No. _____

IN THE

Supreme Court of the United States

CHARLES C. HORNBACK,
PRIVATE,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

David C. Dziengowski
LT, JAG Corps, U.S. Navy
Counsel of Record
Ryan C. Mattina
LCDR, JAG Corps, U.S. Navy
1254 Charles Morris Street, SE
Washington, D.C. 20374
(202) 685-7292

June 23, 2014

QUESTION PRESENTED

The prosecutor here "repeatedly and persistently elicited improper testimony, despite repeated sustained objections as well as admonition and instruction" from the trial judge. *United States v. Hornback*, 73 M.J. 155, 160 (C.A.A.F. 2014). Put simply, "[t]he prosecutorial misconduct . . . was sustained and severe." *Id.* at 160. The prosecutor "attempted to elicit improper testimony from nearly every witness called during the Government's case-in-chief, and made arguably improper argument during her closing argument. She repeatedly appeared unable to either understand or abide by the . . . judge's rulings and instruction during the two-and-a-half day trial on the merits." *Id.* Yet the judge "issued repeated curative instructions. . . ." *Id.* at 161. And a sharply divided U.S. Court of Appeals for the Armed Forces affirmed.

The question presented is:

When a prosecutor commits persistent and severe misconduct, are a judge's curative instructions insufficient to neutralize the misconduct (as the Eleventh Circuit has held) or do the instructions remain an effective antidote (as the U.S. Court of Appeals for the Armed Forces has held)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

United States Courts of Appeals

United States Courts of Criminal Appeals

United States Boards of Review

State Supreme Courts

Statutes

Rules of Evidence

Rules for Courts-Martial

Supreme Court of the United States Rules

Miscellaneous Authority

PETITION FOR A WRIT OF CERTIORARI

Private Charles C. Hornback, United States Marine Corps, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Armed Forces appears at pages 1a through 29a of the appendix to this petition. It is reported at 73 M.J. 155. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals appears at pages 29a through 40a of appendix. It is available at 2013 CCA LEXIS 114.

JURISDICTION

The United States Court of Appeals for the Armed Forces issued its decision on March 6, 2014. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend V.

INTRODUCTION

Private Hornback's case provides this honorable Court with an opportunity to settle a split in the United States Courts of Appeals. The fault line centers on a fundamental question: can persistent and severe prosecutorial misconduct be cured by a trial judge's instructions? If it can, then admittedly, Private Hornback loses this case. But if the Eleventh Circuit's approach is correct, then no court should rely on the presumption that jurors follow a judge's instructions when the misconduct pervades an entire trial. Given its gravity, this important question should be answered by this honorable Court. For these reasons and more, this Court should grant this Petition.

STATEMENT OF THE CASE

1. The trial judge grew tired of the prosecutor's repeated, improper inquiries. He admonished her:

> *I'm tired of having the members being exposed to basically character evidence that's not admissible.* I mean, you can't – I just want to reiterate to you, you can't present evidence that the accused is a druggy; therefore, he probably used drugs. You need to present evidence that he specifically used drugs on a certain day and time. And a specific drug. Not that he's a drug abuser generally and so you should convict him of using drugs. You can't do that . . . . You could do that at an ad[ministrative] board. *You can't do that*

in federal court.

App., *infra*, 10a, 53a (emphasis added). During trial on the merits and during sentencing, the prosecutor argued and made improper witness inquiries that triggered repeated objections, hearings outside the presence of the members, rulings, and admonishment by the trial judge. The summary below attempts to capture the extensive—and agreed upon—misconduct that supports this petition.[1]

2. The United States charged Petitioner with wrongful use of spice, bath salts, and Xanax, signing a false official statement, using provoking speech, communicating threats, solicitation, and larceny. App., *infra*, 2a. In her opening statement, the prosecutor employed the tripartite theme of "[d]ecay, drugs, and dishonesty[.]" App., *infra*, 41a. She stated Petitioner initially "seemed like a good guy." But "in the beginning of 2011 . . . his demeanor started to change and the decay set in." App., *infra*, 41a. As eleven witnesses for the United States took the stand, the prosecutor's focus remained on Petitioner's character. App., *infra*, 3a.

---

[1] During oral argument, the United States conceded the judge intervened fifteen times and called seven Article 39(a) sessions, attempting to neutralize the misconduct. *United States v. Hornback*, USCA Dkt. No. 13-0442/MC, Hr'g Audio 18:18 (C.A.A.F. Jan. 13, 2014), available at http://www.armfor.uscourts.gov/newcaaf/calendar/2014-01.htm. The United States further conceded the prosecutor offended M.R.E 404 on no less than twelve occasions, and committed twenty-two errors in this case. *Id.*

3. Two witnesses testified to start the trial. Then the prosecutor called Lance Corporal (LCpl) Teets.

> Q. [D]id he ever ask you to use drugs with him?
>
> A. Not directly, but in a way where my statement was given to CID, I believe it was. It was an offer or invitation.
>
> Q. Can you explain what the circumstances were?
>
> A. Yes, ma'am.

App., *infra*, 41a. The defense immediately objected. Under Article 39(a), UCMJ, the judge excused the members and held a hearing outside their presence. He then asked the prosecutor, "[W]as that uncharged misconduct, 404(b), with reference to the spice[?]" App., *infra*, 3a. The prosecutor answered in the negative, proffering the witness forgot what he had told her.

4. The above exchange highlights the first time the defense or the trial judge raised Military Rule of Evidence (M.R.E.) 404.[2] It would not be the last. The prosecutor called her next witness.

5. Gunners Mate Third Class (GM3) Robidart knew Petitioner from her time as his supervisor.

---

[2] Military Rule of Evidence 404 follows Federal Rule of Evidence 404. *Compare* Mil. R. Evid. 404 *with* Fed. R. Evid. 404.

App., *infra*, 4a. She also knew Petitioner's wife. The prosecutor probed that latter relationship.

> Q. Did you ever speak to her about the marriage?
>
> A. Yes, ma'am.
>
> Q. And did she tell you anything about why they were separated?
>
> A. There was [*sic*] a lot of reasons, ma'am.

The defense objected on the basis of relevance and improper character evidence. The judge once again called an Article 39(a) hearing. The prosecutor promised she was not trying to elicit improper character evidence. She said she wanted GM3 Robidart to testify that when Petitioner was using drugs, he was treating his wife poorly. Defense lodged a hearsay objection to that proposed testimony, and the judge sustained it.[3] He then ordered the witness and members to return to the courtroom.

6. The prosecutor resumed her direct examination

---

[3] Soon after this discussion, the prosecutor attempted to introduce erroneous evidence under M.R.E. 804, noting the evidence in another case was "determined to be harmless beyond a reasonable doubt after the appellate court looked at that." App., *infra*, 41a. The judge quickly shot that attempt down. "It is still an error. I am not going to purposely make error in hopes that it is found harmless." App., *infra*, 48a.

of GM3 Robidart:

> Q. Did you interact with [Private Hornback] frequently?
> A. I mean on a supervisor to, you know, that kind of basis, yes.
>
> Q. And while you worked with him in the S-8, did he say anything about drug use?
>
> A. I overheard a couple conversations but nothing that I could say for sure he said anything.
>
> Q. Did he . . . say anything that might make you believe he was speaking from personal experience with drugs?

App., *infra*, 4a. At that point, the judge stopped the prosecutor's examination and called another Article 39(a) hearing. He stated:

> I am concerned that you are getting into what would be 404(b) evidence or other acts evidence. We've got to narrow this down. I don't know what time period we're talking about. The fact that he used drugs before, you know, if he was having conversations about using drugs outside the charged time period I don't want that going to the members. I mean, you can make an objection to that.

App., *infra*, 5a. The judge then instructed the prosecutor to stop this line of inquiry. The

prosecutor quickly replied, "Yes, sir."

7. But the prosecutor continued down the impermissible road. Her tack triggered additional cautionary instruction from the judge:

> [I]f someone is charged with using marijuana, you can't come in here and start eliciting testimony or evidence that, you know, he's been around marijuana or he knows things about marijuana. I mean its [*sic*] impermissible character or other acts evidence. I don't think you've given notice of 404(b).

App., *infra*, 49a. The judge then commented on the weakness of GM3 Robidart's testimony. "It seems like a lot of this [evidence] is filtered through hearsay from other people[,]" he began. "[E]ven the testimony of him knowing about spice is something that she may have overheard in passing[,]" he concluded.[4] App., *infra*, 49a. The judge then allowed the prosecutor to continue her direct examination in the presence of the members.

> Q. GM3 Robidart, you testified that you knew the accused a little bit prior to him working for you. *What was his demeanor like* when he was actually working for you?

---

[4] At one point, the judge empathized with the prosecutor. "I'm sensitive to the situation that you're in where you don't have good evidence to convict the guy of what you believe he did, but that's the American judicial system." App., *infra*, 24a.

> A. Well, do you mean as far as how he acted while he was working for me?
>
> Q. How did he act? What was his personality like?
>
> A. To be honest . . . *very combative* . . . .

App., *infra*, 42a (emphasis added). The defense objected, and the judge—for the third time—ordered the members to leave the courtroom. He then issued the prosecutor a litany of questions to examine her witness.

8. The members returned, and the prosecutor resumed her direct examination of GM3 Robidart. Specifically, she asked her about physical changes in Petitioner.

> Q. And can you please tell the court what those were.
>
> . . . .
>
> A. And there would just be days where he would come in and be very sporadic and – I mean just more angry and that sort of thing. And didn't really – I mean we had a lot of butting heads in the shop.
>
> Q. How is that different from how you knew him before?
>
> A. Because before, ma'am, you know *he*

> *was still that same way a little bit but not as bad.*

App., *infra*, 42a (emphasis added). As he did before, the judge interrupted the prosecutor's direct examination. "Okay. Stop this. Disregard all that testimony. Strike that from your memory as though you've never heard it." App., *infra*, 7a.

9. But the prosecutor persisted.

> Q. Did he just explain his use of any prescription drugs with you?
>
> A. Yes, ma'am.
>
> Q. And what did he say?
>
> A. Just that he would overtake what he was supposed to be taking.
>
> Q. Did he explain why that was?
>
> A. To get the high.

App., *infra*, 42a. The defense objected under M.R.E. 404. The judge sustained the objection and for a second time instructed the members to cast the improper character evidence out of their minds. The judge then called a fourth Article 39(a) hearing.

10. The focus of that Article 39(a) hearing centered on the prosecutor's attempt to elicit testimony on Petitioner's alleged wrongful use of Xanax. As before, the judge defined the evidentiary

limits for the wayward prosecutor:

> That is clearly impermissible evidence. You can't say that he used drugs – this drug to get high. He misused this prescription drug on this occasion in order to get high to prove that he therefore used drugs and other prescription drugs on a separate occasion to get high.

App., *infra*, 8a. Additional instructions followed:

> *My concern here is that you are getting into all these potential bad acts that aren't specific to the charged offenses which would blow this case up.* I mean you just can't have that.
>
> . . . .
>
> You need direct evidence that a crime was committed. You can't put all this evidence out there that, yeah, this guy is kind of into drugs and he likes to – he knows a lot about drugs and he knows a lot about drugs that can't be detected in your system. I mean you have to show evidence that he committed the specific crime on the specific date that you alleged . . . . *Not that he's a bad guy*.

App., *infra*, 8a (emphasis added). The members reentered the courtroom. The prosecutor concluded her examination and called the next witness for the

United States.

11. Lieutenant Commander (LCDR) Terrien served as a flight surgeon for Marine Fighter Attack Squadron (VMFAT) 101. As soon as the prosecutor asked him how he knew Petitioner, the judge called another Article 39(a) hearing. The judge knew LCDR Terrien had treated Petitioner, and he was concerned the prosecutor's questions could invade the psychotherapist-patient privilege guaranteed by M.R.E. 513.[5] So he cautioned the prosecutor, "Do not get into any" psychotherapist-patient privilege. App., *infra*, 51a. Evidently concerned his instruction would not be heeded, the judge—once again—provided the prosecutor with a litany of questions to ask her witness. Once the members returned, the prosecutor asked LCDR Terrien if he prescribed Petitioner anti-anxiety medication during the June/July 2011 timeframe. LCDR Terrien answered in the affirmative, testifying he prescribed him Seroquel. The following examination ensued:

---

[5] Rule 513 provides in pertinent part:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

Mil. R. Evid. 513.

