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I. FINDINGS ARGUMENT

1. **Permissible Arguments - *Generally***

* 1. Arguments may properly include reasonable comment on the evidence in the case, including inferences to be drawn therefrom, in support of a party's theory of the case. R.C.M. 919(b).
  2. *United States v. Haney*, 64 M.J. 101 (CAAF 2006). Trial counsel has the duty of prosecuting a case, and he is permitted to comment earnestly and forcefully on the evidence, as well as on any inferences which are supported reasonably by the testimony; he may strike hard blows, but they must be fair; if his closing argument has a tendency to be inflammatory, it must be based on matters found within the record; otherwise, it is improper; the issues, facts, and circumstances of the case are the governing factors as to what may be proper or improper.
  3. Counsel may comment on the testimony, conduct, and motives of witnesses.
  4. Counsel may argue as though the testimony of their witnesses conclusively established the facts related by them.

1. **Permissible Arguments – *Specific Cases***
   1. **Counsel may not make inaccurate reference to law (elements, burden of proof, etc.)**. *United States v. Turner*, 30 M.J. 1183 (A.F.C.M.R. 1990). Error for trial counsel to present a list of facts court would have to find before the panel could find the accused innocent.
   2. **Counsel may not cite legal authority to court with members.** *United States v. McCauley*, 25 C.M.R. 327 (C.M.A. 1958). Error for trial counsel to read from case in the Court-Martial Reports.
   3. **Counsel may not refer to irrelevant matters.** During findings argument, the authorized sentence is generally irrelevant. However, defense counsel should be permitted to inform members of mandatory minimum life sentence to impress seriousness of offense. *United States v. Jefferson*, 22 M.J. 315 (C.M.A. 1986).
   4. **Counsel may not argue facts not in evidence.** 
      1. **Demeanor of non-testifying accused is not evidence*.*** *United States v. Kirks*, 34 M.J. 646 (A.C.M.R. 1992). Trial counsel improperly referred to accused as the "iceman". *But see United States v. Carroll*, 34 M.J. 843 (A.C.M.R. 1992). Demeanor of an accused who does testify is evidence.
      2. **Non-verbal communication and silence.**
         1. Trial counsel may not comment on pre-trial silence and responses to official questioning. *United States v. Clark*, 69 M.J. 438 (C.A.A.F. 2011).
         2. A person’s failure to deny an accusation of wrongdoing concerning an offense for which at the time of the alleged failure the person was under official investigation or was in confinement, arrest, or custody does not support an inference of an admission of the truth of the accusation. M.R.E. 304(h)(3).
         3. “A lack of response or reaction to an accusation is not ‘demeanor’ evidence, but a failure to speak.” *United States v. Alameda*, 57 M.J. 190 (C.A.A.F. 2002); *see also United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2011) (commenting that an accused has not been forthcoming of her version of the facts during the investigation, when the accused does not testify, is fraught with danger).
         4. Trial counsel may not comment on ACC's silence when questioned about offenses while under investigation, even where questioner is personal acquaintance of ACC and not acting in any official capacity. *United States v. Cook*, 48 M.J. 236 (C.A.A.F. 1998).
      3. It is error for counsel to include inadmissible hearsay in findings argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).
      4. Counsel may argue facts of other cases which are generally known. *United States v. Jones*, 11 M.J. 829 (A.F.C.M.R. 1981).
      5. Counsel may not suggest that a military judge’s decision to admit or exclude evidence or to sustain an objection amounts to a comment on the veracity of that evidence or witness. *United States v. Pomarleau*, 57 M.J. 351 (C.A.A.F. 2002).
      6. Counsel may not discuss police reports which are not in evidence. *U.S. ex rel. Shaw v. De Robertis*, 755 F.2d 1279 (7th Cir. 1985)
      7. Counsel may not mention what the testimony of witnesses who were not called would have been. *U.S. v. Palmer*, 37 F.3d 1080 (5th Cir. 1994); *see Borodine v. Douzanis*, 592 F.2d 1202 (1st Cir. 1979).
      8. Prosecutors may not mention their own personal experiences in prosecuting certain types of cases in order to discredit the defense proffered by the Accused. *U.S. v. Wright*, 625 F.3d 583 (9th Cir. 2010).
   5. **Counsel may not argue the nonexistence of evidence after a successful suppression motion.** See ABA Standards for Criminal Justice, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist." The few reported cases on this issue take the position that such an argument misrepresents the facts to the tribunal.
      1. Counsel may not mention evidence that has been suppressed or suggest that other evidence exists. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983).
      2. *State v. McNeely*, 664 P.2d 277 (Idaho Ct. App. 1983). After the defense successfully suppressed currency and cocaine, the prosecution filed a motion in limine to prevent the defense from arguing that the state produced no evidence because it had no evidence. The trial court granted the motion, and the Idaho Court of Appeals affirmed, citing treatises and commentary for the proposition that it is a form of misrepresentation for counsel to argue the absence of evidence when it is absent only because it was suppressed.
      3. *Pritchard v. State*, 673 P.2d 291 (Alaska Ct. App. 1983) (“Defense counsel clearly has the right to argue in support of a Scotch verdict, *i.e.*, that the prosecution has failed to sustain its burden of proof. . . . He may not, however, state to be true something he knows to be false. Thus, for example, he may not base his argument on the nonexistence of evidence which in fact was present but was suppressed on motion by the defense.”
   6. **Counsel may not argue personal belief.**
      1. Counsel may not express personal opinion as to guilt of accused. *United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977).
      2. Counsel may not express personal belief as to truth or falsity of evidence or testimony. *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983). RCM 919(b)
      3. However, telling the panel members that a witness testified truthfully and using the word “clearly” is not improper. *United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010).
      4. Counsel should not phrase argument in personal terms. *United States v. Horn*, 9 M.J. 429 (C.M.A. 1980). Trial counsel's repeated use of term "I think" during argument was improper.
      5. Expression of personal opinion by defense counsel does not confer license on trial counsel to respond in kind. *United States v. Young*, 470 U.S. 1 (1985).
