the aggravation evidence was admissible because it showed it was not an isolated incident but "was part of an extensive and continuing scheme to introduce and sell LSD to numerous buyers." *Id.* at 436.

As these cases demonstrate, the military judge did not err when he allowed the government to introduce appellant's search history. The facts here clearly fall within the scope of R.C.M 1001(b)(4) and caselaw. As the trial counsel noted during the court-martial, the searches went to appellant's state of mind— "He looked up what happens if you shake a baby," and understood the seriousness of the act. (R. at 106). It was not an isolated moment where appellant lost his temper and did not understand the seriousness of his actions. He understood the seriousness of his actions because he looked it up prior. It places the crime in the context of appellant's knowledge. Appellant's minimalization and claim that he did

not remember his actions denied the court any context into the offense; appellant's internet search history demonstrates his knowledge and understanding of the offense and aggravates the circumstances surrounding his crime. The military judge properly admitted the evidence.

B. The probative value of the evidence was not outweighed by the danger of unfair prejudice.

While the military judge did not conduct a Mil. R. Evid. 403 balancing test on the record, this court should still find the evidence admissible. "Sentencing evidence, like all other evidence, is subject to the balancing test of Mil. R. Evid. 403." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). "When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion."" *Id*. (quoting *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1998). When the military judge does not conduct the balancing test, the court examines the record and conducts the test itself. *Manns*, 64 M.J. at 166. However, the absence on the record of the balancing test, by itself, does not provide a basis for error. *United States v. St. Jean*, 83 M.J. 109, 113 (CA.A.F. 2023)(citing *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012)).

Under the balancing test, evidence is only excluded if the "probative value is substantially outweighed by a danger of . . . unfair prejudice, confusion of the issues, misleading the members, undue delay, wasting time, or needlessly

presenting cumulative evidence." Mil. R. Evid. 403. Here, in a guilty plea before a military judge alone, the danger of the trier of fact confusing the issuing or being misled is minimal. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citing *United States v. Mason,* 45 M.J. 483, 484 (C.A.A.F. 1997)).

The military judge properly admitted the evidence as aggravation for appellant's crimes. Moreover, appellant's arguments that the evidence is improper "propensity evidence" misunderstands the prohibition on propensity evidence. (Appellant's Br. 15). The government may not use propensity evidence to prove an accused's guilt during the findings phase of a trial—Mil. R. Evid. 404(a)(1) prohibits the use of "a person's character or character trait . . . to prove that on a particular occasion a person acted in accordance with the character or trait." (Mil. R. Evid. 404(a)(1)). The government did not use the evidence to "prove" appellant violently shook his child on or about 25 February 2021; appellant admitted to that crime. The government properly used the evidence to show the aggravation of the offense: appellant understood the serious consequences of shaken baby syndrome and chose to violently abuse his child.

C. The evidence did not violate appellant's First Amendment rights.

Finally, appellant argues that the use of his search history violates his rights under the First Amendment of the United States Constitution. (Appellant's Br. 16-19). This court should reject this argument. The cases appellant cites—*Stanley v. Georgia, United States v. Alvarez-Nunez,* and *Dawson v. Delaware*—do not stand for the proposition that all internet searches are Constitutionally protected. Because the government used the searches for a legitimate purpose, they are not protected.

Stanley v. Georgia involves the possession of obscene material in violation of Georgia law. 394 U.S. 557, 558 (1969). The Court held that the "First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime." *Id*. at 568. The case does not prohibit the prosecution's use of otherwise Constitutionally protected material when that material is relevant to the government's case in a criminal trial.

In *Dawson v. Delaware,* the Supreme Court held that the introduction in a state capital sentencing proceeding—where the court convicted the defendant of murder during a prison escape—of the defendant's association with the Aryan Brotherhood violated a defendant's rights under the First Amendment. 503 U.S. 159, 168 (1992). Importantly, the Court specifically stated that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id*. at 165. In *Dawson,* the prosecution

erred by failing to demonstrate a relevant nexus between the Constitutionally protected association and the sentencing case—for example, that his association represented a danger to society. *Id*. at 166. A prosecutor cannot smear a defendant during sentencing by injecting irrelevant associations into the proceeding. There must be a logical nexus to the sentencing evidence and the sentencing factors.

