

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES

v.

Appellee

**MOTION FOR LEAVE TO  
FILE SUPPLEMENTAL  
CITATIONS OF AUTHORITY**

Sergeant (E-5)

**TYRESE S. CAMPBELL**

United States Army

Appellant

Docket No. ARMY 20230030

Tried at Fort Bliss, Texas, on 3  
October 2022 and 18–22 January  
2023, before a general court-  
martial convened by the  
Commander, 1st Armored Division  
and Fort Bliss, Colonel Robert L.  
Shuck, Military Judge, presiding.

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

Pursuant to Rules 23.4 and 25.5(a) of this honorable court’s Rules of  
Appellate Procedure, the undersigned appellate government counsel requests leave  
and files the instant motion for supplemental citations of authority for the  
following reasons:

1. Appellant and the government filed their briefs on 25 January 2024 and 15  
May 2024, respectively.
2. On 29 May 2024, appellant filed his Reply Brief and moved this court to  
grant oral argument.
3. On 6 December 2024, this court issued a Notice of Hearing, scheduling  
oral argument on 30 January 2024. The court granted appellant’s Assignments of  
Error II and III as Granted Issues I and II, respectively.

4. On 1 August 2024, after the government’s submission of its brief, the Court of Appeals for the Armed Forces (CAAF) issued *United States v. Leipart*, \_\_ M.J. \_\_\_, 2024 CCA LEXIS 439 (C.A.A.F. 2024), which is relevant to Granted Issue II (improper argument):

a. *Leipart* is a mixed plea case wherein the CAAF found trial counsel committed a clear error when he used the appellant’s guilty plea and providence inquiry to bolster the government’s argument that he was guilty of the contested sexual offenses. \_\_ M.J. \_\_\_, 2024 CCA LEXIS 439 (quoting *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017)) (“Improper argument is one facet of prosecutorial misconduct.”). Despite this error of a constitutional magnitude, the CAAF found the error was harmless beyond a reasonable doubt in view of the presumption that the military judge was able to distinguish between proper and improper argument. *Id.*

b. *Leipart* relied upon *Sewell*, 76 M.J. at 18, which in turn, relied upon *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014)). *Sewell*, a contested case, provides, “[R]eversal is warranted only ‘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.’” 76 M.J. at 18. Likewise, *Hornback* supports the proposition that the presence of prosecutorial misconduct by erroneous argument does not necessarily mandate dismissal of

charges or a rehearing. 73 M.J. at 160. These cases are relevant to whether trial counsel's argument materially prejudiced the substantial rights of appellant.

5. In preparation for oral argument, through discussions with new supervisory counsel, and additional research, undersigned counsel discovered relevant law that were not set forth in appellee's brief.

a. With respect to Granted Issue I (residual hearsay), the following cases support the government's position that (i) appellant failed to renew and instead affirmatively waived his objection to the admission of the 911 call and bodycam footage and (ii) there is no good cause to overlook that waiver:

i. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2019) explains that waiver is the intentional relinquishment or abandonment of a known right. The Court found appellant affirmatively declining to object to the military judge's instructions was waiver.

ii. *United States v. Gutierrez*, 64 M.J. 374, 377–78 (C.A.A.F. 2007) found waiver where appellant affirmatively declined to object to the military judge's instructions.

iii. *United States v. Ahern*, 76 M.J. 194 (2017) found affirmative waiver where appellant stated "No, Your Honor" when the military judge asked if he objected to a stipulation of the expected testimony of an expert witness.

iv. *United States v. Swift*, 76 M.J. 210, 217–18 (C.A.A.F. 2017) found “no objection” constitutes an affirmative waiver of the right or admission at issue.

v. *United States v. Campos*, 67 M.J. 330, 332–33 (C.A.A.F. 2009) found affirmative waiver where appellant stated, “No objection,” to the admission of testimony.