      6. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). During the findings argument, the trial counsel offered her personal views, made disparaging comments about the accused and his counsel, and drew parallels between the accused’s case and the legal problems of various entertainers and public religious figures; these comments rose to the level of prosecutorial misconduct, and the misconduct was prejudicial. It is improper for a trial counsel to interject herself into the proceedings by expressing a personal belief or opinion as to the truth or falsity of any testimony or evidence. There are many ways a trial counsel might violate the rule against expressing a personal belief or opinion; one is by giving personal assurances that the Government’s witnesses are telling the truth; another is by offering substantive commentary on the truth or falsity of the testimony and evidence. Improper vouching occurs when the trial counsel places the prestige of the government behind a witness through personal assurances of the witness’s veracity; improper vouching can include the use of personal pronouns in connection with assertions that a witness was correct or to be believed; prohibited language includes “I think it is clear,” “I’m telling you,” and “I have no doubt;” acceptable language includes “you are free to conclude,” “you may perceive that,” “it is submitted that,” or “a conclusion on your part may be drawn.” In this case, the trial counsel improperly vouched for the credibility of the Government’s witnesses and evidence in a trial for the wrongful use of cocaine where after discussing the testing methods and cut-off levels, she concluded “we know that that was from an amount that’s consistent with recreational use, having fun and partying with drugs,” she personally characterized the drug test results exhibit as “a perfect litigation package,” and she opined that one of the prosecution’s main witnesses was “the best possible person in the whole country to come speak to us about this.” Improper interjection of the prosecutor’s views can also include substantive commentary on the truth or falsity of testimony or evidence; prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant’s guilt and offering unsolicited personal views on the evidence. The trial counsel improperly interjected her personal views of the evidence and her personal opinion about the accused’s guilt at trial for the wrongful use of cocaine where she described the Government’s evidence as “unassailable,” “fabulous,” and “clear,” stated that it was clear from the urinalyses that he was “doing it over and over,” that he was “a weekend cocaine user,” and that he was “in fact guilty of divers uses of cocaine,” and described the accused’s defense as “nonsense,” “fiction,” “unbelievable,” “ridiculous” and “phony.” The injection of the trial counsel’s personal beliefs and opinions was plain and obvious error where over the course of her findings argument, there were more than two dozen instances in which she offered her personal commentary on the truth or falsity of the testimony and evidence, where she repeatedly inserted herself into the proceedings by using the pronouns “I” and “we,” where she put the authority of the Government and her office behind the prosecution’s witnesses, and where she bluntly concluded that the accused was in fact guilty.
      7. *United States v. Terlep*, 57 MJ 344 (C.A.A.F. 2002). It is not proper for a trial counsel to express his personal opinion or belief that a government witness is telling the truth; however, trial counsel’s argument here could reasonably be construed as simply calling the court’s attention to the victim’s fortitude in performing her civic duty as a witness in this personally difficult case.
   7. **Counsel may not comment on the Accused's exercise of any fundamental right.** *Griffin v. California*, 380 U.S. 609 (1965). Trial counsel generally may not comment on any witnesses’ invocation of a fundamental right. *United States v. Matthews*, 66 M.J. 645 (A. Ct. Crim. App. 2008)
      1. **Trial counsel may not comment on Accused's invocation of right to counsel and right to remain silent.**
         1. *United States v. Zaccheus*, 31 M.J. 766 (A.C.M.R. 1990). Trial counsel improperly commented on accused's invocation of right to counsel.
         2. *United States v. Frentz*, 21 M.J. 813 (N.M.C.M.R. 1985). Government may not bring to attention of trier of fact that an accused invoked right to remain silent and consulted with attorney.
         3. *United States v. Pope*, 69 M.J. 328 (C.A.A.F. 2010). It is constitutional error to admit evidence of - or comment on in argument - an accused’s post-apprehension silence as evidence of guilt.
         4. *But see United States v. Clark,* 69 M.J. 438 (C.A.A.F. 2010); *United States v. Haney*, 64 M.J. 101 (C.A.A.F. 2006). Government permitted comment on accused invocation of right to silence and failure to seek counsel when facts were introduced by the defense and integral to the defense theory. *The government is permitted to make a fair response to claims made by the defense, even when a Fifth Amendment right is at stake.*
         5. *United States v. Flores*, 69 M.J. 366 (C.A.A.F. 2010). A trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in her defense. A direct reference made by trial counsel during his closing argument on the merits to a statement made by appellant during the providence inquiry in an attempt to show that appellant corroborated the testimony of another witness was plain and obvious error.
         6. *United States v. Moran*, 65 M.J. 178 (C.A.A.F. 2007). The law discourages trial counsel’s presentation of testimony or argument mentioning an accused’s invocation of his constitutional rights unless, for example, an accused invites such testimony or argument in rebuttal to his own case; such comments may serve to hinder the free exercise of such rights -- rights that carry with them the implicit assurance that their invocation will carry no penalty; the constraint against mentioning the exercise of constitutional rights does not depend on the specific right at issue. In the closing part of his findings argument to the members, trial counsel made an obvious error when he commented that when the OSI asked the accused to consent to the collection of his body hair, the accused refused and invoked his right to counsel; not only was this comment an inaccurate characterization of the testimony presented (the accused had not invoked his right to counsel), but it improperly referenced the accused’s exercise of a constitutional right and suggested, intentionally or not, that the members infer guilt from the invocation of that right.
      2. **Counsel may not comment on Accused's failure to testify.**
         1. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses.
         2. *United States v. Harris*, 14 M.J. 728 (A.F.C.M.R. 1982). Trial counsel's comment that case before court was "one-on-one" and that government case was uncontroverted was impermissible comment on accused's election not to testify.
         3. *United States v. Paige*, 67 M.J. 442 (C.A.A.F. 2009). A military accused has the right not to testify, and trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense. Trial counsel’s comments in argument in a rape trial that appellant had to assert that his mistake was honest to establish a mistake of fact defense violated appellant’s right not to testify, where trial counsel’s choice of words suggested that appellant had to testify to establish the defense.
      3. **Counsel may not comment on Accused's failure to call witnesses.**
         1. *United States v. Mobley*, 31 M.J. 273 (C.M.A. 1990). Trial counsel's use of rhetorical questions in argument which focused on "unanswered questions" was improper indirect comment on accused's failure to testify and failure to produce witnesses.
         2. *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). Trial counsel's improper comment on accused's failure to produce witness was not prejudicial because defense argued that missing witness would testify favorably to accused.
         3. *But see United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.
   8. **Counsel may not argue for burden shift.**