> Q. Can you please describe to the members what Seroquel is?
>
> A. Seroquel is a medication it is classified as an atypical neuroleptic which means it is a newer medicine that is used – *mainly it was developed for psychosis patients with schizophrenia to help them control hallucinations*, *delusions*. . . . It is also used for bipolar conditions manic and depressive bipolar conditions.

App., *infra*, 9a, 42a (emphasis added). The defense immediately objected. The judge sustained the objection and instructed the members to strike the last question and answer from their minds. App., *infra*, 51a.

12. He then called a sixth Article 39(a) hearing outside the presence of the members, stating, "I am concerned that the jury's been tainted by hearing evidence that he was taking schizophrenic medication." App., *infra*, 9a, 42a. The judge asked the prosecutor, "Did we discuss going into . . . what Seroquel is used to treat?" The prosecutor admitted they had not. So the judge gave another curative instruction to the members and the prosecutor called her next witness, LCpl Carrilo.

13. LCpl Carrillo worked with Petitioner and socialized with him after work. He testified to an alleged threat made by Petitioner, but his direct examination produced further inadmissible bad acts. Specifically, the prosecutor raised a conversation

LCpl Carrillo had with Petitioner's wife:

> I was speaking to his wife that day because I was getting my clearance taken care of. And I briefly spoke to her about my motorcycle getting stolen. *She asked me if I thought it was [Petitioner]. Roger that.*

App., *infr*a, 21a (emphasis added). The prosecutor thus introduced an apparent theft by Petitioner. And LCpl Carrillo continued in this vein, further discussing the conversation he had with Petitioner's wife.

> So she said something along the lines of *he is losing it*. I don't feel like I know him anymore. *He is a completely different person.* And I feel like he [is] about to do something really stupid so you need to be careful. *She further asked me if I really thought he stole my bike. And I told her yes.*

App., *infra*, 43a (emphasis added). The defense objected on M.R.E. 404 grounds. The judge sustained the objection, and instructed the members to disregard the testimony about the alleged stolen motorcycle. App., *infra*, 51a-52a. After his testimony concluded, the judge recessed trial for that day.

14. The next day, the United States called Gunnery Sergeant (GySgt) French, its first witness. His testimony generated another M.R.E. 404

objection. Specifically, the prosecutor asked him about his "first reaction" to an alleged threat issued by Petitioner. GySgt French answered:

> My first reaction was with a hundred-plus Marines and sailors working for me, I was, like, wait, what? And when I went into the OIC's office and discussed it with him, they had discussed other information concerning *further NJP's* [*sic*] and that the accused no longer had anything else to lose. *He was at the bottom of the rank structure.*

App., *infra*, 43a (emphasis added). After an M.R.E. 404 objection, the judge once again tried to neutralize the error. He instructed the members, "Don't consider any information regarding the accused's prior record." App., *infra*, 52a.

15. Corporal (Cpl) Morris testified next for the United States. He worked with Petitioner and, significantly, was also his roommate. During her direct examination, the prosecutor launched into another character-based inquiry:

> Q. And what kind of a roommate was he for you?
>
> A. He was a good roommate. It was good times.
>
> Q. And did anything start changing later?
>
> A. Towards the spring, I'd say, *there was*

> *just kind of a drastic change in the way he acted.*
>
> Q. And how is that.

App., *infra*, 44a (emphasis added). Before Cpl Morris could answer, the defense lodged another M.R.E. 404 objection. The judge, once again, sustained the objection. But the prosecutor persisted. She asked, "In specifics, how did things change as a landlord for you?" App., *infra*, 44a. The defense again objected. And for the seventh time, the judge instructed the members to "step out[.]" App., *infra*, 53a.

16. He then cautioned the prosecutor: "Okay. What you can't do is get into a bunch of evidence that the accused is a druggy and, therefore, he probably used some drug at some point. That's not admissible evidence." App., *infra*, 9a. The prosecutor agreed, but then argued her position: "[W]hen people use drugs, there's other indications. It's not just actually the direct evidence of seeing somebody smoking it. . . ." The judge added a qualification to that argument, noting "it would have to be circumstantially related to the time that you charged him with using a specific drug." He asked her what she believed Cpl Morris would say. The prosecutor answered, "I believe he's going to say that he started being late on his rent. He was no longer – he was gone frequently and then would sleep all day." The defense objected to the proposed response based on improper character evidence.

17. Thereafter the judge admonished the prosecutor.

> . . . *I'm tired of having the members being exposed to basically character evidence that's not admissible.* I mean, you can't -- I just want to reiterate to you, you can't present evidence that the accused is a druggy; therefore, he probably used drugs. You need to present evidence that he specifically used drugs on a certain day and time.

App., *infra*, 10a, 53a (emphasis added).

18. The prosecutor probed another impermissible subject area with Cpl Morris. Specifically, she asked a question that revealed Petitioner stopped paying his half of the rent. App., *infra*, 45a. The defense objected, first on M.R.E. 404 grounds, and then on relevance grounds. The judge sustained the objection.

19. Cpl Kelly testified next. He socialized with Petitioner at his apartment. On direct examination, Cpl Kelly testified he found "a glass bowl" a few weeks after Petitioner "was kicked out[.]" This testimony triggered another defense objection under M.R.E. 404. App., *infra*, 24a. The judge sustained the objection. Apparently exasperated, the judge then instructed the prosecutor to "[j]ust lead." App., *infra*, 54a. Cpl Kelly is the final witness worthy of discussion here.

20. On the third day of trial on the merits, the parties delivered their closing arguments. The prosecutor began hers by reiterating her tripartite theme from opening statements: "drugs, decay, and dishonesty." App., *infra*, 46a. She then argued, "*The accused is like a criminal infection that is a plague to the Marine Corps—*" App., *infra*, 11a (emphasis added). The defense immediately objected, and the judge sustained the objection. But as before, the prosecutor persisted in her character-centric argument.

21. She argued, "[T]he accused's life was decaying over the course of that year. *He became that criminal infection*[.]" App., *infra*, 46a (emphasis added). The defense lodged another objection, and the judge again sustained it.

22. The prosecutor then invoked the supposed desires of Petitioner's command, an invocation that ran afoul of Article 37, UCMJ.[6] She argued, "And the command has taken . . . action in the form of these charges before you. The government is confident that you will find him guilty beyond a reasonable doubt." App., *infra*, 11a. At that point, the judge interrupted the prosecutor and instructed the members that "the convening authority is not expecting a certain result in this case." App., *infra*, 54a. The judge then issued a *sua sponte* instruction on character evidence:

---

[6] Article 37, UCMJ, 10 U.S.C. § 837 (2006), prohibits any servicemember from attempting to coerce or unlawfully influence a tribunal.

> Additionally, throughout the course of this trial and even during the closing argument, I sustained several objections to character evidence. You may not consider any evidence that was the subject of a sustained objection for any purpose, and you may not consider -- those objections related to character evidence, you may not conclude based on any of that evidence or arguments of counsel that the accused is a bad person or has general criminal tendencies and that he, therefore, committed the offenses charged. You need to base your determination on the admitted evidence in this case and determine if the offenses were committed beyond a reasonable doubt at the specific times and in the specific manners in which they were alleged.
>
> Can all the members follow that instruction?
>
> Affirmative response from all members.

App., *infra*, 12a. Notably, this instruction did not cite specific examples of objectionable character evidence. It also failed to cite any objectionable examples of irrelevant evidence, hearsay evidence, and evidence related to psychotherapist-patient privilege.

23. During rebuttal argument, the prosecutor

injected her personal opinion and vouched for evidence. Arguing Petitioner failed to make a mistake when he signed an official Navy form, she quipped, "This is probably the most simple DoD form that I have ever seen." App., *infra*, 46a. She also baldly insisted her witnesses were truthful during the trial.

24. After securing convictions for wrongful use of spice, false official statement, and larceny, App., *infra*, 2a, the prosecutor's abuses continued into the sentencing phase of the case. During her sentencing argument, for example, the prosecutor attempted to argue evidence of an offense for which Petitioner was not convicted.

> Members, we are here now because you have convicted this Marine of smoking Spice and also of stealing from the U.S. Government. Now, the Spice conviction you found to be true beyond a reasonable doubt, and with that, came the testimonies of two individuals who both heard him say he was using Spice at work. What was he doing at work? F-18 mechanic –

App., *infra*, 47a (emphasis added). Defense counsel objected, and the judge, for a final time, sustained his objection. He subsequently issued another cautionary instruction to the prosecutor.

> You have to argue about the crime that he was convicted of. He was convicted of smoking Spice that they observed him smoking.

. . . .

> *You can't speculate as to other bad acts that he might have done. I want you to stay away from other bad acts or evidence of a general criminal disposition and focus on the offenses of which the accused was convicted.*

App., *infra*, 55a-56a (emphasis added). The prosecutor answered as before—"Yes, sir."

25. A special court-martial panel of members sentenced Petitioner to confinement for three months and a bad-conduct discharge. App., *infra*, 30a.

26. On appeal, the U.S. Navy-Marine Corps Court of Criminal Appeals (N-M.C.C.A.) affirmed. The opinion is reproduced at App. 31a. Adopting a *laissez-faire* approach to prosecutorial misconduct, that court assumed without deciding that it occurred. It then tested for prejudice and found no harm. App., *infra*, 33a.

27. The U.S. Court of Appeals for the Armed Forces (C.A.A.F.) granted review of this case pursuant to 10 U.S.C. § 867 (2006). Its published decision is reproduced at App. 1a. In a sharply divided 3-2 opinion, that court also affirmed.[7] App.,

[7] Chief Judge Baker and Judge Ohlson wrote separate dissents, though each jurist joined the other's dissenting opinion. App., *infra*, 18a, 25a. In their view, the prosecutor's misconduct denied Petitioner a fair trial. *Id.*

infra, 18a. Significantly, all judges agreed the prosecutor committed misconduct. "Trial counsel repeatedly and persistently elicited improper testimony," wrote Judge Stucky for the majority. App., *infra*, 14a. Going further, the majority labeled her misconduct "sustained and severe." App., *infra*, 15a. The disagreement within that court turned on harm.

28. Despite finding "sustained and severe" misconduct, the majority affirmed. App., *infra*, 15a, 18a. In its view, the "judge appears to have left no stone unturned in ensuring that the members considered only admissible evidence in this case." App., *infra*, 16a. Consequently, the majority placed "heav[y]" emphasis on the fact that the judge issued "curative instructions when appropriate." App., *infra*, 16a.

29. In affirming, the majority also relied on the fact that Private Hornback's team secured a partial acquittal. It opined, "[T]he fact that the panel acquitted Appellant of other, weaker drug charges indicates that it took the military judge's instructions to disregard impermissible character evidence seriously." App., *infra*, 18a.

30. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. The Lower Court's Decision Created A Split On The Issue Of Whether Judicial Instructions Can Neutralize Persistent And Severe Prosecutorial Misconduct

The starting point for this discussion is *Berger v. United States*, 295 U.S. 78 (1935). There, this Court reversed a conviction where the misconduct was not "slight or confined to a single instance," but instead was "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* at 89.