vi. *United States v. Massey*, 27 M.J. 371 (C.M.A. 1989) found a failure to renew a pre-trial motion for a sanity board did not constitute a waiver. This is relevant but distinguishable from the instant case where the military judge issued a conditional evidentiary ruling and then at trial, appellant affirmatively waived any objection to their admission.

vii. *United States v. Williams*, 77 M.J. 459 (C.A.A.F. 2018) (citing *United States v. Guardado*, 77 M.J. 90, 93 (C.A.A.F. 2017)) held that as appellant’s motion in limine to preclude propensity instructions was not yet ripe and he did not renew his objection when afforded the opportunity to do so at trial, the court reviewed for plain error. This is relevant but distinguishable from the instant case because the appellant in *Williams* did not affirmatively waive.

viii. *United States v. Ciulla*, 32 M.J. 186 (C.A.A.F. 1991) found waiver where the military judge’s ruling on a relevance objection to a line of questioning was tentative and the obligation to renew the objection and seek clarification was incumbent upon defense.

ix. *United States v. Boswell*, 36 M.J. 807 (A.C.M.R. 1993) found waiver where the military judge’s ruling on an impeachment witness production request was tentative and defense failed to renew the request.

x. *United States v. Conley*, 78 M.J. 747, 753 (Army Ct. Crim. App. 2019) asserting that where the court finds “no evidence of impropriety, government overreach or excess, or other matter that might weigh in favor of noticing a waived issue,” relief is not warranted.

xi. *United States v. Ramirez*, ARMY 20210376, 2022 CCA LEXIS 667, \*18 (Army Ct. Crim. App. 2022) explaining the court may overlook waiver only with respect to the sentence under the amended version of Article 66, UCMJ (2021).

xii. *United States v. Olson*, ARMY 20190267, 2021 CCA LEXIS 160, \*10–11 (Army Crim. App. 1 Apr 2021) recalling the court’s power to overlook waiver under the “should be approved” clause of Article 66, UCMJ (2019) was “more likely to occur only in those cases which ‘have disadvantaged the accused in a manner that the CCA determines needs correction,’ or a court-martial in which ‘the perception of unfairness in the trial may have the actual effect of undermining good order and discipline.’”

b. With respect to Granted Issue II, the following cases address the standard of review and support the government’s position that the military judge adequately cured trial counsel’s remarks in closing:

i. *United States v. Hasan*, 84 M.J. 151 (C.A.A.F. 2024), considering an improper sentencing argument, provides that in those instances where a clear or obvious error rises to the level of a constitutional violation, the burden shifts to the government to “show that the error was harmless beyond a reasonable doubt.”

ii. *United States v. Fletcher*, 62 M.J. 175, 184–85 (C.A.A.F. 2005) discusses how the court should assess prejudice. It puts forth a 3-prong balancing test: “(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.” Moreover, indicators of severity include the number of instances of misconduct compared to the overall length of the argument; whether the misconduct was limited; the length of the trial; and whether counsel abided by any rulings from the military judge.

iii. *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger*, 295 U.S. at 88) explains the appropriate remedy for prosecutorial misconduct depends on the impact of those violations.

6. The government may rely upon the abovementioned cases at argument.

## CONCLUSION

WHEREFORE, the United States prays this honorable court grant the instant motion.

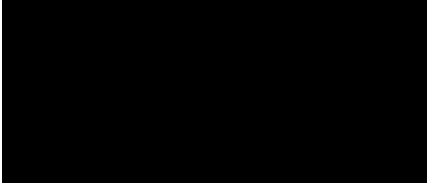
MOTION FOR LEAVE TO FILE  
SUPPLEMENTAL CITATIONS  
OF AUTHORITY

Panel No. 4

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_



Vy T. Nguyen  
CPT, JA  
Appellate Attorney  
Government Appellate Division

**CERTIFICATE OF SERVICE, U S v. CAMPBELL (20230030)**

I certify that a copy of the foregoing was sent via electronic submission to  
the Defense Appellate Division at [REDACTED]

[REDACTED] on the 22nd day of January, 2025.

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