*United States v. Lewis*, 69 M.J. 379 (C.A.A.F. 2010). An improper implication by the trial counsel that the defendant carries the burden of proof on the issue of guilt constitutes a due process violation. HOWEVER, the limitation on comments regarding the burden of proof does not apply *in circumstances where the defense has the burden of proof on a particular matter, such as an alibi defense; likewise, the limitation on comments cannot be used by the defense as both a shield and a sword*. In this case, where the defense articulated a strategy expressly promising an affirmative showing of innocence, attempted to make such an affirmative showing during its case on the merits, and argued in closing that it had delivered on its promise, the prosecution could (1) on cross-examination of the defense expert, rely on the defense posture and the evidence presented during the defense case as providing the basis for questions posed to the expert regarding whether his investigation had found any exculpatory evidence, and (2) during rebuttal of closing argument, rely on the defense counsel’s closing argument, which highlighted the earlier defense presentation, as providing the basis for the comments that the defense expert had found nothing exculpatory for appellant; the defense posture and the evidence opened the door to exploration of these matters; in context, the prosecution’s questions and argument fell well within the range of permissible cross-examination and argument; accordingly, appellant failed to meet his burden of establishing error, much less plain error.

* 1. **Counsel may not seek to inflame passions of the court**
     1. *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). By characterizing accused as a prurient sex fiend and a deviant pervert, trial counsel urged the members to cast aside reason.
     2. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989). Court upheld trial counsel's argument comparing the accused to three well-known television evangelists, stating "A criminal trial is not a tea dance.”
     3. *United States v. Causey*, 37 M.J. 308 (C.M.A. 1993). In urinalysis case, trial counsel argued that if members accepted accused's innocent ingestion defense they would "hear it a million times again" in their units. Court held this improperly inflamed members with fear that urinalysis program would break down. *See* [*U.S. v. Sanchez*, 659 F.3d 1252 (9th Cir. 2011)](https://web2.westlaw.com/find/default.wl?mt=26&db=0000506&findtype=Y&tc=-1&rp=%2ffind%2fdefault.wl&spa=003653924-U10&ordoc=0289532007&serialnum=2026429488&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=3D33C30C&rs=WLW13.07) (holding improper prosecutor’s “send a memo” statement, point of which was that if jury acquitted defendant of importation and possession of cocaine based on his duress defense that verdict would, in effect, send message to other drug couriers to use that defense themselves).
     4. *United States v. Schroder*, 65 M.J. 49 (C.A.A.F. 2007). Trial counsel is at liberty to strike hard, but not foul, blows; to that end, it is error for trial counsel to make arguments that unduly inflame the passions or prejudices of the court members. An accused is supposed to be tried and sentenced as an individual on the basis of the offenses charged and the legally and logically relevant evidence presented; thus, trial counsel is also prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence. Where MRE 414 evidence is admitted, there is a need for procedural safeguards to delimit the use of such evidence; one such safeguard is to ensure that trial counsel does not use such evidence to unduly inflame the members; the MRE 414 safeguards could be undermined if trial counsel’s comments were permitted to range outside the realm of legally relevant matters and express a sense of outrage and injustice regarding the victims of uncharged misconduct. In child molestation case, trial counsel erred in arguing that the members should render justice for the purported victim of uncharged misconduct which was admitted as propensity evidence; the argument invited the members to convict and punish appellant for his uncharged misconduct, as opposed to using that misconduct to inform their judgments regarding the charged conduct; this error was also plain and obvious.
     5. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). Counsel are prohibited from making arguments calculated to inflame the passions or prejudices of the jury. The trial counsel’s references to religious figures and entertainers who had experienced legal problems in response to the accused’s good citizen defense improperly invited comparison to those cases, the facts of which were not admitted into evidence and which bore no similarity to the accused’s case; although references to public figures and news stories may be allowed, the specificity and detail of her comments went well beyond the generic comments; the trial counsel did not make generalized references to current events to give her argument some context; she made specific references to sensational events not in evidence in order to support her contention that the accused was guilty; although the accused’s good citizen defense may have opened the door to an appropriate response, the comments of the trial counsel were outside the bounds of fair comment.
     6. Counsel may not mention their own personal experiences that are outside the evidence of record in order to elicit passion and sympathy from the jury. *U.S. v. Galloway*, 316 F.3d 624 (6th Cir. 2003).
     7. *U.S. v. Parkes*, 668 F.3d 295 (6th Cir. 2012). Counsel erred by suggesting in a bank fraud case that jury alone could prevent bank loss of $4 million.
     8. *U.S. v. Boyd*, 640 F.3d 657 (6th Cir. 2011). Counsel erred by commenting to the jury in a murder case that “it could have been you,” and references to the “cool winds blowing above” the murder victims in their respective graves.
     9. *Com. of Northern Mariana Islands v. Mendiola*, 976 F.2d 475, 486 (9th Cir. 1992), overruled on other grounds by, *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997). Counsel erred by remarking that defendant would walk “out the door, right behind the jury.”
  2. **Counsel may not argue evidence beyond its limited purpose**
     1. *United States v. Sterling*, 34 M.J. 1248 (A.C.M.R. 1992). Accused was charged with two specifications of use of cocaine based on two positive urinalysis tests. Trial counsel improperly argued that one test corroborated the other.
     2. *United States v. Burton*, 67 M.J. 150 (CAAF 2009). The government may not introduce similarities between a charged offense and prior conduct, whether charged or uncharged, to show modus operandi or propensity without using a specific exception within our rules of evidence, such as MRE 404 or 413. It follows, therefore, that portions of a closing argument encouraging a panel to focus on such similarities to show modus operandi and propensity, when made outside the ambit of these exceptions, are not a reasonable inference fairly derived from the evidence, and are improper. Trial counsel’s suggestion during closing argument on findings that the members of the panel could compare the similarities between the charged sex offenses for a propensity to commit these types of offenses and see the accused’s modus operandi was improper argument; although the charged offenses were themselves the proper subject of closing argument, the underlying conduct had not been offered or admitted under MRE 404 or 413, and as such, trial counsel’s invitation to the panel to compare the charged offenses to find modus operandi or propensity was improper.