Nearly sixty years after *Berger*, the U.S. Court of Appeals for the Eleventh Circuit addressed a similar, persistent form of prosecutorial misconduct. *See generally United States v. Crutchfield*, 26 F.3d 1098, 1100 (11th Cir. 1994) (observing a record "replete with examples of unquestionable prosecutorial misconduct."). The prosecutor there, as in Petitioner's case, engaged in "[s]everal lines of questioning" that elicited irrelevant and improper character evidence. *Id.* Also there, like here, "the record reflect[ed] numerous instances in which the prosecutor simply ignored the court's rulings on relevancy and improper character evidence objections." *Id.* at 1102. Consistent with *Berger's* special concern for persistent misconduct, the Eleventh Circuit opined that "[w]hen improper inquiries and innuendos *permeate a trial to such a degree* as occurred in this case, we do not believe that instructions from the bench are sufficient to offset

the prejudicial effect suffered by the accused." *Crutchfield*, 26 F.3d at 1103 (emphasis added). Concluding that "a jury cannot always be trusted to follow instructions to disregard improper statements[,]" *id.* (citing *United States v. McLain*, 823 F.2d 1457, 1462 n.8 (11th Cir. 1987)), the Eleventh Circuit then reversed and remanded for a new trial.

Here, the prosecutor "engaged in . . . misconduct virtually *from start to finish*." *United States v. Hornback*, 73 M.J. 155, 164 (Ohlson, J., dissenting) (emphasis added); App., *infra*, 26a. The first time the judge instructed the prosecutor not to use improper character evidence appears on page 164 of the record of trial. The last time appears on page 534. These examples bookend numerous objections from the defense and multiple cautionary instructions from the trial judge. App., *infra*, 41a-56a. Chief Judge Baker neatly summarizes the persistent and severe misconduct in his separate dissent:

> There were eighteen instances of impermissible evidence coming before the members. Twelve of these involved improper character evidence. The military judge also sustained three relevance objections, two hearsay objections, and one objection on the grounds of psychotherapist-patient privilege. In addition, during closing argument, trial counsel improperly invoked the convening authority.

Hornback, 73 M.J. at 162 (Baker, C.J., dissenting); App., *infra*, 19a. Just as in *Berger* and *Crutchfield*, the misconduct here was far from isolated or confined to a single instance. Though there is additional similarity.

In *Crutchfield*, the prosecutor repeatedly elicited improper character evidence. "Although the court sustained appellant's repeated objections to this testimony . . . the prosecutor continued these improper inquiries throughout the trial." *Crutchfield*, 26 F.3d at 1100 n.2. Here, as Chief Judge Baker recognized, "the majority of improper conduct [also] involved the introduction of character evidence." *Hornback*, 73 M.J. at 162 (Baker, C.J., dissenting); App., *infra*, 19a-20a. The majority addressed the "pervasive impropriety" of the prosecutor's misconduct:

> Trial Counsel attempted to elicit improper testimony from *nearly every witness called during the Government's case-in-chief, and made arguably improper argument during her closing argument.* She repeatedly appeared unable to either understand or abide by the military judge's rulings and instruction during a two-and-a-half day trial on the merits.

Hornback, 73 M.J. at 160-61 (emphasis added); App., *infra*, 15a.

Despite the obvious similarities to *Crutchfield* (the majority actually cites the case in finding misconduct, *see Hornback* 73 M.J. at 160; App., *infra*, 14a), the divided lower court parts company with the

Eleventh Circuit, affirming in light of what it labels "no stone unturned" curative instructions. *Hornback*, 73 M.J. at 161; App., *infra*, 16a. To be sure, the majority also relies on what it describes as "strong" evidence regarding Petitioner's conviction for larceny and false official statement. *Id.* (discussing the documentary evidence that supported those charges). But the majority ultimately returns to the curative instructions, underscoring their dispositive nature. *Id.* at 161. ("[T]he fact that the panel acquitted Appellant of other, weaker drug charges indicates that it took the military judge's instructions to disregard impermissible character evidence seriously.").[8]

Notably, the lower court also parts company with the Third, Eighth, and Ninth Circuits. Those circuits join the Eleventh Circuit in finding curative instructions do not automatically cure prosecutorial misconduct, especially when—like here—the misconduct is so severe. *See Moore v. Morton*, 255 F.3d 95 (3d Cir. 2011) (reversing under 28 U.S.C. §

[8] In so finding, the lower court sends an unfortunate message to prosecutors; namely, these improper tactics are worth employing in a weak case. By eliciting improper evidence and making improper argument, prosecutors can turn a total acquittal into a partial one, understanding that result weighs in favor of affirmance on appeal. This danger is real, as the prosecutor here sought to admit improper evidence, arguing to the judge that it was found "to be harmless beyond a reasonable doubt after the appellate court looked at that." App., *infra*, 41a. Putting a stop to this unfortunate message supplies an additional reason for this Court to grant this important petition.

2254 review despite "strong curative instructions" when evidence supporting conviction was weak and prosecutorial misconduct was strong); *United States v. Weatherspoon*, 410 F.3d 1142, 1151 (9th Cir. 2005) (finding the curative instructions "did not neutralize the harm of the improper statements because they did not mention the specific statements of the prosecutor and were not given immediately after the damage was done[.]"); *United States v. Beeks*, 224 F.3d 741, 747 (8th Cir. 2000) (reversing where "prosecutor pursued a line of inquiry that was improper," notwithstanding defense counsel agreeing on the record that the judge's instruction "was the proper instruction[.]").

These decisions are not only consistent with *Berger*. They also dovetail with this Court's decision in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). There, this Court observed "some occurrences [of prosecutorial misconduct] may be too clearly prejudicial for such a curative instruction to mitigate their effect."[9] *Id.* at 644. The majority does not reconcile its decision with *Donnelly, Crutchfield, Moore, or Weatherspoon*. Instead, it finds "no

[9] American cinema provides an apt example. During a jury trial for murder, defense attorney Paul Biegler, played by James Stewart, engaged in the following conversation with his client, Lieutenant Frederick Manion, played by Ben Gazzara:

> "How can a jury disregard what it's already heard?"
>
> "They can't, Lieutenant. They can't."

Anatomy of a Murder (Carlyle Productions 1959).

evidence . . . that the members failed to comply with the military judge's instructions . . . ." *Hornback*, 73 M.J. at 161; App., *infra*, 18a. That finding compelled Chief Judge Baker's to ask: "when is too much, too much?" *Id.* at 162 (Baker, C.J., dissenting); App., *infra*, 21a. Put differently, at what point does a judge lose the power to neutralize misconduct through instruction? The majority's opinion suggests the answer is never. But that result is directly inapposite to *Crutchfield*. It also contravenes relevant decisions of the Third and Ninth Circuit, not to mention this Court's seminal decision in *Berger*.

By granting this petition, this honorable Court can resolve the split in the courts of appeals and provide needed guidance to trial practitioners on this important question.

II. The Persistent and Severe Prosecutorial Misconduct Deserves The Supervisory Authority Of This Honorable Court

The persistent and severe prosecutorial misconduct in this case warrants this honorable Court's supervisory power. S.Ct. R. 10(a). Simply put, "[t]here is no excuse for offending twice, after the court has ruled upon the matter[.]" *Beck v. United States*, 33 F.2d 107, 114 (8th Cir. 1929). Entrusted with unique responsibilities, "the [federal prosecutor] is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be

done. . . ." *Berger*, 295 U.S. at 88. In ensuring justice is done, "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

> The prosecutor . . . enters a courtroom to speak for the People and not just some of the People. The prosecutor speaks not solely for the victim, or the police, or those who support them, but for all the People. That body of 'The People' includes the defendant and his family and those who care about him.

Lindsey v. State, 725 P.2d 649, 660 (Wyo. 1986) (Urbigkit, J., dissenting) (quoting Commentary, *On Prosecutorial Ethics*, 13 Hastings Const. L.Q. 537-39 (1986)).

A prosecutor commits misconduct when she "oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *Berger*, 295 U.S. at 84. Prosecutorial misconduct takes many forms, including repeated injection of improper character evidence during trial. *See generally Crutchfield*, 26 F.3d 1098.

Relevant here, injecting improper character evidence is especially dangerous because it "is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Old Chief v. United States*, 519

U.S. 172, 181 (1997) (quoting *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)). Chief Judge Baker, in his dissent, recognized the dangerous cocktail of prosecutorial misconduct and improper character evidence.

> The misconduct was . . . severe. As noted, the majority of improper conduct involved the introduction of character evidence. *Character evidence is particularly anathema to U.S. notions of fair trial*, running the risk as it does that members may be swayed to convict not on the basis of evidence, but because the defendant is a bad person deserving of punishment.

Hornback, 73 M.J. at 162; App., *infra*, 19a-20a (emphasis added). This case is therefore especially worthy of this Court's supervisory power because it not only exhibits persistent misconduct, it exhibits a form of misconduct that is anathema to our legal system. As the United States Navy Board of Review once opined, "A studied effort to arouse passion and prejudice is characterized by repeated and persistent asking of improper questions to which the objections of the defense have been sustained." *United States v. Stockdale*, 13 C.M.R. 540, 543 (N.B.R. 1953) (citing *Beck* 33 F.2d at 114).

Prosecutors play a central role in the criminal justice system. That system will fail if prosecutors are not held to a high standard of integrity. *See, e.g.*, *United States v. Trombetta*, 476 U.S. 479, 485-86 (1984). This honorable Court has previously exercised its supervisory power to ensure prosecutors

met that high standard. *See, e.g.*, *Berger*, 295 U.S. 78; *Donnelly*, 416 U.S. 637; *Brady v. Maryland*, 373 U.S. 83 (1963). But despite that guidance, prosecutorial misconduct still remains a problem, as evidenced by Petitioner's case. The time has come to revisit this vital issue.

Notably, this Court had an opportunity to do just that when it recently reviewed a petition for writ of certiorari in *Calhoun v. United States*, 568 U.S. ___, 133 S. Ct. 1136 (2013). In that drug conspiracy case, a federal prosecutor argued to the jury that the defendant engaged in a drug deal because he, an African-American, was found in a room with Hispanic acquaintances and a bag of money. The defendant later asserted the prosecutor's racially charged remark violated his constitutional rights.

Justice Sotomayor, joined by Justice Breyer, wrote to disclaim any tolerance of the prosecutor's tactic. *Id.* at 1. The Justices criticized the prosecutor's attempt to "fan the flames" of prejudice. *Id.* at 4. Such prosecutorial misconduct, they continued, "diminishes the dignity of our criminal justice system and undermines respect for the rule of law." *Id.*

Ultimately, this Court denied the petition for writ of certiorari. Highlighting the weaknesses of that petition, the Justices noted defendant's counsel did not object to the statement at trial; any claims on appeal, moreover, were forfeited when the defendant did not raise them to the Fifth Circuit. *Id.* at 2. So while the prosecutorial misconduct was evident in *Calhoun*, that case was not an appropriate vehicle

for this Court's review. This case is different: Petitioner here objected to the numerous instances of prosecutorial misconduct at trial and has continuously asserted these claims on appeal. Accordingly, his case is ideal for this honorable Court's review.

III. This Case Presents An Ideal, Uncluttered Vehicle Worthy Of Review

There should be no doubt this case presents an ideal, uncluttered vehicle for review. Two good reasons demonstrate why. First, all parties—including the court below—agree this prosecutor committed severe misconduct. The United States conceded misconduct at oral argument before the C.A.A.F, and the C.A.A.F. found accordingly. *Hornback*, 73 M.J. at 164-65 (Ohlson, J., dissenting) ("Indeed, even *by the Government's own accounting*, trial counsel's actions prompted the military judge to sustain defense counsel's objections fifteen times, give the panel members curative instructions seven times, and convene Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2012), sessions to discuss objectionable material four times.") (emphasis added); App., *infra*, 26a-27a.

There is even agreement regarding the acute severity of the misconduct. Judge Ohlson exhaustively catalogues the many adjectives used in the majority and dissenting opinions to describe the misconduct here: "'significant,' 'repeated,' 'pervasive,' 'sustained,' 'persistent,' and 'severe[.]'" *Hornback*, 73 M.J. at 164 (Ohlson, J., dissenting); App., *infra*, 25a.

And in his separate dissent, Chief Judge Baker lists the practical realities of that significant, repeated, pervasive, sustained, persistent, and severe misconduct.