Appellant cites *United States v. Alvarez-Nunez*, a Third Circuit case involving the improper consideration that the defendant was a member of a music group that promoted "violence, drugs, and the use of weapons and violence" and that the group was "associated with murders, drug sales and smuggling and weapons trafficking." 828 F.3d 52, 54 (3rd Cir. 2016). Citing *Dawson*, the Third Circuit noted that "[w]here protected conduct has no bearing on either the crime committed or on any of the relevant sentencing factors, consideration of that conduct infringes a defendant's First Amendment rights." *Id*. at 56. The Third Circuit noted that the *Alvarez-Nunez* district court erred by concluding that "the lyrics and music videos comprised "objective evidence . . . that this [crime] was not a mistake," that they reflected that the defendant had a history of involvement "with firearms, with violence, [and] with murders," and that they made it likely that the defendant possessed the gun for nefarious purposes." *Id*. at 57 (quotations and brackets in original). The court found that the district court relied on "naked inferences" rather than extrinsic evidence when it made this determination. *Id.*

Taken together, these cases do not support appellant's argument that his First Amendment rights were violated. These cases support the government's use of his internet search history to demonstrate his knowledge and understanding of shaken baby syndrome. The evidence properly aggravates his crime by demonstrating that appellant knew of the severe risk he took on his child's life when he violently attacked him.

This court should grant no relief.

II.WHETHER THE GOVERNMENT MADE IMPROPER ARGUMENT AT SENTENCING.

Facts Specific to This Assignment of Error

Shortly into his sentencing argument, the trial counsel stated, "Thank God, thank higher power, thank luck that we don't have any known long term injuries to [redacted]." (R. at 164). Towards the end of his argument, the trial counsel stated, "it is by the grace of God alone that [redacted] is with us today." (R. at 170). During his argument, trial counsel misstated a portion of Ms. MJ's testimony, arguing that [redacted] struck his head into the wall and "giggle about it," even though she never mentioned laughter or giggling when she testified about any changes she observed in her son since the abuse. (R. at 112, 170). The trial counsel argued in aggravation that appellant "left Ms. [redacted] without a husband. He left his son, [redacted], without a father, and he left them both, along with [redacted] with a lifetime of grief and

challenges to overcome." (R. at 169). The trial counsel's argument covered approximately seven full pages of transcript (R. at 163-70). The defense did not object during the government's arguments. Following arguments, the military judge stated, "the court did not consider any [in]appropriate argument or inadmissible evidence." (R. at 175).[3]

Standard of Review

This court reviews "prosecutorial misconduct and improper argument de novo." *United States v. Vorhees*, 75 M.J. 5, 9 (C.A.A.F. 2019) (citing *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018)). If no objection is made, the court reviews for plain error. *Id*. Under plain error, the burden is on the appellant to establish prejudice. *Id*. (citing *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)).

Law and Argument

"Prosecutorial misconduct occurs when trial counsel '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." *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014) (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). "Prosecutorial misconduct can be generally defined as

[3] The trial transcript uses the word "appropriate." A review of the audio indicates the military judge said he would not consider *inappropriate* argument.

action or inaction by a prosecutor in violation of some legal norm or standard." *Andrews*, 77 M.J. at 402 (citing *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). "Prosecutors have a 'duty to refrain from improper methods calculated to produce a wrongful conviction.'" *Id*. (quoting *Berger v. United States*, 295 U.S 78, 88 (1935)).

"In analyzing allegations of prosecutorial misconduct, 'courts should gauge the overall effect of counsel's conduct on the trial, and not counsel's personal blameworthiness.'" *United States v. Rodriguez-Rivera*, 63 M.J. 372, 378 (C.A.A.F. 2006) (quoting *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003)). It is not the "number of legal norms violated but the impact of those violations on the trial which determines the appropriate remedy for prosecutorial misconduct." *Fletcher*, 62 M.J. at 184 (quoting *Meek*, 44 M.J. at 6). The test for prosecutorial misconduct is (1) whether there has been "action or inaction by a prosecutor in violation of some legal norm or standard," and (2) whether there is prejudice. *Hornback*, 73 M.J. at 150.