  3. **Counsel may not make racist comments**
     1. *United States v. Lawrence*, 47 M.J. 572 (N.M.Ct.Crim.App. 1997). Trial counsel'’ rebuttal argument referring to testimony by the accused and his “Jamaican brothers” was plain error and was unmistakenly pejorative, even if trial counsel did not intend to evoke racial animus.
     2. *United States v. Diffoot*, 54 MJ 149 (C.A.A.F. 2000). Trial counsel’s closing argument, which argued that appellant should be convicted because he was the Hispanic associate of two Hispanic Marines who admitted committing the larceny crimes, prejudicially violated appellant’s due process right to a fundamentally fair trial:  (1) it improperly attempted to enhance the prosecution’s case based on the defendant’s race and his criminal associations; (2) the comments were made during closing argument, a critical point in the trial; (3) the evidence of appellant’s guilt was not overwhelming; (4) there was no effort by the trial counsel or military judge to disavow the improper argument; and (5) there was no effort to limit consideration of appellant’s ethnicity and associations to proper purposes.
     3. *United States v. Thompson*, 37 M.J. 1023 (A.C.M.R. 1993). Trial counsel improperly argued that accused dealt drugs because of the "stereotypic view of what the good life is, Boyz in the Hood - drug dealing - sorry to say, the black male and the black population. But nevertheless, it is that look, it is that gold chain, it is that nice car that epitomizes a successful individual."
     4. *United States v. Rodriguez*, 60 M.J. 87 (C.A.A.F. 2004). In a case involving a Latino accused, the prosecutor made a passing reference to a “Latin movie” during closing argument. The court declined to adopt a *per se* prejudice test for statements about race, but it did caution that improper racial comments could deny an accused a fair trial.
     5. The trial counsel's use of the phrase "chilling with his boy" in describing a defense witness's association with the appellant was at the least insensitive sarcasm and could have been racist. *United States v. Walker*, 50 M.J. 749 (N-M.Ct. Crim. App. 1999).
  4. **Counsel may not malign Defense Counsel or Accused**
     1. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). It is improper for a trial counsel to attempt to win favor with the members by maligning defense counsel. The trial counsel improperly made disparaging comments about the defense counsel’s style and also made comments suggesting that the accused’s defense was invented by his counsel at trial for the wrongful use of cocaine where she openly criticized defense counsel by accusing him of scaring witnesses, cutting off witnesses, and suborning perjury from his own client, she referred to the accused’s arguments as “fiction” at least four times and called one of the accused’s arguments a “phony distraction.” The trial counsel’s attacks on defense counsel’s courtroom manner and integrity were plainly improper where she obviously attempted to win over the jury by putting herself in a favorable light while simultaneously making defense counsel look like a mean and nasty person who would say anything to get his client off the hook were plainly improper, she erroneously encouraged the members to decide the case based on the personal qualities of counsel rather than the facts, and her comments not only had the potential to mislead the members, but also detracted from the dignity and solemn purpose of the court-martial proceedings.
     2. *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005). Disparaging comments by the trial counsel are improper when they are directed to the defendant himself; calling the accused a liar is a dangerous practice that should be avoided. The trial counsel improperly made disparaging comments about the accused’s credibility at trial for the wrongful use of cocaine where she told the members that the accused had “zero credibility” and that his testimony was “utterly unbelievable,” and where in rebuttal, she argued that the accused lied when questioned by his defense counsel; this language was more of a personal attack on the accused than a commentary on the evidence. The trial counsel’s improper characterization of the accused as a liar at trial for the wrongful use of cocaine did not rise to the level of plain error where the defense had opened the door for comment on conflicting testimony when the accused testified that he had never used drugs and then later admitted that he had experimented with marijuana; although the trial counsel should have avoided characterizing the accused as a liar and confined her comments instead to the plausibility of his story, her comments were not so obviously improper as to merit relief in the absence of an objection from counsel.
     3. *United States v. Erickson,* 65 M.J. 221 (C.A.A.F. 2007). Trial counsel erred by comparing the accused with Hitler, Saddam Hussein, and Osama bin Laden, and described the accused as a demon belonging in hell. Defense counsel did not object at trial, however, so the court tested for plain error under prosecutorial misconduct standards and under that high standard found no prejudice.
     4. *United States v. Quarles*, 25 M.J. 761 (N.M.C.M.R. 1987). During findings argument, trial counsel characterized the accused as a prurient sex fiend and a deviant pervert. This improperly urged the members to cast aside reason and to impermissibly convict based on the accused alleged deviant character.
     5. *United States v. Waldrup*, 30 M.J. 1126 (N.M.C.M.R. 1989). Portraying accused as a "despicable and disgusting" man who took advantage of the "sacred" relationship between a mother and child was improper.
     6. *United States v. Barrazamartinez*, 58 M.J. 173 (C.A.A.F. 2003). The appellant pled guilty to wrongfully importing marijuana into the United States across the border from Mexico. At sentencing, the trial counsel argued that the appellant’s actions were abhorrent because the United States was engaged in a war on drugs. He also argued that the appellant was “almost a traitor” because he brought drugs into the country when the nation was trying to stop drugs from coming into the country. Although the trial counsel’s use of the word “traitor” was a matter of concern, it did not rise to the level of unduly inflaming the passions or prejudices of the panel members.
     7. *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986). Trial counsel's argument that accused was a degenerate scum and miserable human being was properly based on evidence in the record.
     8. Comparing a defense witness to Hitler was improper. *United States v. Nelson*, 1M.J. 235 (C.M.A. 1975).