> Despite repeated instructions from the military judge about what sort of evidence was proper, trial counsel solicited impermissible evidence – evidence that came before the members – that Appellant claimed he had used prescription drugs to get high, that he had been prescribed medication used to treat schizophrenia, that he had a history of nonjudicial punishments, that he failed to pay his rent, that possible drug paraphernalia was found in his room, and that his behavior had been angry and erratic. In the presence of the members, trial counsel committed often multiple violations of numerous rules of evidence including Military Rule of Evidence (M.R.E.) 402 (relevance), M.R.E 404 (character evidence), M.R.E. 513 (psychotherapist-patient privilege), and M.R.E. 802 (hearsay); she invoked the convening authority in violation of Article 37, UCMJ, 10 U.S.C. 837 (2012); and she impermissibly made arguments in closing calculated to inflame passions and prejudices. Rule for Courts-Martial (R.C.M.) 919(b) Discussion.

Hornback, 73 M.J. at 163 (Baker, C.J., dissenting); App., *infra*, 21a-22a.

Given this unanimity on the misconduct, the crystallized issue before this Court is prejudice,

particularly as it relates to the curative power of instructions from the bench. This fact weighs in favor of review.

The second good reason why Petitioner's case presents an ideal, uncluttered vehicle for review is preservation. As detailed in the statement of the case, *supra*, the trial defense attorney preserved this issue, having lodged no less than fifteen objections to the prosecutor's offensive misconduct. And those instances of misconduct that did not trigger a defense objection were still preserved by the trial judge, who, on several occasions, interrupted the prosecutor *sua sponte* to try to right her wayward ways. This preservation, pointedly, stands in stark contrast to *Calhoun*, *supra*, where the defense did not preserve the misconduct.

Admittedly, the defense here did not move for a mistrial, a motion it surely could have made. But given the severity of this misconduct, Chief Judge Baker suggests the onus for mistrial—at least in a special case like this—rests with the trial judge. "[T]his case does prompt the question[,]" he writes, "at what point should a military judge sua sponte declare a mistrial or call in the supervising trial attorney?" *Hornback*, 73 M.J. at 162 (Baker, C.J., dissenting); App., *infra*, 20a. Preservation, then, also weighs in favor of review.

In sum, that the parties agree severe misconduct occurred, and that the issue was properly preserved at trial and on appeal, shows this case is an ideal, uncluttered vehicle to address the vexing problem of prosecutorial misconduct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David C. Dziengowski
LT, JAG Corps, U.S. Navy
Counsel of Record
Ryan C. Mattina
LCDR, JAG Corps, U.S. Navy
1254 Charles Morris St. SE
Washington Navy Yard, DC, 20374
(202) 685-7292

June 23, 2014

UNITED STATES,
Appellee

v.

Charles C. HORNBACK,
Private U.S. Marine Corps,
Appellant

No. 13-0442

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

73 M.J. 155
2014 CAAF LEXIS 248

January 13, 2014, Argued
March 6, 2014, Decided

COUNSEL: For Appellant: Lieutenant David C. Dziengowski, JAGC, USN (argued).

For Appellee: Colonel Stephen C. Newman, USMC (argued); Brian K. Keller, Esq. (on brief).

JUDGES: STUCKY, J., delivered the opinion of the Court, in which ERDMANN and RYAN, JJ., joined. BAKER, C.J., filed a dissenting opinion, in which OHLSON, J., joined. OHLSON, J., filed a dissenting opinion in which BAKER, C.J., joined.

OPINION

[*156] Judge STUCKY delivered the opinion of the Court.

We granted review to consider whether trial counsel's conduct constituted prosecutorial misconduct, and if so, whether Appellant's substantial right to a fair trial was materially prejudiced. We hold that significant prosecutorial misconduct occurred, but that the error was ultimately not prejudicial. We therefore affirm the judgment of the United States Navy-Marine Corps Court of Criminal Appeals.

I. Posture of the Case

Contrary to his pleas, Appellant was convicted by a panel of members sitting as a special court-martial of one specification each of using "spice," signing a false official statement, and larceny of military property, in violation of Articles 92, 107, and 121, Uniform Code of Military **[**2]** Justice (UCMJ), 10 U.S.C. §§ 892, 907, 921 (2012). He was acquitted of five other specifications including wrongfully using Xanax, larceny, solicitation, using provoking speech, and communicating threats, in violation of Articles 92, 121, and 134, UCMJ, 10 U.S.C. §§ 892, 921, 932 (2012). The convening authority approved the adjudged sentence of a bad-conduct discharge and three months of confinement, and the United States Navy-Marine Corps Court of Criminal Appeals affirmed. *United States v. Hornback*, No. NMCCA 201200241, 2013 CCA LEXIS 114, at *13, 2012 WL 7165301, at *5 (N-M. Ct. Crim. App. Feb. 21, 2013).

II. Background

During the Government's case-in-chief, trial counsel called eleven witnesses. The first witness, Lance Corporal (LCpl) Powers, testified that Appellant asked her if she smoked spice, showed her a container of what he said was spice, and proceeded to smoke the substance that he said was spice from a pipe. The second witness, Karen Carney, testified that Appellant showed her a jar of what looked like marijuana, but Appellant said was spice. She testified that Appellant told her that spice "[g]ets you high like marijuana," but "[d]oesn't show up on a drug test." She further **[**3]** testified that she "smoked a hit" of the substance Appellant identified as spice, and watched Appellant smoke the rest of it. She also testified as to a second occasion that she saw Appellant smoke a pipe loaded with the substance he identified as spice.

No objectionable testimony was elicited from these first two witnesses. The rest of the witnesses, however, proved quite problematic for trial counsel. Trial counsel first questioned LCpl Teets regarding Appellant's knowledge of the effects of spice and asked whether Appellant ever asked LCpl Teets to use drugs. Although defense counsel objected on the bases of speculation and improper lay opinion, the military judge called an Article 39(a), UCMJ, session and questioned trial counsel about the admissibility of the testimony under Military Rule of Evidence (M.R.E.) 404(b). The military **[*157]** judge asked, "was that uncharged misconduct, 404(b), with reference to the spice[?] I mean, what was the purpose of asking that witness about all that first background? He didn't smoke spice with this

witness, did he?" Defense counsel did not object on M.R.E. 404(b) grounds, however, and the military judge overruled the stated objection. Later during LCpl **[**4]** Teets's testimony, the military judge called a second Article 39(a), UCMJ, session, during which he cautioned trial counsel to "make sure you are staying away from" character evidence.

The next witness was Gunner's Mate Third Class (GM3) Robidart, a friend of Appellant's wife. Trial counsel asked whether Appellant's wife ever spoke about their marriage to her or told GM3 Robidart anything about why she and Appellant were separated, apparently in an attempt to elicit testimony that Appellant was using drugs. Defense counsel objected on the grounds of relevance and improper character evidence. The military judge called another Article 39(a), UCMJ, session. The military judge explained that "[y]ou can't just put out there that he used drugs at some point. You have to factor it in to the period charged, right?" The objection was sustained and the members returned.

Trial counsel continued to question GM3 Robidart, this time asking, "did [Appellant] say anything that might make you believe he was speaking from personal experience with drugs?" The military judge sua sponte called another Article 39(a), UCMJ, session, discussing the problem with trial counsel:

> MJ: I am concerned that you are **[**5]** getting into what would be 404(b) evidence or other acts evidence. We've got to narrow this down. I don't know what

time period we're talking about. That fact that he used drugs before, you know, if he was having conversations about using drugs outside the charged time period I don't want that going to the members. I mean you can make an objection about that.

. . . .

I don't want to hear any testimony about drug use -- the accused admitting to drug use -- unless it is the accused admitted to drug use during the charged period. Okay?

TC: Yes, sir.

MJ: All right. So first orient to the charged period. I don't want there to be the possibility that there was drug use before or after the charged period being admitted into evidence. That would be inadmissible. All right?

TC: Yes, sir.

DC: And, Your Honor, I would also ask that it be to the substances charged. I believe there may be an allegation of ecstasy.

MJ: Exactly. And, yeah, I don't want just drug use, coke, cocaine, ecstasy, heroin, marijuana. I want the drug. I want it specified to the drug and during the time period if he has made an admission to that. . . .

The military judge then provided trial counsel the opportunity to question GM3 **[**6]** Robidart outside the presence of members. Trial counsel took the opportunity, and following the questioning, defense counsel objected on the bases of hearsay and speculation. The military judge sustained the objection and reviewed the limits of hearsay with trial counsel.[1] Trial counsel responded that she was trying to elicit circumstantial evidence that the accused was someone who may have used drugs, based on his familiarity with drugs. The military judge responded once again that that would be impermissible character evidence, stating, "I mean if someone is charged with using marijuana, you can't come in here and start eliciting testimony or evidence that, you know, he's been around marijuana or he knows things about marijuana. I mean its impermissible character or other acts evidence."

1 The MJ explained:

> [A]ny statement his wife made to her is hearsay. It is not admissible. Any statements [LCpl Teets] made to her is hearsay regarding the accused [sic] drug use. That is not admissible.

The members returned, and after one proper question, trial counsel asked GM3 Robidart, "[w]hat was his personality like?" Defense counsel objected,

and the military **[*158]** judge again sent the members back **[**7]** out. This time, the military judge went so far as to specifically tell trial counsel what questions she could ask.[2] The members reentered the courtroom, and after one transcribed page of questioning, trial counsel again ventured into improper character evidence. The military judge sua sponte interrupted, stating, "Okay. Stop this. Disregard all that testimony. Strike that from your memory as though you've never heard it. Can all members follow that instruction?" The members responded affirmatively.

2 The MJ explained:

> Here is how this should go. How often did you see the accused? Did you interact with him on a daily basis? Were you able to observe the way he acted at work? You don't have to get into the specifics. How well do you know him? How long did he work for you, et[]cetera, et[]cetera. Okay. Without her talking about the specifics. Okay. And then presumably, you have some questions about the change in that. Is that right?

Trial counsel went on to ask GM3 Robidart about Appellant's use of "any prescription drugs," and GM3 Robidart testified that Appellant said he would "overtake what he was supposed to be taking . . . .

[t]o get high." The military judge sustained defense counsel's **[**8]** objection on M.R.E. 404(b) grounds and instructed the members to disregard the testimony. Trial counsel continued to ask about unidentified prescription drugs, defense counsel objected, and the military judge called another Article 39(a), *UCMJ*, session. After discussing what trial counsel was trying to elicit, the military judge explained, "[t]hat is clearly impermissible evidence. You can't say that he used drugs -- this drug to get high. He misused this prescription drug on this occasion in order to get high to prove that he therefore used drugs and other prescription drugs on a separate occasion to get high." The military judge explained why he was striking the testimony:

> My concern here is that you are getting into all these potential bad acts that aren't specific to the charged offenses which would blow this case up. I mean you just can't have that.
>
> . . . .
>
> You need direct evidence that a crime was committed. You can't put all this evidence out there that, yeah, this guy is kind of into drugs and he likes to -- he knows a lot about drugs and he knows a lot about drugs that can't be detected in your system. I mean you have to show evidence that he committed the specific crime on the **[**9]** specific date that you alleged he committed the specific crime. Not that he's a bad guy.

The next Government witness was Lieutenant Commander (LCDR) Terrien, Appellant's doctor. Trial counsel asked about Appellant's prescription for Seroquel, and LCDR Terrien explained that it is a medication for schizophrenia and bipolar conditions. Defense counsel objected, the military judge sustained and instructed the members to disregard the answer. After a few more questions, the military judge sua sponte called an Article 39(a), UCMJ, session. The military judge explained that he was "concerned that the jury's been tainted by hearing evidence that [Appellant] was taking schizophrenia medication." The military judge chided defense counsel for failing to object on privilege grounds, and explained that he would give an instruction after cross-examination.

The testimony of the next two Government witnesses, LCpl Carillo and Gunnery Sergeant (GySgt) French, was also the subject of sustained objections on M.R.E. 404(b) grounds. Each time, the military judge instructed the members to disregard the testimony.