The legal test for improper argument is 1) whether the argument was erroneous and (2) whether it materially prejudiced the substantial rights of the accused." *United States v. Baer,* 53 M.J. 235, 237 (C.A.A.F. 2000). When reviewing arguments of trial counsel, the arguments "must be viewed within the context of the entire court-martial. The focus of [the court's] inquiry should not be

on words in isolation, but on the argument as 'viewed in context.'" *Baer,* 53 M.J. at 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)). The presence of prosecutorial misconduct by erroneous argument does not necessarily mandate dismissal of charges or a rehearing. *Hornback*, 73 M.J. at 160. "If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." *Dunlap v. United States*, 165 U.S. 486, 498 (1897). The trial counsel is a zealous advocate for the government and may "argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *United States v. Halpin*, 71 M.J. 477, 479 (C.A.A.F. 2012) (quoting *Baer*, 53 M.J. at 237).

The CAAF has used a three-factor test in assessing the cumulative impact of prosecutorial misconduct on an accused's substantial rights and the integrity of the trial. *Fletcher*, 62 M.J. at 184. In assessing the prejudice from prosecutorial misconduct, courts consider (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *Fletcher*, 62 M.J. at 184. "In other words, prosecutorial misconduct by a trial counsel will require reversal when the trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the members

convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184.

When the defense fails to object to improper argument, the court reviews for plain error. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021). To prove plain error resulted from the trial counsel's improper argument during the sentencing proceeding, Appellant has the burden of establishing "(1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011)).

While a court-martial has "broad discretion to adjudicate the sentence . . . sentencing must comply with due process and a judge may not base a sentence on impermissible considerations such as race, religion, or gender." *United States v. Russell*, 76 M.J. 855, 859 (Army Ct. Crim. App. 2017)(citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977)). Moreover, "an appeal to religious impulses or beliefs as an independent source of higher law calling for a particular result would constitute improper argument." *United States v. Jinetecabarcas*, ARMY 20130444, 2015 CCA LEXIS 122, at 9-10 (Army Ct. Crim. App. 27 March 2015) (mem. op.) (quoting *United States v. Kirk*, 41 M.J. 529, 533 (C.G. Ct. Crim. App. 1994)).

Here, appellant argues the prosecutor made the following errors in argument: (1) invoking a higher power by stating "by the grace of God," and thanking God

that "we don't have any known long term injuries," (Appellant's Br. 25); (2) the prosecutor mischaracterized the harm to [redacted] and mischaracterized Ms. [redacted]'s testimony (Appellant's Br. 25-26); and trial counsel improperly insinuated appellant would offend again (Appellant's Br. at 27). To the extent that these arguments were improper, appellant's failure to object forfeited the error and this court should determine any error was not plain or obvious. Even if the court finds plain error, it should determine the arguments did not materially prejudice the substantial rights of the accused. Each argument is discussed in more detail below.

A. Trial Counsel's allusions to God, while potentially improper, did not prejudice appellant.

Trial counsel made potentially improper argument when he twice cited a higher power that "saved" [redacted] from severe injury or death. Taken in context, his comments did not ask the military judge to consider religious impulses or beliefs, but rather alluded to the probability that appellant could have killed or severely injured his son. While trial counsel should not have invoked a higher power during the proceedings, his comment on the potential severity of injury is a proper comment on the evidence. Even if the court determines trial counsel erred in his argument, this court should determine this error was not severe, was not plain, and did not materially prejudice the substantial rights of appellant.

B. Trial Counsel argued facts not in evidence, but the error did not materially prejudice the substantial rights of the appellant.

Several facts asserted by trial counsel do not appear in the record. As noted in appellant's brief, Ms. [redacted] never testified that [redacted] "giggled" when he struck his head against the wall. (Appellant's Br. 26). She did testify, and trial counsel argued, that when he throws temper tantrums, he "repeatedly hit his head on very hard surfaces." (R. at 112, 170; Appellant's Br. 26). Trial counsel continued, admitting "we can't definitively pin that on the accused." (R. at 170).

The government further concurs that trial counsel's argument that appellant caused harm to Ms. [redacted] and his children by leaving them without a husband and father was not proper aggravation evidence. (Appellant's Br. 26). This argument extends beyond the aggravating circumstances directly relating to or resulting from the offenses and is directed at the government's action following the offenses. The trial counsel erred by making this argument.