1. **Defense opens the door – the “invited response” or “invited reply.”**
   1. If the defense says in opening statement that the accused will testify or produce certain evidence or call certain witnesses, places the issue before the members, or gives a disingenuous argument, the defense opens the door to government comment. *See generally United States v. Robinson*, 485 U.S. 25 (1988).
   2. *United States v. Gilley*, 56 M.J. 113 (C.A.A.F. 2001). The defense counsel brought up the issue of why an interview with investigators ended and argued that it ended because the contents of the written statement were false. In fairness, the government was allowed to argue that the accused never saw the contents of the statement to even know if the contents were false and did not sign the statement because he invoked his right to counsel. The court was still troubled by the government’s repeated references to the invocation of rights.
   3. *United States v. Espronceda*, 36 M.J. 535 (A.F.C.M.R. 1992). When defense counsel proffers anticipated testimony of a potential witness and then does not call that witness, the defense opens the door to a proper government response.
   4. *United States v. Webb*, 38 M.J. 62 (C.M.A. 1993). Trial counsel properly commented that defense counsel did not live up to the promise he made during his opening statement to present an alibi witness.
   5. *United States v. Haney*, 64 M.J. 101 (C.A.A.F. 2006). Not plain error when government commented on accused’s invocation of right to silence and failure to seek counsel when those facts were introduced by the defense and integral to the defense theory. *See also United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005); *United States v. Lewis*, 69 M.J. 379 (C.A.A.F. 2011); *see generally United States v. Turner*, 30 M.J. 1183, 1184 (A.F.C.M.R. 1990); *Jenkins v. Anderson*, 447 U.S. 231 (1980).
2. **Asking the panel to “imagine” or “Golden Rule” arguments**
   1. Counsel may not ask members to place themselves in position of victim’s relative when determining punishment. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976).
   2. Counsel may not ask the panel to place themselves in the position of the victim, as in, use the word “imagine.” *United States v. Baer,* 53 M.J. 235 (C.A.A.F. 2000). Trial counsel asked the members to “imagine being [the victim] sitting there as these people are beating him,” and “imagine the pain and agony . . . you can't move. You're being taped and bound almost like a mummy. Imagine as you sit there as they start binding.” The court stated that such “Golden Rule arguments” are impermissible and improper. The court also warned that “trial counsel who make impermissible Golden Rule arguments and military judges who do not sustain proper objections based upon them are risking reversal.” *See also United States v. McClary*, 68 M.J. 606 (C.G. Ct. Crim. App. 2010) (error to ask the panel to imagine what it would be like to have your neck squeezed while being choked). *But see United States v. Edmonds*, 36 M.J. 791 (A.C.M.R. 1993); *United States v. Melbourne*, 58 M.J. 682 (N-M. Ct. Crim. App. 2003).
   3. However, counsel can ask the members to *consider* the fear and pain of the victim. *United States v. Baer,* 53 M.J. 235 (C.A.A.F. 2000).
3. **May Argue – but be careful**
   1. *United States v. Paige*, 67 M.J. 442 (CAAF 2008). A military accused has the right not to testify, and trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense. The privilege against self-incrimination provides an accused servicemember with the right not to testify at his court-martial and precludes comment by trial counsel on his silence. *However, it is permissible for trial counsel to comment on the defense’s failure to refute government evidence or to support its own claims. A constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the members naturally and necessarily would interpret the summation as comment on the failure of the accused to testify*. The discussion to RCM 919 suggests that trial counsel may not argue that the prosecution’s evidence is unrebutted if the only rebuttal could come from the accused. Trial counsel’s comments in argument in a rape trial that there was uncontradicted evidence of the alleged victim’s intoxicated condition just prior to and at the instance of penetration did not violate appellant’s right not to testify, even though the alleged victim could not remember what happened and appellant was thus the only person who could testify as to the alleged victim’s condition at that time, where the closing argument did not focus on that time period. The members would not naturally and necessarily interpret the trial counsel’s summation in a rape trial as comment on the failure of the accused to testify where trial counsel’s closing argument addressed the evidence raised through direct and cross-examination of numerous government and defense witnesses who provided extensive observations of the alleged victim’s intoxicated condition as a sequence through time; the testimony of the defense’s own witnesses contributed to the development of the sequence, which extended beyond the crucial time periods immediately preceding and following the rape to the point where the alleged victim was receiving medical attention at the barracks, in the ambulance, and at the hospital; in emphasizing that the evidence at the time of the rape and immediately after the rape was uncontradicted, trial counsel’s summation stressed consistency between the observations of two witnesses, contrasting it with the more varied nature of the testimony surrounding the other witnesses’ observations as the evening progressed. [[1]](#footnote-1)
   2. *But See United States v. Carter*, 61 M.J. 30 (CAAF 2005). It is black letter law that a trial counsel may not comment directly, indirectly, or by innuendo, on the fact that an accused did not testify in his defense; he may not comment on the accused’s exercise of the right against self-incrimination; and he may not argue that the prosecution’s evidence is unrebutted if the only rebuttal could come from the accused. *Not every prosecutorial comment on the failure of an accused to testify is impermissible; it is well established that the government may comment on the failure of a defendant to refute government evidence or to support his own claims; a constitutional violation occurs only if either the defendant alone has the information to contradict the government evidence referred to or the jury naturally and necessarily would interpret the summation as comment on the failure of the accused to testify*. The charged act here involved two adults alone in a private room in the early hours of the morning; there were no screams, no injuries, no physical evidence of a struggle, and no other witnesses; only the accused possessed information to contradict the government’s sole witness; as such, prosecutorial comment on the failure to present contradicting evidence constituted an impermissible reference to the accused’s exercise of the privilege against self-incrimination unless the comment constituted a fair response to a claim made by the defense. The improper comments in this case were not isolated or a “slip of the tongue;” trial counsel used the words “uncontroverted” and “uncontradicted” repeatedly -- eleven times in all -- such that the reference to the accused’s decision not to testify became a centerpiece of the closing argument; even after the military judge instructed the members not to draw any adverse inferences from the accused’s silence, trial counsel persisted in characterizing the evidence as “uncontradicted” three more times; considering the statements in context, trial counsel improperly implied that the accused had an obligation to produce evidence to contradict the government’s witness; this essentially shifted the burden of proof to the accused to establish his innocence -- a violation of protections of the Fifth Amendment.
   3. *United States v. Gilley*, 56 MJ 113 (C.A.A.F. 2002). Where prosecutorial comments are a fair response to a claim made by the defendant or his counsel, there is no violation of the Fifth Amendment privilege against self-incrimination. To determine whether or not prosecutorial comments are fair, the comments are examined in context, and invoke consideration of the "invited response" or "invited reply" rule to assess whether, viewed in the context of the entire trial, defense counsel’s comments clearly invited the reply. Trial counsel’s argument, which consisted of repeated references to appellant’s request for counsel, could have reflected negatively upon the invocation of those rights by leading the members to attach a significance to such invocation that went beyond fair rebuttal of appellant’s allegation. *See also United States v. Clark,* 69 M.J. 438 (C.A.A.F. 2010).
   4. *United States v. Garren*, 53 MJ 142 (C.A.A.F. 2000). Trial counsel’s opening and closing comments, that appellant was an NCO who did not take responsibility for his actions, called attention to inconsistencies in appellant’s statements to criminal investigators and were fair comment upon what trial counsel expected the evidence to show and what he was in fact required to show to establish guilt beyond a reasonable doubt in a trial that dealt with appellant’s lies about his criminal responsibility.
4. **DEFENSE ISSUES IN FINDINGS ARGUMENT:** Counsel should not argue the nonexistence of evidence after a successful suppression motion. See ABA Standards for Criminal Justice, Standard 4-7.8 and its Commentary: "A lawyer who has successfully urged the court to exclude evidence should not be allowed to point to the absence of that evidence to create an inference that it does not exist." *See* *State v. McNeely*, 664 P.2d 277 (Idaho Ct. App. 1983); *Pritchard v. State*, 673 P.2d 291 (Alaska Ct. App. 1983).
5. **REBUTTAL ARGUMENT. R.C.M. 919(b)**
   1. As the Government has the burden, the Court will allow the Government to “give the last word.”
   2. Directly rebut one to three specific points made by defense. Don’t use rebuttal to rehash your entire argument. Brevity is the key!
   3. The trial counsel’s rebuttal argument is generally limited to matters argued by the defense. If trial counsel introduces new matter in rebuttal, then the defense counsel should be allowed to reply in rebuttal. However, the trial counsel will be allowed to make the final argument. R.C.M. 919(b) discussion.
6. **REMEDIES FOR IMPROPER ARGUMENT**
   1. Military judge can sua sponte stop the argument. *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).
   2. Military judge can give a curative instruction. *United States v. Carpenter*, 29 C.M.R. 234 (C.M.A. 1960); *United States v. Horn*, 9 M.J. 429 (C.M.A 1980).
      1. *United States v. Riveranieves*, 54 MJ 460 (CAAF 2001). Where trial counsel misstates evidence during argument on findings and an objection that the argument is improper is sustained, the military judge should immediately instruct the members that the argument was improper and that they must disregard it. Appellant was prejudiced where trial counsel misstated evidence during argument on findings and, upon objection, the military judge agreed with trial counsel’s reading of the record and communicated this belief to the members.
      2. *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). Military judge ruled that trial counsel’s comments in opening improperly referenced the accused’s election of rights. The military judge issued curative instructions and polled the members. These corrective actions kept error harmless beyond a reasonable doubt.
   3. Military judge can require a retraction from counsel. *United States v. Lackey*, 25 C.M.R. 222 (C.M.A. 1958).
   4. Military judge can declare a mistrial. *United States v. O'Neal*, 36 C.M.R. 189 (C.M.A. 1966); *United States v. McPhaul*, 22 M.J. 808 (A.C.M.R. 1986), *pet. denied* 23 M.J. 266 (C.M.A. 1986).
   5. Counsel must cease argument once military judge rules on issue in question. *United States v. Warnock*, 34 M.J. 567 (A.C.M.R. 1991).