Next, trial counsel called Corporal (Cpl) Morris, Appellant's roommate. After one sustained objection **[**10]** to improper character evidence, trial counsel continued to elicit improper testimony and the military judge called another Article 39(a), UCMJ, session. Again, the military judge explained, "[w]hat you can't do is get into a bunch of evidence that the accused is a druggy and, therefore, he probably used some drug at some point. That's not admissible evidence." The military judge then instructed trial

counsel to **[*159]** practice her examination of Cpl Morris outside of the presence of members, explaining:

> MJ: I'm tired of having the members being exposed to basically character evidence that's not admissible. I mean you can't -- I just want to reiterate to you, you can't present evidence that the accused is a druggy; therefore, he probably used drugs. You need to present evidence that he specifically used drugs on a certain day and time.
>
> TC: Yes, sir.
>
> MJ: And a specific drug. Not that he's just a drug abuser generally and so you should convict him of using drugs. You can't do that.
>
> TC: Yes, sir.
>
> . . . .
>
> MJ: You could do that at an ad board. You can't do that in federal court.

After the members returned, trial counsel's examination of Cpl Morris drew one additional sustained M.R.E. 404(b) objection.

The **[**11]** Government called three more witnesses during its case-in-chief. During the examination of LCpl Kelly, objections to improper M.R.E. 404(b) evidence and hearsay were sustained,

and during the examination of Chief Warrant Officer 3 (CWO3) Easton, a hearsay objection was sustained.

Trial counsel also struggled to avoid statements that the military judge ruled to be improper character evidence during her closing argument. She argued that "[t]he accused is like a criminal infection that is a plague to the Marine Corps." Defense counsel objected on M.R.E. 404(b) grounds, and the military judge sustained the objection. Shortly thereafter, trial counsel again argued, "[h]e became that criminal infection." Defense counsel objected and the military judge sustained the objection. Trial counsel then went on to argue, "And the command has taken form -- has taken action in the form of these charges before you. The government is confident that you will find him guilty beyond a reasonable doubt." The military judge immediately interrupted, stating:

> Hang on a second.
>
> Okay. Members, a couple things.
>
> One, with respect to that last question, you all agree the convening authority is not expecting a certain **[**12]** result in this case, that you're to try the case or decide the issues based on the evidence presented before you, and no one is presuming any certain outcome in this case.
>
> Additionally, throughout the course of this trial and even during closing

> argument, I sustained several objections to character evidence.
>
> You may not consider any evidence that was the subject of a sustained objection for any purpose, and you may not consider -- those objections related to character evidence, you may not conclude based on any of that evidence that the accused is a bad person or has general criminal tendencies and that he, therefore, committed the offenses charged. You need to base your determination on the admitted evidence in this case and determine if the offenses were committed beyond a reasonable doubt at the specific times and in the specific manners in which they were alleged.

The military judge asked if all members could follow that instruction, and the panel responded affirmatively.

III. Law

Where proper objection is entered at trial, this Court reviews alleged prosecutorial misconduct for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing Article 59, UCMJ, 10 U.S.C. § 859 (2000)). **[**13]** Most of the alleged misconduct in this case was either objected to at trial, or the subject of a sua sponte interruption by the military judge.[3]

> 3 Appellant argues that additional instances of misconduct occurred during trial counsel's opening statement and closing argument, but were not objected to at trial. We conclude that Appellant has not shown that these instances constitute plain error.

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.'" *Id.* **[*160]** at 178 (quoting *Berger v. United States*, 295 U.S. 78, 84, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)). "Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citing *Berger*, 295 U.S. at 88).

The presence of prosecutorial misconduct does not necessarily mandate dismissal of charges or a rehearing. "It is not the number of legal norms violated but the impact of those violations on the trial which **[**14]** determines the appropriate remedy for prosecutorial misconduct." *Id.* at 6. In determining whether prejudice resulted from prosecutorial misconduct, this 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." *Fletcher*, 62 M.J. at 184 (quoting *Meek*, 44 M.J. at 5). This Court has identified "the best approach" to the prejudice inquiry as requiring the balancing of three factors:

"(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Id. "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." Id.

IV. Discussion

A. Did prosecutorial misconduct occur?

Trial counsel repeatedly and persistently elicited improper testimony, despite repeated sustained objections as well as admonition and instruction from the military judge. Other courts of appeals have held that repeated violations of rules of evidence can **[**15]** constitute prosecutorial misconduct. See, e.g., *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994) (finding prosecutorial misconduct in repeated violation of Federal Rules of Evidence 404, 608, and 609, where such violations "continued even after the court instructed the prosecutor as to their impropriety"); *Beck v. United States*, 33 F.2d 107, 114 (8th Cir. 1929) (finding prosecutorial misconduct where the prosecutor continued to ask improper questions after sustained objections, reasoning, "there is no excuse for offending twice, after the court has ruled upon the matter"). We find that trial counsel's repeated and persistent violation of the Rules for Courts-Martial and Military Rules of Evidence constitutes prosecutorial misconduct in this case. *See Meek*, 44 M.J. at 5 (defining prosecutorial

misconduct as "violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon"); Rule for Court-Martial (R.C.M.) 502(d)(5) Discussion (trial counsel should be prepared to "make a prompt, full, and orderly presentation of the evidence at trial," and consider the Military Rules of Evidence). It matters **[**16]** not that trial counsel seems to have been merely inexperienced, ill prepared, and unsupervised in this case. Although one may wonder what her supervisors were doing during the course of Appellant's trial, the prosecutorial misconduct inquiry is an objective one, requiring no showing of malicious intent on behalf of the prosecutor, and we find none here.

B. Did Appellant suffer prejudice?

To determine whether Appellant suffered prejudice to a substantial right from the misconduct, this Court considers the Fletcher factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." 62 M.J. at 184.

The prosecutorial misconduct in this case was sustained and severe. Trial counsel attempted to elicit improper testimony from nearly every witness called during the Government's case-in-chief, and made arguably improper argument during her closing argument. She repeatedly appeared unable to either understand or abide by the military judge's rulings and instruction during the two-and-a-half day trial on the merits. As a result of this pervasive

impropriety, we find **[*161]** that the first *Fletcher* factor weighs in **[**17]** Appellant's favor.

When we consider curative measures, however, the military judge appears to have left no stone unturned in ensuring that the members considered only admissible evidence in this case. He called multiple Article 39(a), UCMJ, sessions to prevent tainting the panel. He issued repeated curative instructions to the members, each time eliciting that they understood and would follow his instructions. He also issued a comprehensive instruction during trial counsel's closing argument, again explaining that the members could not consider evidence that was the subject of a sustained objection for any purpose. The military judge acted early and often to ameliorate trial counsel's misconduct. Compare *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (holding that "[t]he ameliorative actions of the military judge . . . secured the fairness and impartiality of the trial" where the military judge engaged in timely remedial actions including curative instructions to members), with *Fletcher*, 62 M.J. at 185 (finding the military judge's curative efforts to be "minimal and insufficient" where he gave only a generic limiting instruction, chastised trial counsel on a single occasion, **[**18]** and failed to sua sponte interrupt trial counsel). Here, the military judge acted effectively to secure the fairness of Appellant's trial by protecting the panel from potentially improper evidence and issuing curative instructions when appropriate. This factor weighs heavily in the Government's favor.

Turning to the third *Fletcher* factor, Appellant stands convicted of signing a false official statement, larceny, and using spice. The false official statement conviction arose from signing a false record stating that he was not married to a military member, when in fact he was. The larceny conviction is based on the amount of Basic Allowance for Housing (BAH) he was overpaid as a result of the false statement. The evidence of these two convictions was strong. Trial counsel presented documentary evidence of the false record with Appellant's signature, as well as testimony by the officer in charge of service records at Appellant's base, CWO3 Easton, who explained the workings of the dependency forms. As for the larceny, trial counsel submitted BAH documents showing the amount Appellant was paid by the Government while receiving BAH at the with-dependents rate, plus additional testimony by **[**19]** CWO3 Easton explaining the process. Moreover, the improper character evidence that trial counsel sought to elicit in this case related to the drug offenses; it did not implicate the larceny or false official statement offenses. For these specifications, the strength of the evidence weighs heavily in the Government's favor.

The evidence supporting the spice conviction was not as strong as that supporting the larceny and false official statement convictions, but it was substantial. As Appellant points out, there was no drug test, and the military judge commented on the weakness of some of the evidence trial counsel attempted to submit. Nonetheless, the first two witnesses established that they saw Appellant

smoking a substance that he identified to them as spice. Furthermore, the military judge instructed the panel to disregard the improper testimony elicited by trial counsel, and "[a]bsent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *Thompkins*, 58 M.J. at 47. There is no evidence here that the members failed to comply with the military judge's instructions in convicting Appellant of the spice offense. To the contrary, and despite **[**20]** the clumsy attempts by the trial counsel to elicit improper character evidence related to drug use generally, the fact that the panel acquitted Appellant of other, weaker drug charges indicates that it took the military judge's instructions to disregard impermissible character evidence seriously.

Balancing these factors, we are confident that the members convicted Appellant on the basis of the evidence alone. The Appellant was not prejudiced by trial counsel's misconduct in this case. Accordingly, the judgment of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

DISSENT BY: BAKER; OHLSON

DISSENT

BAKER, Chief Judge, with whom OHLSON, Judge, joins (dissenting):

I agree with the majority that prosecutorial misconduct occurred, which is the rubric **[*162]** used to describe the repeated improper questioning and comment exhibited in this case. I also agree that the proper method for determining whether such

misconduct was prejudicial to a substantial right is through application of the factors outlined in *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). **[**21]** However, for the reasons I stated below, I respectfully dissent in this case. Furthermore, I join Judge Ohlson's dissent in this case.

As the Supreme Court stated in *Smith v. Phillips*, "the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. . . . [T]he aim of due process is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused." 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (citations and internal quotation marks omitted). The essential question is not whether trial counsel's conduct was improper, but whether it resulted in "a failure to observe that fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974) (citation and internal quotation marks omitted).

I agree that the prosecutorial misconduct in this case was sustained. There were eighteen instances of impermissible evidence coming before the members. Twelve of these involved improper character evidence. The military judge also sustained three relevance objections, two hearsay objections, and one objection on the grounds of psychotherapist-patient **[**22]** privilege. In addition, during closing argument, trial counsel improperly invoked the convening authority. The misconduct was also severe. As noted, the majority of improper conduct

involved the introduction of character evidence. Character evidence is particular anathema to U.S. notions of fair trial, running the risk as it does that members may be swayed to convict not on the basis of evidence, but because the defendant is a bad person deserving of punishment. Thus, it is in evaluating the final two *Fletcher* factors where I break with the majority. Upon analyzing all three factors, I believe that the correct conclusion is that Appellant did not receive a fair trial, as I am not convinced on this record that members convicted Appellant on the basis of admissible evidence alone.

Measures Adopted to Cure the Misconduct

It is evident that the military judge attempted to neutralize any prejudice resulting from trial counsel's conduct. As documented by the majority, his interjections were frequent and forceful. He called numerous Article 39(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 839(a) (2012), sessions in which he instructed trial counsel as to what was and was not admissible. **[**23]** In addition, the military judge delivered curative instructions on most, though not all, occasions when improper evidence did come before the members.[1]

1 It is hard to find fault with the military judge's actions, especially in the absence of a motion for a mistrial. However, this case does prompt the question: at what point should a military judge sua sponte declare a mistrial or call in the supervising trial attorney?

This Court has determined that, absent evidence to the contrary, it will presume that members follow a military judge's instructions. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000). However, this case begs the question: when is too much, too much? The Supreme Court, in *Donnelly*, also established that curative instructions are not in fact curealls, noting that "some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect." 416 U.S. at 644. This notion that a curative instruction is not automatically assumed sufficient to remedy all misconduct is echoed in a number of circuit court decisions, including from the United States Courts of Appeals for the Third, Ninth, and Eleventh Circuits. *Moore v. Morton*, 255 F.3d 95, 119-20 (3d Cir. 2001); **[**24]** *United States v. Weatherspoon*, 410 F.3d 1142, 1152 (9th Cir. 2005); *United States v. Kerr*, 981 F.2d 1050, 1054 (9th Cir. 1992); *United States v. Simtob*, 901 F.2d 799, 806 (9th Cir. 1990); *United States v. Crutchfield*, 26 F.3d 1098, 1103 (11th Cir. 1994).

