NOT HARMLESS: C.A.A.F.'S FLAWED APPROACH TO PLAIN ERROR REVIEW IN *UNITED STATES V. TOVARCHAVEZ*

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I. Introduction

In April 2015, a general court-martial tried Specialist (SPC) Juventino Tovarchavez for sexually assaulting the same victim on two separate occasions in September 2014.[1] During the trial for two specifications of sexual assault, the military judge instructed the panel that, pursuant to Military Rule of Evidence (MRE) 413, they could consider each charged offense as evidence of the accused's propensity to commit the other charged offense.[2] Defense counsel made no objection to the instruction.[3] After two

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[1] United States v. Tovarchavez, No. ARMY 20150250, 2017 CCA LEXIS 602, at *1–2 (A. Ct. Crim. App. Sept. 7, 2017), *aff'd*, No. ARMY 20150250, 2018 CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019); Joint App. at 39, United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019) (No. 18-0371).

[2] *Tovarchavez*, 2017 CCA LEXIS 602, at *15; MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413 (2012). In cases involving sexual assault, Military Rule of Evidence (MRE) 413 provides an exception to the ordinary prohibition against using uncharged misconduct or past convictions as evidence of an accused's propensity to commit the charged conduct, permitting the admission of evidence that the accused committed other acts of sexual assault "for its bearing on any manner to which it is relevant." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 413(a) (2019) [hereinafter MCM].

[3] *Tovarchavez*, 2017 CCA LEXIS 602, at *15.

days of trial, the panel convicted SPC Tovarchavez of just one specification and sentenced him to two years' confinement and a dishonorable discharge.[4]

Subsequent to trial, the Court of Appeals for the Armed Forces (C.A.A.F.) held in *United States v. Hills* that charged misconduct could not be used as propensity evidence in support of other charged misconduct.[5] Giving the panel instruction in *United States v. Tovarchavez* was a "constitutional error"—one so serious that the conviction could only be upheld if the error was found to be "harmless beyond a reasonable doubt."[6] There could be no "reasonable possibility that the [error] . . . might have

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[4] *Id.* at *1–2; Joint App., *supra* note 1, at 36.

[5] United States v. Hills, 75 M.J. 350, 355 (C.A.A.F. 2016). In *Hills*, the Government used evidence of *charged* sexual misconduct as propensity evidence of *other* charged sexual misconduct. *Id.* at 353. The court found that, as drafted, MRE 413 did not apply to charged sexual misconduct and that the accompanying panel instruction violated the appellant's presumption of innocence and as such was constitutional error:

> A foundational tenet of the Due Process Clause is that an accused is presumed innocent until proven guilty.
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> . . . .
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> It is antithetical to the presumption of innocence to suggest that conduct of which an accused is presumed innocent may be used to show a propensity to have committed other conduct of which he is presumed innocent.

Id. at 357 (citations omitted). The court later clarified that this use of MRE 413 is equally impermissible in judge-alone cases. United States v. Hukill, 76 M.J. 219, 222 (C.A.A.F. 2017). Prior to *Hills*, this use of MRE 413 was a fairly common and unchallenged practice in military trials, despite the court's admonition that its conclusion "seem[ed] obvious." *Hills*, 75 M.J. at 353; *see Hukill*, 76 M.J. at 222 (acknowledging that prior to *Hills*, "the common understanding of the law was that charged misconduct could be used as propensity evidence under M.R.E. 413"). The *Military Judges' Benchbook* in use at the time provided sample instructions for both scenarios, applying MRE 413 to both charged and uncharged sexual offenses. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 7-13-1, n.3.1, n.4.2 (10 Sept. 2014). Consequently, when *Hills* was decided, there were numerous cases pending review in which this error occurred without objection at trial. *E.g.*, United States v. Guardado, 75 M.J. 889 (A. Ct. Crim. App. Nov. 15, 2016), *aff'd in part and rev'd in part*, 77 M.J. 90 (C.A.A.F. 2017); United States v. Phillips, No. ACM 38771, 2019 CCA LEXIS 102 (A.F. Ct. Crim. App. Mar. 8, 2019), *rev'd*, 79 M.J. 300 (C.A.A.F. 2019); United States v. Long, No. ARMY 20150160, 2018 CCA LEXIS 512 (A. Ct. Crim. App. Oct. 26, 2018), *petition dismissed without prejudice*, 79 M.J. 99 (C.A.A.F. 2019); United States v. Berger, No. 201500024, 2018 CCA LEXIS 218 (N-M. Ct. Crim. App. May 3, 2018), *vacated*, 76 M.J. 128 (C.A.A.F. 2017); United States v. Hill, No. ARMY 20130331, 2018 CCA LEXIS 111 (A. Ct. Crim. App. Feb. 27, 2018); *Tovarchavez*, 2017 CCA LEXIS 602; United States v. Moore, No. ARMY 20140875, 2017 CCA LEXIS 191 (A. Ct. Crim. App. Mar. 23, 2017), *aff'd*, 77 M.J. 198 (C.A.A.F. 2018); United States v. Williams, No. ARMY 20130582, 2017 CCA LEXIS 24 (A. Ct. Crim. App. Jan. 12, 2017) *aff'd in part and rev'd in part*, 77 M.J. 459 (C.A.A.F. 2018); United States v. Harrison, No. ACM 38745, 2016 CCA LEXIS 431 (A.F. Ct. Crim. App. July 20, 2016), *aff'd*, 76 M.J. 127 (C.A.A.F. 2017).