II. THE PROSECUTION SENTENCING ARGUMENT. R.C.M. 1001(g).

1. Trial counsel may not purport to speak for the convening authority or any higher authority. R.C.M. 1001(g).
   1. Counsel may not even hint that they speak for the convening or higher authority-“I stand before you as a representative of the US Government…the US Government wants this person to go to jail for a minimum of forty-four months and fourteen days” was improper argument. *United States v. Flynn*, 34 M.J. 1183 (A.F.C.M.R. 1992).
   2. PRACTICE TIP: This rule seeks to prevent unlawful command influence. The members are charged with determining an appropriate sentence. Do not say or do anything that could be construed as subjecting them to outside influence regarding what an appropriate sentence might be.

B. Likewise, counsel should not refer to the views of the convening or higher authorities or any policy directive relative to punishment. R.C.M. 1001(g); *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983)(any reference to departmental or command policies which in effect bring the commander into the deliberation room is improper, whether referenced by trial counsel or defense counsel). PRACTICE TIP: Do not argue the Air Force “zero tolerance” policy for drugs or sexual harassment.

1. Do argue core values. Core values do not constitute guidance from higher authority related to punishment. Rather, they are aspirational concepts service personnel are expected to know and follow. Failure to comply with them does not necessarily require any specific punishment or disposition. *United States v. Fortner*, 48 M.J. 882 (N-M.Ct.Crim.App. 1998*), rev. denied*, 51 M.J. 478 (1999).

2. Do not refer to possible post-trial actions such as clemency.

C. Do argue for a specific lawful sentence. R.C.M. 1001(g). *Example: “An appropriate sentence in this case would be a bad conduct discharge, 5 months confinement, and reduction to airman basic.”*

* 1. Arguing for a sentence that exceeds the pretrial agreement is appropriate. *United States v. Rich*, 12 M.J. 661 (A.C.M.R. 1981).
  2. Do not argue any quantum of punishment greater than the court-martial may adjudge. R.C.M. 1001(g). PRACTICE TIP: Calculate the maximum punishment based on the offenses of which the accused was convicted. The military judge will confirm the maximum punishment during an Article 39(a) session. Make sure your recommended sentence/argument does not call for punishment in excess of that amount. This issue most often arises when the accused is partially acquitted…remember to revise your sentencing argument to fit the convictions. Also, when the accused has been found not guilty of any offense, do not include that offense or the underlying facts in your argument.
  3. Do not indicate the recommended sentence was coordinated with or approved by any higher authority. To do so would create unlawful command influence. *See, para. A, above.*
  4. Do not reference sentences from other cases.
  5. Do not, aside from recommending a sentence, express any personal opinion. *United States v. Barnack*, 10 M.J. 799 (A.F.C.M.R. 1981).
  6. Do not invite the members to sentence the accused for uncharged misconduct, conduct for which he was acquitted, or for lying (unless he was convicted of a false statement type offense).

a. Trial counsel was well within the parameters when he argued that members should *consider* the testimony of two witnesses who testified about uncharged misconduct. Trial counsel did not ask members to sentence accused for the uncharged misconduct. *United States v. Dewrell*, 52 M.J. 601 (A.F.Ct.Crim.App. 1999).

b. Sentence was set aside where TC argued repeatedly in sentencing that the accused was actually the perpetrator when he was only convicted of aiding and abetting. *United States v. Martinez*, 30 M.J. 1194 (A.F.C.M.R. 1990).

c. The accused lying during trial cannot be used as a basis for punishment. It can only be used in considering rehabilitation potential. *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982). *See, paragraph H., below.*

D. Trial counsel-who is charged with being a zealous advocate for the government-may argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *United States v. Halpin*, 71 M.J. 477 (C.A.A.F. 2013); *United States v. Baer*, 53 M.J. 235 (2000)(citation omitted); *United* *States v. Nelson*, 1 M.J. 235 (C.M.A. 1975).

1. A financial motive for the murder was a fair inference from evidence of debts and the purchase of an additional life insurance policy. *United States v. Snodgrass*, 37 M.J. 844 (A.F.C.M.R. 1993).
2. Fair inference/argument that we need to protect accused’s two-year-old daughter when he has abused the two other female juveniles entrusted to his care. *United States v. Robinson*, 43 M.J. 501 (A.F.Ct.Crim.App. 1995).
3. Trial counsel may not make overzealous appeals to national pride, patriotism, local, racial or religious prejudice.
4. *United States v. Garza*, 43 C.M.R. 376 (C.M.A. 1971). TC reference to the revocation of the accused's security clearance due to his association with the Socialist Workers' Party was inflammatory.
5. *United States v. Pendergrass*, 38 C.M.R. 189 (C.M.A. 1968). TC argument was inflammatory in calling the accused a "coward" and "unfaithful to his nation" because he failed to go on patrol in Vietnam. Evidence indicated that the accused thought that he was not properly in the service and that he had previously performed faithfully in combat.
6. *United States v. McCarthy*, 37 M.J. 595 (A.F.C.M.R. 1993). In court for drug use which took place during the Gulf War, TC equated the war to the war on drugs, called the accused a “collaborator” and likened drug use to surrendering. The argument came close to the line of separating proper and improper argument. However, there was no substantial error in this judge alone case.

1. Do not argue facts not in evidence. *United States v. White*, 36 M.J. 306 (C.M.A. 1993); *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983); *United States v. Eck*, 10 M.J. 501 (A.F.C.M.R. 1980). PRACTICE TIP: Track all exhibits and keep detailed notes of trial testimony so you know exactly what is on the record.
2. Do not misstate evidence. *United States v. Hampton*, 40 M.J. 457 (C.M.A. 1994)(misquoting witness testimony is error). PRACTICE TIP: It is sometimes difficult to remember what a witness said during your private interview versus on the stand. Using your notes will ensure you are not misquoting witnesses or arguing facts not in evidence and will impress the members with your accuracy/reliability. (They have notes too!)

E. Argue contemporary history, human experiences, and matters of common knowledge. *United States v. Stargell*, 49 M.J. 92 (1998)(common knowledge includes routine personnel actions, thus, it was permissible for TC to state that if the court did not give a punitive discharge the accused, with over 19 years service, would be honorably retired); *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994)(following conviction for disobeying an order to deploy, TC was permitted to argue members should consider how those who did deploy and face danger would view the sentence).