C. Trial Counsel's argument fairly commented on the evidence.

The remainder of appellant's claims of prosecutorial misconduct are clearly within the "bounds of that propriety and fairness" required of the trial counsel and reflect the trial counsel's fair comment on the evidence within the sentencing factors of R.C.M. 1002(f). Appellant attacks the argument based off the prosecutor's interpretation of Pros. Ex. 6, the Mayo Clinic report on shaken baby syndrome. (Appellant's Br. 20-21). Appellant alleges that trial counsel's argument that "[a]busing a child this way could lead to permanent brain damage and it can

lead to death" is not supported by the record—that there is no evidence that [redacted] suffered whiplash or was subject to deadly force. (Appellant's Br. 25-26). Trial counsel did not allege appellant suffered whiplash; he truthfully stated, based off the evidence within the record, that this was a distinct possibility when assaulting a child in the manner appellant attacked [redacted]. The video, introduced in Pros. Ex. 5, shows the extreme violence of appellant. This was a fair comment on the facts before the court-martial.

Appellant further claims that trial counsel should not have suggested appellant might offend again without a severe sentence. (Appellant's Br. 27). This is not prosecutorial misconduct but a fair comment on the evidence; the evidence supported the fact that appellant used his search engine to research shaken baby syndrome months prior to the charged incident. The knowledge gained from his internet searches did not prevent him from attacking his own child. Trial counsel fairly argued that only a severe sentence would prevent a reoccurrence of this incident. The trial counsel was within the bounds of propriety when he argued for a severe sentence.

D. Any error was not plain and obvious; any errors did not materially prejudice appellant's substantial rights.

This court should affirm appellant's sentence because any errors in the prosecutor's argument did not materially prejudice appellant's substantial rights.

First, the errors are neither plain nor obvious. The prosecutor's references to God appear to be a colloquialism for luck, not a request for the court to consider religious factors into its decision. The prosecutor's misstatements of Ms. [redacted]'s testimony are minor in light of the entire record; Defense counsel's failure to object to the argument indicates its minimal impact on the trial proceedings.

Second, the misconduct was not severe. In nearly seven transcript pages of argument, the prosecutor's errors encompass only a couple of lines. There are 176 pages within the record, a prosecution exhibit that includes a video of appellant violently shaking his son, a stipulation of fact where appellant admitted to violently shaking his son, and evidence of the potential severity of his crimes. Considering the entire record, the prosecutor's erroneous statements during argument did not affect the case.

Third, the argument occurred before a military judge who explicated stated that he would not consider inappropriate arguments. (R. at 175). "As the sentencing authority, a military judge is presumed to know the law and apply it correctly, absent clear evidence to the contrary." *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009) (citing *United States v. Bridges*, M.J. 241, 248 (C.A.A.F. 2008)). There is no indication that the military judge did not know or follow the law. The military judge's statement that he would not consider inappropriate argument should be determinative of this court's decision.

The evidence supported a harsh sentence for appellant. The video in Pros. Ex. 5 is difficult to watch—appellant appears to use his full upper body strength to violently assault a four-month-old child. As the prosecutor aptly noted, anything further and this would have been charged as a different crime. (R. at 167). Additionally, the sentence was within the range for which the appellant and his counsel bargained. The appellant's current claim that the evidence does not support the bargained-for sentence is a non sequitur.

Moreover, a trier of fact may consider the mendacity of the accused when considering an appropriate punishment—a factor trial counsel argued. (R. at 166). In *United States v. Warren*, the Court of Military Appeals noted that "a defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." 13 M.J. 278, 282 (C.M.A. 1982). Here, trial counsel argued that the appellant's statements immediately after his wife confronted him with the video, his statements during the providence inquiry, and his statements during the unsworn testimony demonstrate his mendacious minimization of his actions and lack of rehabilitation potential. This is a valid argument by trial counsel and a factor the military judge could consider when deciding the sentence.

The military judge sentenced appellant harshly because his crimes deserved a harsh punishment, irrespective of any improper argument by the trial counsel. The military judge stated he did not consider inadmissible evidence or improper argument. This court should affirm the sentence imposed by the military judge.

Conclusion

WHEREFORE, the Government respectfully requests that this honorable court affirm the findings and sentence.

[redacted]

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