[*163] Despite repeated instructions from the military judge about what sort of evidence was proper, trial counsel solicited impermissible evidence -- evidence that came before members -- that Appellant claimed he had used prescription drugs to get high, that he had been accused of stealing a motorcycle, that he had been prescribed medication used to treat schizophrenia, that he had a history of nonjudicial punishments, that he failed to pay his rent, that possible drug paraphernalia was found in his room, and that his behavior had been angry and erratic. In the presence of the members, trial counsel

committed often multiple violations of numerous rules of evidence including Military Rule of Evidence (M.R.E.) 402 (relevance), M.R.E. 404 (character evidence), M.R.E. 513 (psychotherapist-patient privilege), and M.R.E. 802 (hearsay); she invoked the convening authority in violation of Article 37, UCMJ, 10 U.S.C. § 837 (2012); and she impermissibly **[**25]** made arguments in closing calculated to inflame passions and prejudices. Rule for Courts-Martial (R.C.M.) 919(b) Discussion.

Given the extent, pervasiveness, and character of the prosecutor's improper questions and comments, looking at the context of the entire trial, I believe that the curative instructions were not sufficient to counteract the impermissible material that leaked in. The critical question is not whether the military judge delivered curative instructions but whether they were enough to ensure that members did indeed make their decision based solely on the evidence, not on the basis that Appellant was a bad person.

The Weight of Evidence Supporting Conviction

Appellant was ultimately convicted of three out of eight specifications: wrongful use of spice (Article 92, UCMJ), making a false official statement (Article 107, UCMJ), and larceny of military property (Article 121, UCMJ). I agree with the majority that the evidence supporting the later two convictions was strong. In addition, very little of the prosecutorial misconduct touched upon the larceny and false official statement charges.

However, the evidence supporting the spice charge was weaker and largely circumstantial.

[26]** Two witnesses, Karen Carney and Lance Corporal Kimberly D. N. Powers, testified that they saw Appellant smoke something in a glass pipe that he told them was spice. Ms. Carney also took one hit of the substance Appellant was smoking but stopped there, as she did not like the taste, and she felt none of its effects. There was no drug test, no analysis of the substance Appellant called spice, and no testimony as to the characteristics or effects of smoking spice. Aside from this, the Government included some highly circumstantial evidence solicited from Lance Corporal Joshua N. Teets. Teets testified that Appellant told him spice could not be detected in a drug test, the inference being Appellant knew so much about spice because he had smoked it. Also of note is the fact that the Marine Corps regulation banning the use of spice describes it as "a mixture of medicinal herbs laced with synthetic cannabinoids or cannabinoid mimicking compounds" and forbids the actual or attempted possession or use of any "derivative, analogue, or variant" of the substance. Dep't of Defense, U.S. Marine Corps Forces, Pacific Order 5355.2A, Prohibited Substances para. 1-3.b. (July 30, 2010). This description **[**27]** is narrow enough that it is feasible members could find that possession and use of an untested substance that Appellant simply called spice did not provide sufficient evidence that Appellant actually used or possessed a variety of spice covered by this order.

In addition, much of the improper evidence that came before the members did touch upon the drug charges, including Gunner's Mate 3 Malaea

Robidart's testimony that she had overheard drug-related conversations having to do with Appellant and that he told her he used prescription medications to get high, Corporal P. Kelly's testimony that he found a glass bowl in Appellant's room, testimony referencing Appellant's behavior changes including recent angry and sporadic behavior, reference to the disintegration of Appellant's marriage possibly due to drug-related issues, and evidence indicating his overall poor character, including a history of previous nonjudicial punishments. This **[*164]** could be enough to convince members that Appellant was the type of person who would do drugs and tip any doubts they had in the "beyond reasonable" direction.

Though he ultimately denied Appellant's R.C.M. 917 motion to dismiss, the military judge himself **[**28]** commented about the shakiness of the spice charge. "I'm sensitive to the situation that you're in where you don't have good evidence to convict the guy of what you believe he did, but that's the American judicial system." Overall, the Government's case on the spice charge was weak, as the military judge noted. Thus it is conceivable the prosecutor's misconduct swayed members towards a conviction they might not otherwise have made. In context, the fact that members acquitted on five of eight charges can cut both ways. It can suggest that members carefully followed the military judge's instruction. But it can also suggest that members found the Government's case close and were open to persuasion, in which case character evidence may have made a difference, either directly or indirectly,

by giving members a margin of comfort that, even if there was doubt, Appellant deserved what he got.

Trial counsel's misconduct was not "slight or confined to a single instance, but . . . pronounced and persistent, with a probably cumulative effect upon the jury which cannot be regarded as inconsequential." *Fletcher*, 62 M.J. at 185 (alteration in original) (citation and internal quotation marks omitted). **[**29]** Trial counsel did commit prosecutorial misconduct and the scope and pervasiveness of that misconduct was sufficient to interfere with Appellant's substantial right to a fair trial. Although the prejudice is clearest with respect to the spice charge, in light of the pervasive nature of the misconduct, I would set aside the changes and authorize a rehearing on all charges. Therefore, I respectfully dissent.

OHLSON, Judge, with whom BAKER, Chief Judge, joins (dissenting):

I concur with the majority's observation that the trial counsel "repeatedly and persistently elicited improper testimony, despite repeated sustained objections as well as admonition and instruction from the military judge." I also concur with the majority's determination that the trial counsel's actions constituted prosecutorial misconduct. Where I differ is on the question of whether the trial counsel's "significant," "repeated," "pervasive," "sustained," "persistent," and "severe" misconduct materially prejudiced Appellant's right to a fair trial. I believe it did.

I readily acknowledge that the military judge in this case repeatedly gave curative instructions to the panel in most of the many instances where the trial **[**30]** counsel engaged in prosecutorial misconduct, and that he also appropriately provided the panel with a comprehensive instruction at the end of the court-martial explaining to the members that they could not consider evidence that was the subject of sustained objections. Further, I concede that "[a]bsent evidence to the contrary, court members are presumed to comply with the military judge's instructions." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003). However, I also note that, consistent with this Court's precedent, "[P]rosecutorial 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." *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005) (emphasis added). In my view, such is the case here.

As documented by the majority, during this court-martial trial counsel engaged in prosecutorial misconduct virtually from start to finish. In her opening statement, case-in-chief, closing argument, and sentencing argument, trial counsel either injected improper character evidence (which is of particularly grave **[**31]** concern), elicited improper hearsay evidence, or made improper arguments. (For example, trial counsel opined to the panel members: "The accused is like a criminal infection that is a plague to the Marine Corps.") Indeed, even by the Government's own accounting, trial counsel's actions

prompted the military judge to sustain defense counsel's objections fifteen times, give the panel members curative instructions seven **[*165]** times, and convene Article 39(a), UCMJ, 10 U.S.C. § 839(a) (2012), sessions to discuss objectionable material four times.[1]

> 1 The nagging -- if unspoken -- question in this case is, "Where was the chief of justice?" As noted by the majority, trial counsel appeared to be not only "inexperienced" but also "unsupervised," and she "repeatedly appeared unable to either understand or abide by the military judge's rulings and instructions." The issue of why this trial counsel did not receive the level of supervision, guidance, assistance, instruction, and training that she so obviously needed is not a matter before this Court. However, I find it appropriate to note that the responsibility to protect a servicemember's constitutional right to a fair trial does not rest solely with **[**32]** the lone trial counsel advocating in the courtroom; it extends to the chief of justice and to other supervisory officers as well.

The military judge's admonishments to trial counsel during the course of this court-martial are also quite telling. For example:

> o MJ: "I'm tired of having the members being exposed to basically character evidence that's not admissible."

o MJ: "My concern here is that you are getting into all these potential bad acts that aren't specific to the charged offenses, which would blow this case up."

o MJ: "I am concerned that the jury's been tainted by hearing evidence that [the Accused] was taking schizophrenia medication."

o MJ: "What you can't do is get into a bunch of evidence that the accused is a druggy and, therefore, he probably used some drug at some point."

The attentiveness of the military judge to trial counsel's repeated prosecutorial misconduct was admirable, and his admonishments and attempted remedial measures were appropriate. Ultimately, however, they were not sufficient. I echo the sentiments of the United States Court of Appeals for the Eleventh Circuit in *United States v. Crutchfield*: "When improper inquiries and innuendos permeate a trial to such **[**33]** a degree as occurred in this case, [I] do not believe that instructions from the bench are sufficient to offset the prejudicial effect suffered by the accused." 26 F.3d 1098, 1103 (11th Cir. 1994).

On this record I "cannot be confident that the members convicted the appellant on the basis of the evidence alone." *Fletcher*, 62 M.J. at 184. Therefore, I respectfully dissent and would authorize a rehearing on all charges.

UNITED STATES OF AMERICA

v.

CHARLES C. HORNBACK,
PRIVATE (E-1), U.S. MARINE CORPS

NMCCA 201200241

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

2013 CCA LEXIS 114

February 21, 2013, Decided

NOTICE: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

COUNSEL:
For Appellant: LT David Dziengowski, JAGC, USN.

For Appellee: Maj William Kirby, USMC.

JUDGES: Before B.L. PAYTON-O'BRIEN, R.Q. WARD, J.R. MCFARLANE, Appellate Military Judges. Senior Judge PAYTON-O'BRIEN and Judge MCFARLANE concur.

OPINION OF THE COURT

WARD, Judge:

A special court-martial panel of members convicted the appellant, contrary to his pleas, of violating a lawful general order by using the substance known as "Spice", signing a false official statement, and larceny of military property, in violation of Articles 92, 107, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 907, and 921. The panel sentenced the appellant to be confined for three months and to be discharged from the Marine Corps with a bad-conduct discharge. The convening authority (CA) approved the sentence as adjudged, and except for the punitive discharge, ordered it executed.

The appellant first alleges **[*2]** that prosecutorial misconduct by the trial counsel materially prejudiced his substantial right to a fair trial. Next, he argues that the evidence was both factually and legally insufficient to prove beyond a reasonable doubt that he used "Spice". Last, he cites error in the promulgating order. We find merit in the appellant's final assigned error and order appropriate relief in our decretal paragraph. [1] After carefully considering the record of trial and the submissions of the parties, we are convinced that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant occurred. Arts. 59(a) and 66(c), UCMJ.

1 Although we find this error to be harmless, the appellant is entitled to accurate court-

martial records. *United States v. Crumpley*, 49 M.J. 538, 539 (N.M.Ct.Crim.App. 1998).

Factual Background

The appellant faced a litany of offenses relating to wrongful use of prohibited substances, [2] Basic Allowance for Housing (BAH) fraud, [3] provoking speech, and communicating threats. At trial, the Government called a number of witnesses who both testified to admissions made by the appellant and to their own observations **[*3]** of the appellant's behavior that indicated wrongful use of a prohibited substance. On several occasions, trial defense counsel (TDC) timely objected to either the scope or substance of trial counsel's questions, necessitating Article 39(a) sessions. During these sessions, the military judge examined the witness in the context of the trial counsel's proffer of expected relevant testimony. On some of these occasions, the military judge overruled TDC's objections and allowed limited examination by the trial counsel. Other times, however, the military judge prohibited the trial counsel's intended inquiry. The military judge gave a curative instruction in the majority of instances where the witness offered improper testimony. During findings instructions, the military judge instructed the panel on the proper use of character evidence and instructed them to ignore any testimony that was the basis of a sustained objection. Last, the military judge sustained TDC's objections to trial counsel's comments during closing argument, and issued a curative instruction upon conclusion of trial counsel's argument.