[6] *Hills*, 75 M.J. at 357 (quoting United States v. Wolford, 62 M.J. 418, 420 (C.A.A.F. 2006)).

contributed to the conviction"[7]—an extremely high burden falling on the Government to prove. Notably in *Hills*, the appellant objected to the MRE 413 instruction during trial, preserving the error for appeal.[8] *Tovarchavez* reached appellate review following the decision in *Hills*.[9]

The Army Court of Criminal Appeals (A.C.C.A.) issued its first opinion in *Tovarchavez* in September 2017, more than two years after SPC Tovarchavez's conviction.[10] Reviewing the erroneous panel instruction, A.C.C.A.'s decision hinged on one important distinction from *Hills*: the appellant's failure to object at trial.[11] The court stated:

> [O]ur analysis of prejudice for *Hills* violations is framed by the appellate posture of the issue on appeal. In cases of preserved error, the burden falls on the [G]overnment and the burden is harmlessness beyond a reasonable doubt. In cases of unpreserved error, the burden is on appellant to show material prejudice to a substantial right.[12]

Applying the more Government-friendly standard for unpreserved errors, A.C.C.A. held that the appellant's failure to establish prejudice merited no relief.[13]

Following an unrelated remand, *Tovarchavez* returned to A.C.C.A. over a year later, and the court agreed to revisit the *Hills* issue in light of new case law.[14] Ultimately, the court reached the same conclusion: where an

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[7] *Id.* (quoting United States v. Moran, 65 M.J. 178, 187 (C.A.A.F. 2007) (alteration in original)).
[8] *Id.* at 352.
[9] When there is a change in the law during the pendency of an appeal, as in *Tovarchavez*, the resulting error is deemed forfeited rather than waived. Johnson v. United States, 520 U.S. 461, 464–65 (1997); United States v. Humphries, 71 M.J. 209, 211 (C.A.A.F. 2012) ("Because the law at the time of trial was settled and clearly contrary, it is enough that the error is plain now, and the error was forfeited rather than waived." (citing United States v. Harcrow, 66 M.J. 154, 156–58 (C.A.A.F. 2008))). Multiple commentators have criticized this approach, arguing that the application of changes in the law to cases pending appeal should be divorced from procedural rules of preservation and forfeiture. *E.g.*, Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 212–14 (2011); Meir Katz, *Plainly Not "Error": Adjudicative Retroactivity on Direct Review*, 25 CARDOZO L. REV. 1979, 1999–2008 (2004).
[10] *Tovarchavez*, 2017 CCA LEXIS 602.
[11] *Id.* at *14.
[12] *Id.* at *19 (citations omitted).
[13] *Id.* at *19–20.
[14] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371, at *2–3 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). The parties' affidavits

error is not preserved at trial, even if the error is of "constitutional magnitude," it remained the appellant's burden to establish that the error materially prejudiced his substantial rights.[15] Conversely, only for preserved errors would the burden shift to the Government to establish that the error was harmless beyond a reasonable doubt.[16] The court again found that the appellant failed to meet his burden but explicitly noted that this conclusion turned on which test applied—the appellant could not establish material prejudice to his substantial rights, but, equally, the court found that the Government would have been unable to establish harmlessness beyond a reasonable doubt.[17]