F. Do not make “Golden Rule” arguments aimed at inflaming the passions and prejudices of members. *United States v. Baer*, 53 M.J. 235 (2000)(trial counsel crossed the line when he in effect asked the members to put themselves in the place of the victim “you can’t move…you’re being taped and bound.” However, because his argument on the whole was not calculated to inflame the members’ passions and prejudices but to describe the situation in which the victim was placed, it was not reversible error).

1. Although asking members to put themselves in the victim’s place is improper, asking the members to imagine the victim’s fear, pain, terror, and anguish is permissible because it is simply asking the members to consider victim impact evidence. *United States v. Baer*, 53 M.J. 235 (2000); *United States v. Holt*, 33 M.J. 400 (C.M.A. 1991).
2. Asking member to place themselves in the position of victim's close relatives is improper. *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976)(improper argument to ask court members to put themselves in the place of a husband who saw his wife repeatedly raped); *United States v. Wood*, 40 C.M.R. 3 (C.M.A. 1969)(improper argument to ask court members to imagine that the child victims of sex assaults were their own children). *United States v. Nellum*, 21 M.J. 700 (A.C.M.R. 1986)(error to ask MJ in argument to consider whether he would like to have the accused walk the streets of his community).
3. It is proper to argue the rights of the victim's family or how they were affected by the crime. *United States v. Gray*, 51 M.J. 1 (1999); *United States v. Pearson*, 17 M.J. 149 (C.M.A. 1984).

G. Do not comment on an accused's status *(he is a cop, aircraft mechanic, etc)* unless there is evidence on the record to suggest that the crime was facilitated by his status or he abused his position to commit the offense. *United States v. Collins*, 3 M.J. 518 (C.M.A. 1977)(no justifiable basis for his argument that the accused's membership in the security police squadron was an aggravating circumstance). However, you can argue the accused’s status as an NCO. *United States v. Everett*, 33 M.J. 534 (A.F.C.M.R. 1991).

1. Absent any evidence that accused used drugs or any justifiable basis for inference that his job was in any way affected by the offense of introducing marijuana onto a military base, it was improper for trial counsel to argue that accused's job, working on military aircraft, was a matter which the court should take into consideration. *United States v. Lewis*, 7 M.J. 958 (A.F.C.M.R 1979).

2. Arguing that accused's duty position at the base hospital was an aggravating factor in a marijuana transaction was improper where offenses charged were not facilitated by the accused's position at the base hospital, nor did he abuse his status in committing them. *United States v. Goodson*, 7 M.J. 888 (A.F.C.M.R. 1979).

3. Appropriate to argue position/status in cases where the offense was facilitated by duty status or the accused abused his duty status in the commission of the offense. *United States v. Alias*, 47 M.J. 817 (A.F.Ct.Crim.App. 1998)(proper to comment where SJA’s duty status assisted the improper relationship and the integrity of the office was called into question based on his misconduct).

H. Do argue the fact the accused lied bears on his rehabilitative potential. Do not argue his punishment should be increased because he lied. *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992); *United States v. Warren*, 13 M.J. 278 (C.M.A. 1982); *United States v. Marsh*, 35 M.J. 505 (A.F.C.M.R. 1992). *See, Section IV, B, 3, above*. PRACTICE TIP: Do not argue “Amn Bennett took that stand, looked you in the eye, and lied, he deserves a bad conduct discharge” Do argue “Amn Bennett took that stand, looked you in the eye, and lied, consider that in determining his rehabilitation potential.”

I. Trial counsel may not comment on the accused’s right to remain silent or the exercise of other rights. *United States v. Gray*, 51 M.J. 1 (1999)(improper argument where accused had not testified and trial counsel stated “has he ever indicated to you by his actions any remorse for what he has done?”); *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983)("[d]on't feel sorry for the accused…he asserted his rights…he has been represented by counsel…he fought this every inch of the way" was improper argument); *United States v. Johnson*, 1 M.J. 213 (C.M.A. 1975)(TC erred in arguing the accused had neither pled guilty nor stated that he had learned his lesson.); *United States v. Austin*, 25 M.J. 639 (A.C.M.R. 1987)(improper for TC to argue the impact of accused's right to confront and cross‑examine the victim).

1. 1. Trial Counsel may comment upon lack of remorse in determining the accused’s rehabilitation potential if the following foundation has been laid: the accused has either testified or made an unsworn statement and has either expressed no remorse or his expression of remorse can be arguably construed as shallow, artificial, or contrived. *United States v. Paxton*, 64 M.J. 484 (C.A.A.F. 2007); *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992); *United States v. Holt,* 33 M.J. 400 (C.M.A. 1991)(TC may, in the proper case, call to the court's attention the accused's "recalcitrance in refusing to admit his guilt after findings").

2. Likewise, trial counsel’s argument that the accused did not accept responsibility for his actions was fair. *United States v. Garren*, 53 M.J. 142 (2000)(wholly fair and accurate to comment on accused’s failure to accept responsibility where the accused had made three pretrial statements and had testified at trial); *United States v. Toro*, 37 M.J. 313 (C.M.A. 1993), cert. denied, 510 U.S. 1091 (1994)(comment that nowhere in the accused’s unsworn statement does he acknowledge the finding of guilt was proper).

3. Comment on the accused's unsworn statement. *United States v. Marsh*, 70 M.J. 101 (C.A.A.F. 2011) (trial counsel’s statement during sentencing argument asking the panel members to give less weight to appellant’s unsworn statement because he was not subject to cross-examination fell within the boundary of fair prosecutorial comment, where appellant’s statement was not subject to cross-examination and the members could legitimately consider that fact in assessing its credibility); *United States v. Breeze*, 11 M.J. 17 (C.M.A. 1981). Proceed cautiously, within the guidelines of this case: "[w]hen you weigh the accused's statement, I ask you to consider something different about the accused's statement. Everybody else who sat in that box today took an oath to tell the truth." TC erred in arguing that the accused, by choosing to make a unsworn statement in mitigation, did not subject himself to questioning by the members and counsel. *United States v. Murphy*, 8 M.J. 611 (A.F.C.M.R. 1979).

1. Do argue a dishonorable or bad conduct discharge is an appropriate **punishment**. Do not argue the accused deserves to lose his job, should be separated, should not be retained or words to that effect. Sentencing proceedings are not intended to be a vehicle to make an administrative decision about whether the accused should be retained or separated. *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989).
   1. Any blurring of the distinction between a punitive discharge and administrative separation from the service is improper. *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992)(“if you retain her, if you do not give her a bad conduct discharge, then…she is going to be working…in the Air Force. Is this really the individual…we need in the United States Air Force” improper argument).