2 Charged as general order violations, these prohibited substances included "Spice," "Bath **[*4]** Salts," and the prescription drug Xanax. The appellant was also charged with wrongfully soliciting another to use a prohibited substance.

3 These specifications included signing a false official statement, larceny and presenting a fraudulent claim against the United States.

Prosecutorial Misconduct

"Prosecutorial misconduct is action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006) (quoting *United States v. Argo*, 46 M.J. 454, 457 (C.A.A.F. 1997)) (internal quotation marks omitted). Appellate courts review *de novo* the question of whether prosecutorial misconduct amounted to prejudicial error. *Argo*, 46 M.J. at 457. However, we review for plain error when no objection is raised at trial. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

When analyzing allegations of prosecutorial misconduct and whether it amounts to a due process violation, this court looks at the fairness of the trial and not the culpability of the prosecutor. *Edmond*, 63 M.J. at 345 (citing *Smith v. Phillips,* 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)). **[*5]** We must focus on the "overall effect of counsel's

conduct on the trial, and not counsel's personal blameworthiness." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citation omitted). If prosecutorial misconduct is found, this court will examine the record as a whole to determine whether the appellant was prejudiced by weighing three factors: (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.

Citing numerous instances in the record, the appellant argues that the trial counsel repeatedly attempted to introduce improper character evidence, solicit improper hearsay, inject unlawful command influence, and improperly vouch for the credibility of the Government's evidence at trial. Appellant's Brief of 5 Sep 2012 at 28-29. On many of these occasions, TDC raised timely objections. [4] Other times, however, TDC raised no objection. [5]

> 4 Record at 163-64, 177, 183, 186, 193-94, 224, 251, 255, 310, 314, 445, 456, 533-34.
>
> 5 *Id.* at 114, 115, 141, 220, 456, 471-473, 535. We have reviewed these instances raised by the appellant for the first time on appeal and find no plain **[*6]** or obvious error.

Turning now to those instances objected to at trial, even assuming without deciding that trial counsel's actions amounted to misconduct, we find no material prejudice to the appellant's substantial right to a fair trial.

1. Severity of the Misconduct

The appellant relies mostly on those instances where he argues that trial counsel injected improper character evidence into the trial, noting "[t]he dangers of improper character evidence are noteworthy and real . . . ." *Id.* at 29. We do not take issue with his point on the dangers of such evidence; however, we do take issue with his characterization of these instances in the record. On many of these occasions, TDC objected before very little, if any, improper testimony was actually elicited. Record at 163-68, 175, 185, 255. On other occasions, the military judge later allowed limited inquiry, or at least related inquiry into the subject matter objected to by TDC. *Id.* at 175, 193-94, 268. Last, our review of the record indicates that on at least three occasions, the improper character evidence was unsolicited by the trial counsel during her examination of the witness. *Id.* at 225, 251, 314. We also note that much of the dialogue **[*7]** from the military judge now cited to by the appellant came during Article 39a sessions out of the presence of the members. Although the military judge may have been unimpressed by the trial counsel's proffer of expected relevance, the fact remains that either through a timely objection from TDC or an interruption by the military judge, the panel never heard the proffered testimony.

We next turn to the appellant's claim that during argument the trial counsel improperly disparaged him, introduced unlawful command influence, and commented on facts not admitted during trial. Twice the military judge properly sustained TDC's

objections to the trial counsel's likening the appellant to a plague or criminal infection within the Marine Corps. *Id.* at 445, 456. These comparisons, while inappropriate, amount to two limited references during an argument that spanned twelve pages of transcript. We also view trial counsel's comment "the command . . . has taken action in the form of these charges before you," [6] as similarly improper; but it was limited in nature and not conveyed as a desired or intended result by the convening authority. [7] Finally, a close review of the record does not support the **[*8]** two occasions where the military judge interrupted trial counsel for arguing facts not in evidence. [8]

6 Record at 456.

7 The military judge immediately issued a curative instruction following this comment.

8 *Id.* at 447, 453. We disagree with the appellant's characterization that the "record is unclear whether the military judge actually struck the entirety of Corporal (Cpl) Morris's testimony." Appellant's Brief at 20. Twice when the trial counsel alluded to Cpl Morris's testimony, the military judge interrupted, stating that he previously struck Cpl Morris's testimony. During the Government's case, the military judge indicated that he would strike Cpl Morris's testimony after Cpl Morris invoked his privilege against self-incrimination. Record at 278. However, before deciding to do so, he allowed the trial counsel a recess.

> Following the recess, trial counsel informed the military judge that the Government had obtained immunity for Cpl Morris. The military judge reconsidered his ruling and allowed the testimony. *Id.* at 287-91. The military judge did properly sustain TDC's objection to the trial counsel's comment during sentencing argument that the appellant used "Spice" during work since **[*9]** the only evidence of the appellant's "Spice" use occurred at a residence. *Id.* at 533-34.

2. Curative Measures

On many of the occasions when the military judge either sustained an objection from TDC, or interrupted the trial counsel, he later issued a curative instruction to the panel. *Id.* at 185, 186, 225, 251, 456. The military judge also twice instructed the panel to disregard evidence that was the subject of a sustained objection, and to not consider any of the related evidence or argument for any purpose. *Id.* at 456-57, 495-96. We find no evidence that the members failed to follow the military judge's instructions, [9] particularly in light of the fact that the panel acquitted the appellant of five of the total eight offenses submitted to them. [10]

> 9 We presume, absent evidence to the contrary, that members followed the military judge's instructions and disregarded this evidence. *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000).

10 Appellate Exhibit XXXIII.

3. Weight of the Evidence

The evidence introduced on the "Spice" use included two unbiased witnesses who both testified to the appellant smoking a substance that he described to them as "Spice". In addition, the members heard **[*10]** testimony from other witnesses that the appellant discussed his use of "Spice" and how the Navy was unable to detect it during urinalyses. *Id.* at 125-26, 131-33, 140. Most of the references to improper character evidence and related Article 39a sessions focused on the prohibited substance offenses, two of which later resulted in not guilty findings. [11] Little of the now complained of conduct by the trial counsel related to the false official statement or BAH larceny. On these latter offenses, the Government's case was much stronger.

11 At the close of evidence, the military judge entered a finding of not guilty for the specification alleging wrongful use of "Bath Salts". Record at 422. The members also found the appellant not guilty of the specification alleging wrongful use of Xanax and the specification alleging wrongful solicitation of another to use "Bath Salts". AEs XXXIII and XXXV.

Having balanced the *Fletcher* factors, we conclude that, taken as a whole, even if the trial counsel's actions amounted to misconduct, we are confident that the members convicted the appellant on the basis of the evidence alone. *Fletcher*, 62 M.J. at 184.

Legal and Factual Sufficiency

The appellant next argues **[*11]** that the evidence that he wrongfully used "Spice" was both legally and factually insufficient citing the lack of any forensic or scientific testing, and the military judge's characterization of the Government's evidence as "weak" during an Article 39a session. Appellant's Brief at 41.

Issues of factual and legal sufficiency are reviewed *de novo*. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is whether "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this court] are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Rankin*, 63 M.J. 552, 557 (N.M.Ct.Crim.App. 2006), *aff'd*, 64 M.J. 348 (C.A.A.F. 2007).

Legal sufficiency, by contrast, is determined by asking "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Dobson*, 63 M.J. 1, 21 (C.A.A.F. 2006) **[*12]** (citation omitted). When testing for legal sufficiency, we must draw every reasonable inference from the record in favor of the prosecution. *United States v. McGinty*, 38 M.J. 131, 132 (C.M.A. 1993) (quoting *United States v. Blocker*, 32 M.J. 281, 284 (C.M.A. 1991)).

We have summarized above much of the evidence for this offense. We also note that in prosecutions for use of a controlled substance, forensic or scientific testing to confirm the identity is not required to sustain a conviction. *See generally United States v. Tyler*, 17 M.J. 381, 386-87 (C.M.A. 1984) (holding witness's opinion corroborated by circumstantial evidence can be sufficient to identify a drug); *United States v. Jessen*, 12 M.J. 122, 126 (C.M.A. 1981) (holding testimony from undercover investigator familiar with drug sufficient to prove its identity); *United States v. White*, 9 M.J. 168, 169-70 (C.M.A. 1980) (finding admission by appellant corroborated by other witnesses' testimony to be sufficient).

Based on the evidence in the record before us, we are convinced that a reasonable factfinder could have found all the essential elements of this offense beyond a reasonable doubt. These circumstances include the appellant's **[*13]** description of the substance as "Spice," testimony that the appellant removed a substance resembling marijuana from a small container and then smoked it through a glass pipe, his repeated statements to others that "Spice" could not be detected through urinalysis, and his soliciting others to use "Spice" with him. [12] Furthermore, we ourselves are convinced of the appellant's guilt beyond a reasonable doubt.

> 12 It is these additional circumstances that distinguish this case from *United States v. Nicholson*, 49 M.J. 478 (C.A.A.F. 1998) (conviction of marijuana possession relying

solely upon one witness's brief observation insufficient.)

Conclusion

The findings of guilty and the sentence are affirmed. The supplemental court-martial order will reflect that as to Specification 1 of Charge I the appellant was found guilty except for the words "on divers occasions." [13]

13 We note that the military judge granted the Government's motion to amend the date specified in Charge I, Specification 1. Record at 441. However, the cleansed charge sheet provided to the members also removed the phrase "on divers occasions". AE XXXV; Record at 443-44. This appears to have been an oversight as the military judge **[*14]** declined to strike this language. Record at 420. However, as the members' finding was based on the charge sheet submitted without the phrase, the court-martial order does not currently reflect the guilty finding.

Senior Judge PAYTON-O'BRIEN and Judge MCFARLANE concur.

Examples of Prosecutorial Misconduct	Record Citations
Government Opening Statement	
➢ "decay, drugs, and dishonesty" ➢ "his demeanor started to change and the decay set in. He began acting differently" ➢ "[t]he accused appeared to be somewhat untruthful"	R. at 114.
Government Case-in-Chief	
➢ "did he ever ask you to use drugs with him?"	R. at 140.
➢ "Did you ever speak to her about the marriage?" ➢ "And did she tell you anything about why they were separated?"	R. at 162.
➢ "[It was] determined to be harmless beyond a reasonable doubt after the appellate court looked at that."	R. at 166.
➢ "And while you worked with him in the S-8, did he say anything about drug use?" ➢ "Did he . . . say anything that might make you believe he was speaking from personal experience with drugs?"	R. at 168.
➢ Q. "GM3 Robidart, you testified that you knew the accused a little bit prior to him working for you. What was his demeanor like when he was actually working for you?" ➢ A. "Well, do you mean as far as how he acted while he was working for me?"	R. at 183.

➢ Q. "How did he act? What was his personality like?" ➢ A. "To be honest, ma'am, very combative"	R. at 183.
➢ Q. "How is that different from how you knew him before?" ➢ A. "Because before, ma'am, you know he was still that same way a little bit but not as bad."	R. at 185.
➢ Q. "Did he just explain his use of any prescription drugs with you?" ➢ A. "Yes, ma'am." ➢ Q. "And what did he say?" ➢ A. "Just that he would overtake what he was supposed to be taking." ➢ Q. "Did he explain why that was?" ➢ A. "To get the high."	R. at 186.
➢ Q. "Can you please describe to the members what Seroquel is?" ➢ A. "Seroquel is a medication it is classified as an atypical neuroleptic which means it is a newer medicine that is used -- mainly it was developed for psychosis patients with schizophrenia to help them control hallucinations, delusions. It is also used for bipolar conditions manic and depressive bipolar conditions."	R. at 211.
➢ Q. "So what happened earlier in the day that also made you take this	R. at 223.

very seriously?" ➢ A. "[W]hile conducting my ISO prep I went up to S-2 where his wife currently works or was currently working at the time. After completing my training, we spoke a few brief words about my motorcycle being stolen. She then further stated that he was about to do something crazy. That, you know, he has been acting very differently for me to be worried." . . . . ➢ A. "May I continue with what I was saying?" ➢ Q. "Yes please." ➢ A. ". . . She further asked me if I really thought he stole my bike. And I told her yes."	R. at 223-24.
➢ Q. "Were there any additional long-term changes that you made in life after these threats?" ➢ A. "Yes, ma'am. I still -- I don't go to -- I don't leave my house even if it's to check the mail without leaving my door unlocked."	R. at 226.
➢ Q. "And what was your first reaction?" ➢ A. "My first reaction was with a hundred-plus Marines and sailors working for me, I was, like, wait, what? And when I went into the OIC's office and discussed it with him, they had discussed other information concerning further	R. at 251.