2. Trial counsel’s argument that the accused’s behavior made him unsuitable for further military service and his commission should be taken away was not error because his argument, as a whole, made it obvious he was asking for a dismissal because the severe nature of the offenses warranted a dismissal. *United States v. Sanchez*, 50 M.J. 506 (A.F. Ct. Crim. App. 1999).

1. Refer to uncharged misconduct in context of rehabilitation potential. A trial counsel may not invite the court-martial to punish an accused for uncharged misconduct. *United States v. Schroder*, 65 M.J. 49 (C.A.A.F. 2007) (although MRE 414(a) provides that evidence of uncharged misconduct may be considered for any matter to which it is relevant, there is a risk with propensity evidence that an accused may be convicted and sentenced based on uncharged conduct and not the acts for which he is on trial; as a result, where MRE 414 evidence is admitted, there is a need for procedural safeguards to delimit the use of such evidence; one such safeguard is to ensure that trial counsel does not use such evidence to unduly inflame the members; the MRE 414 safeguards could be undermined if trial counsel’s comments were permitted to range outside the realm of legally relevant matters and express a sense of outrage and injustice regarding the victims of uncharged misconduct. In child molestation case, trial counsel erred in arguing that the members should render justice for the purported victim of uncharged misconduct which was admitted as propensity evidence; the argument invited the members to convict and punish appellant for his uncharged misconduct, as opposed to using that misconduct to inform their judgments regarding the charged conduct; this error was also plain and obvious).
2. Refer to the generally accepted sentencing philosophies: rehabilitation of the accused, general deterrence, specific deterrence of misconduct of the accused, and social retribution. R.C.M 1001(g). Sentencing instructions reference **five principals of sentencing** based on *United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989): rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses.
3. 1. **Rehabilitation**: Does he have the ability to learn from his mistakes?

a. Argue that an appropriate punishment is the first step toward salvaging the accused and that a light sentence eliminates the incentive for rehabilitation.

b. Proper use of uncharged misconduct, i.e. prior convictions, non-judicial punishment or letters of reprimand. Evidence of uncharged misconduct sheds light on the character of the accused. Argue demonstrated lack of rehabilitation potential based on the accused prior repeated acts. *United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996)(“the previous punishments…have had absolutely no impact on his life…no impact on his mindset…no lessons have been learned” proper argument), *rev. denied*, 48 M.J. 372 (1997). PRACTICE TIP: Do not argue or suggest he should be punished for the uncharged misconduct.

2. **Punishment**: He deserves to be punished. Argument that invoked retribution and vindication of wrongs was proper. *United States v. Loving*, 41 M.J. 213 (1994), *aff’d*, 517 U.S. 748 (1996).

3. **Protection of Society**: *Example: Society has legal rights along with the accused. He has forfeited his right to live among us by choosing to commit a violent crime.*

4. **Preservation of Good Order, Morale and Discipline** in the Military. *United States v. Meeks*, 41 M.J. 150 (C.M.A. 1994)(“five years in jail is nothing compared to the fear that he had last October had he deployed…think about his co-workers who did deploy…think of the message you’re going to send to them. Think about …who had to volunteer to replace this man…who went voluntarily, if he finds out that this man got a light sentence, think of the message you’re going to send out” proper argument in refusal to deploy case).

5. **Specific Deterrence**. R.C.M. 1001(g). Specific deterrence deals with deterring the offender from future misconduct. *Example: Next time the accused is faced with the decision of whether or not to use drugs the answer should be clear: no, it’s not worth the price I will pay later.*

6. **General Deterrence** deals with deterring others who know of the accused’s crime from committing future misconduct.

* + 1. Trial counsel may not invite court members to rely on general deterrence to the exclusion of other factors. *United States v. Gerdl*, 10 M.J. 168 (C.M.A. 1981)(repeated references to general deterrence including “the maximum punishment would be a deterrent to people who might commit this crime” on the borderline of propriety). A proper sentence is one tailored to the particular accused member and the nature and seriousness of the offenses. *United States v. Cantrell*, 44 M.J. 711 (A.F.Ct.Crim.App. 1996).
    2. PRACTICE TIP: Your argument should focus on an appropriate sentence based on facts and circumstances surrounding the offenses and the record/information presented about this accused. In addition, it is permissible to argue that proposed sentence would serve society by discouraging others from committing a similar offense. However, you should not focus on general deterrence, nor should you suggest the accused sentence should be increased to set an example for or deter others.

**III. DEFENSE SENTENCING ARGUMENT.** Defense Counsel should not:

A. Concede the accused’s guilt during sentencing in a not-guilty plea case. *United States v. Anderson*, 55 M.J. 198 (2001).

B. Request/concede the propriety of a punitive discharge. When defense counsel argues for a punitive discharge or concedes its appropriateness, even as a tactical step to mitigate another element of the possible sentence, counsel must make a record that such advocacy is pursuant to the accused’s wishes. As a result, the military judge must make appropriate inquiries on the record in an Article 39(a) session regarding the accused’s specific wishes if defense counsel so argues. *United States v. Bolkan*, 55 M.J. 425 (2001)(“if you must choose between confinement and a bad-conduct discharge, give him the punitive discharge.); *United States v. Pineda*, 54 M.J. 298 (2001)(“a bad-conduct discharge, and I don’t like asking for one, but I’m practical it’s going to happen.”); *But see,* *United States v. Lyons*, 36 M.J. 425 (C.M.A. 1993)(MJ does not have a *sua sponte* duty to inquire on the record regarding a request for a punitive discharge when the rationale is made clear from the unsworn statement. “I feel that it is in both my interest and the Navy to discharge me”).

C. Ask the court to reconsider its findings of guilty. *United States v. Brown*, 13 M.J. 890 (A.C.M.R. 1982).

D. Argue command policy. *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983).

E. Compare sentences in other cases. Sentence comparison is limited to post trial relief and only in cases where there is a direct correlation between the offense and offender, a highly disparate sentence, and no good reason for the disparity.

IV. REBUTTAL ARGUMENT. R.C.M. 1001(g).

1. There is no right to rebuttal argument in the sentencing phase. The rationale is the prosecution carries no burden of proof. Rebuttal is at the discretion of the judge. Determine your circuit and/or your judge’s policy prior to argument.
2. Directly rebut one to three specific points made by defense. Don’t use rebuttal to rehash your entire argument. Brevity is the key!

1. To make sense of the above paragraphs, note that it applies when the defense presents its own evidence at trial. If the defense puts on some evidence, the government can generally say that the parts of its case that the defense did not respond to are unrebutted – unless the only way the defense could respond to the government’s case would be for the accused to testify, and the accused elected not to testify. United States v. Carter, 61 M.J. 30 (C.A.A.F. 2005); United States v. Paige, 67 M.J. 442, 454 (C.A.A.F. 2009) (Stucky, J., dissenting). [↑](#footnote-ref-1)