NJP's and that Appellant no longer had anything else to lose. He was at the bottom of the rank structure." ➢ DC: "Objection. Hearsay as to what the other members were saying in this meeting." ➢ TC: Sir, again, the effect on his state of mind at this stage." ➢ MJ: ". . .I'm not sure what the relevance of him being at the bottom of the rung – I mean, do you have a relevance or improper character evidence objection? ➢ DC: "As well."	R. at 251.
➢ Q. "And what kind of roommate was he for you?" ➢ A. "He was a good roommate. It was good times." ➢ Q. "And did anything start changing later?" ➢ A. "Towards the spring, I'd say, there was just kind of a drastic change in the way he acted." ➢ Q. "And how is that?" . . . . ➢ Q. "In specifics, how did things change as a landlord for you?"	R. at 255.

➢ Q. "Can you please tell the members the reason why you were still receiving BAH with dependents after you should have notified the IPAC?" ➢ A. "Yes, ma'am. We were on a lease together, wanted to finish up the lease, and then he stopped paying me for the other half of the rent." ➢ Q. "Who's 'he'?" ➢ A. "Private Hornback."	R. at 309-10.
➢ Q. "Now, a few weeks after the accused left the apartment and vacated the apartment, did you find anything in his room?" ➢ A. "Yes, ma'am." ➢ Q. "And what is it that you found a few weeks after he was kicked out?" . . . . ➢ A. "I found a glass bowl."	R. at 313-14.
➢ Q. "So Corporal Kelly, to the incident that the defense was describing, why did the police show up at the house that night?" ➢ A. "They received a phone call stating domestic violence." ➢ Q. "From whom?" . . . . ➢ Q. "How do you know a call was made?"	R. at 330-31.

➢ A. When I was detained, the police officer said there was a domestic --“	R. at 330-31.
Government Closing Argument	
➢ “This case is about drugs, decay, and dishonesty. Napoleon Bonaparte said, ‘The infectiousness of a crime is like that of a plague.’ The accused is like a criminal infection that is a plague to the Marine Corps --”	R. at 445.
➢ “What it comes down to is that the accused’s life was decaying over the course of that year. He became that criminal infection --” ➢ “And the command has taken . . . action in the form of these charges before you. The Government is confident that you will find him guilty beyond a reasonable doubt.”	R. at 456.
➢ “Members, you saw the dependency application itself, the NAVMC 10922. This is probably the most simple DOD form that I have ever seen.”	R. at 471.
➢ “Now, members, the next main issue the defense spoke to you about, the next main excuse, I should say, is that Kelly and Morris planted those camera cards.” ➢ “And the defense contends the fact that there’s a discrepancy in their stories means that they’re lying. Discrepancies happen when people don’t collaborate. They are not collaborating on their stories.	R. at 472.

That's why there are differences in their stories." ➢ "They did not collaborate on this story. They were not fabricating the story."	R. at 472.
Government Sentencing Argument	
➢ "Members, we are here now because you have convicted this Marine of smoking Spice and also of stealing from the U.S. Government. Now, the Spice conviction you found to be true beyond a reasonable doubt, and with that, came the testimonies of two individuals who both heard him say he was using Spice at work. What was he doing at work? He was F-18 mechanic --"	R. at 533.
➢ "And lastly, the commander's main goal is to preserve good order and discipline."	R. at 535.

Instruction and Admonishment	**Record Citations**
Government Case-in-Chief	
➢ "[W]as that uncharged misconduct, 404(b), with reference to the spice[?] I mean, what was the purpose of asking that witness about all that first background? He didn't smoke spice with this witness, did he?"	R. at 141.
➢ "I mean you can't just put out there that he used drugs at some point. You have to factor it in to the period charged right?"	R. at 164.

➢ "It is still an error. I am not going to purposely make error in hopes that it is found harmless."	R. at 166.
➢ "I am concerned that you are getting into what would be 404(b) evidence or other acts evidence. We've got to narrow this down. I don't know what time period we're talking about. The fact that he used drugs before, you know, if he was having conversations about using drugs outside the charged time period I don't want that going to the members."	R. at 168.
➢ MJ: "I don't want to hear any testimony about drug use -- the accused admitting to drug use -- unless it is the accused admit[ing] to drug use during the charged period. Okay?" ➢ TC: "Yes, sir." ➢ MJ: "All right. So first orient to the charged period. I don't want there to be the possibility that there was drug use before or after the charged period being admitted into evidence. That would be inadmissible. All right?" ➢ TC: "Yes, sir." . . . . ➢ MJ: "And, yeah, I don't want just drug use, coke, cocaine, ecstasy, heroin, marijuana. I want the drug. I want it specified to the drug and during the time period if he has	R. at 169.

made an admission to that . . . But that is impermissible evidence going to the members if it is outside that window or if it is a different type of drug. Okay?	R. at 169.
➢ "I mean, if someone is charged with using marijuana, you can't come in here and start eliciting testimony or evidence that, you know, he's been around marijuana or he knows things about marijuana. I mean its [*sic*] impermissible character or other acts evidence. I don't think you've given notice of 404(b)."	R. at 176.
➢ "It seems like a lot of this is filtered through hearsay from other people. She -- even the testimony of him knowing about spice is something that she may have overheard in passing. It wasn't like a conversation she was having with the accused. It was -- she testified that she overheard --"	R. at 181.
➢ MJ: "Here is how this should go. How often did you see the accused? Did you interact with him on a daily basis? Were you able to observe the way he acted at work? You don't have to get into the specifics. How well do you know him? How long did he work for you, etcetera,	R. at 183.

etcetera. Okay. Without her talking about the specifics. Okay. And then presumably, you have some questions about the change in that. Is that right?" ➢ TC: "That is right, sir." ➢ MJ: "All right. Stick to that. Okay?" ➢ TC: "Yes, sir."	R. at 183.
➢ "Okay. Stop this. Disregard all that testimony. Strike that from your memory as though you've never heard it."	R. at 185.
➢ "Sustained. Disregard that last question and answer. Can all members follow that instruction? Cast it out of your minds as though you had never heard it. Can all members follow that instruction?"	R. at 186.
➢ "That is clearly impermissible evidence. You can't say that he used drugs -- this drug to get high. He misused this prescription drug on this occasion in order to get high to prove that he therefore used drugs and other prescription drugs on a separate occasion to get high."	R. at 188-89.
➢ MJ: "My concern here is that you are getting into all these potential bad acts that aren't specific to the charged offense which would blow this case up. I mean you just can't have that."	R. at 190.

➢ TC: "Sir, I need --" ➢ MJ: You need direct evidence that a crime was committed. You can't put all this evidence out there that, yeah, this guy is kind of into drugs and he likes to -- he knows a lot about drugs and he knows a lot about drugs that can't be detected in your system. I mean you have to show evidence that he committed the specific crime on the specific date that you alleged . . . Not that he's a bad guy."	R. at 190.
➢ "Do not get into any psychotherapist [privilege]."	R. at 206.
➢ "Sustained. Strick [sic] that last question and answer from your mind."	R. at 211.
➢ "Now, I am concerned that the jury's been tainted by hearing evidence that he was taking schizophrenia medication."	R. at 212.
➢ "Well, I am going to let her – I mean I thought Captain Holmes what we talked about that you were just going to ask him about whether he provided Xanax. Did we discuss going into like what Seroquel is used to treat?"	R. at 213.
➢ MJ: "Members, I believe that is the second time it has been referenced something about the potential that the accused --" ➢ TC: "It is uncharged, sir." ➢ MJ: "-- had something to do with a stolen motorcycle. You may not	R. at 224-25.

consider that for any reason. Strike that testimony from your minds as though you've never heard it and don't consider it for any purpose. Can all members follow that instruction?"	R. at 225
➢ MJ: "I'm not sure what the relevance of him being at the bottom of the rung -- I mean, do you have a relevance or improper character evidence objection?" ➢ DC: "As well." ➢ MJ: "Okay. I'm going to sustain it for that. Sustained on the last question regarding the accused's prior record. Don't consider any information regarding the accused's prior record."	R. at 251.
➢ Q. "And how is that?" ➢ DC: "Objection. 404 character evidence." ➢ MJ: "Response? Improper character evidence." ➢ TC: "No, sir. This goes directly to the charges as far as circumstantial evidence of drug use." ➢ MJ: "Sustained." . . . . ➢ TC: "In specifics, how did things change as a landlord for you?" ➢ DC: "Objection. 404 and then 401,	R. at 255.

relevance." . . . . ➢ MJ: "Okay. We need a 39(a) session, members, if you could step out, please.	R. at 255.
➢ "Okay. What you can't do is get into a bunch of evidence that the accused is a druggy and, therefore, he probably used some drug at some point. That's not admissible evidence."	R. at 256.
➢ "It can't be this amorphous, generalized -- I got it. I mean, you've got a lot of smoke. Where's the fire. I mean, you need to corroborate these things and it needs to be specific. He used drugs on this date. . . ."	R. at 258.
➢ MJ: "Because I'm tired of having the members being exposed to basically character evidence that's not admissible. I mean, you can't -- I just want to reiterate to you, you can't present evidence that the accused is a druggy; therefore, he probably used drugs. You need to present evidence that he specifically used drugs on a certain day and time." ➢ TC: "Yes, sir." ➢ MJ: "And a specific drug. Not that he's just a drug abuser generally and so you should convict him of using drugs. You can't do that. ➢ TC: "Yes, sir."	R. at 259.

. . . . ➢ MJ: "You could do that at an ad board. You can't do that in federal court." ➢ TC: "Yes, sir."	R. at 259.
➢ MJ sustains objection on relevance grounds.	R. at 310.
➢ MJ sustains objection on improper character evidence grounds. ➢ MJ instructs TC to "[j]ust lead."	R. at 314.
➢ MJ sustains objection on hearsay grounds.	R. at 331.
➢ MJ sustains objection on hearsay grounds.	R. at 385.
Government Closing Argument	
➢ MJ sustains objection to TC closing argument on improper character evidence grounds.	R. at 445.
➢ MJ to Members, "Yeah. Don't consider that evidence."	R. at 447.
➢ MJ sustains objection on improper character evidence grounds.	R. at 456.
➢ "Hang on a second. Okay. Members, a couple things. One, with respect to that last question, you all agree the convening authority is not expecting a certain result in this case, that you're to try the case or decide the issues based on the evidence presented before you, and no one is presuming any certain outcome in this case. Additionally, throughout the course of this trial and even during the closing argument, I sustained	R. at 456-57.

several objections to character evidence. You may not consider any evidence that was the subject of a sustained objection for any purpose, and you may not consider -- those objections related to character evidence, you may not conclude based on any of that evidence or arguments of counsel that the accused is a bad person or has general criminal tendencies and that he, therefore, committed the offenses charged. You need to base your determination on the admitted evidence in this case and determine if the offenses were committed beyond a reasonable doubt at the specific times and in the specific manner in which they were alleged. Can all the members follow that instruction? Affirmative response from all members."	R. at 456-57.
Government Sentencing Argument	
➢ MJ: "Sustained. You have to argue about the crime that he was convicted of. He was convicted of smoking Spice that they observed him smoking." ➢ TC: "Yes, sir." ➢ MJ: "You can't speculate as to other bad acts that he might have done. I want you to stay away from other bad acts or evidence of a general	R. at 533-34.

criminal disposition and focus on the offenses of which the accused was convicted."	R. at 534