Eventually, *Tovarchavez* reached C.A.A.F., where the court issued its decision on 31 May 2019, more than four years after the original trial.[18] In an opinion sharply criticizing A.C.C.A.'s reasoning and conclusion, the majority held that the nature of the error, not preservation at trial, controlled the analysis; for constitutional errors, the Government bears the burden of demonstrating that the error was harmless beyond a reasonable doubt, regardless of objection at trial.[19] Under this more stringent standard, C.A.A.F. found the Government unable to meet its burden and set aside the appellant's conviction.[20]

In the military, where many convictions are subject to automatic appellate review, the conclusion of trial is far from the end of litigation.[21] The procedural history of *Tovarchavez* illustrates that trial is often the first, and shortest, phase of a case's lifespan.[22] *Tovarchavez* also highlights the

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concerning a claim of ineffective assistance of counsel contained material differences of fact, necessitating remand for an additional factfinding hearing. *Tovarchavez*, 2017 CCA LEXIS 602, at *2, 11.

[15] *Tovarchavez*, 2018 CCA LEXIS 371, at *15.

[16] *Id.* at *14–15.

[17] *Id.* at *21–22.

[18] *Tovarchavez*, 78 M.J. 458.

[19] *Id.* at 462–63.

[20] *Id.* at 469.

[21] Under the recently revised Article 66, Uniform Code of Military Justice (UCMJ), the courts of criminal appeals conduct automatic review of all cases in which judgment includes a sentence of death, dismissal, punitive discharge, or confinement of two years or more. UCMJ art. 66(b)(3) (2017). Previously, automatic review extended to cases in which judgment included a sentence of confinement of one year or more, capturing an even broader proportion of total convictions. UCMJ art. 66(b)(1) (1983).

[22] Specialist Tovarchavez's court-martial concluded less than nine months after the alleged offenses, but appellate review (which resulted in authorization for a retrial) took an additional four years. *Tovarchavez*, 78 M.J. at 458; United States v. Tovarchavez, No. ARMY 20150250, 2017 CCA LEXIS 602, at *1–2 (A. Ct. Crim. App. Sept. 7, 2017), *aff'd*, 2018

different ways of evaluating potential trial errors on appeal. Depending on whether an error was properly preserved at trial and the nature of the error in question, an appellate court's standard of review will vary widely.

"Simply stated, the standard of review is the amount of deference an appellate court accords a trial judge's decision."[23] Standards of review are the key to appellate practice—they are the lens through which the higher court views the facts of the case, the decisions of the trial judge, and any alleged errors. As such, standards of review are often outcome determinative.[24] Given identical facts, an appellate court may be bound to uphold a case if review is limited to evaluating a trial judge's exercise of discretion; alternatively, that same appellate court may overturn the case if permitted to review the decision de novo, with the appellate judges substituting their own judgment for that of the lower court.[25] Assuming a court finds error, it may still uphold the result if an appellant cannot establish prejudice. Conversely, as in *Tovarchavez*, an identical error may not survive review if the Government is required to *disprove* the possibility of prejudice beyond a reasonable doubt.[26]

What standard of review is used to determine whether an error occurred at trial? Assuming an error did occur, how does an appellate court evaluate prejudice? The two principal factors that determine the appropriate standard of review are (1) preservation of the alleged error and (2) the nature or magnitude of the error. An appellate court will evaluate an alleged error

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CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019); Joint App., *supra* note 1, at 39.

[23] Lieutenant Colonel Patricia A. Ham, *Making the Appellate Record: A Trial Defense Attorney's Guide to Preserving Objections—the Why and How*, ARMY LAW., Mar. 2003, at 10, 16.

[24] United States v. Baker, 70 M.J. 283, 287 (C.A.A.F. 2011) (stating standards of review can be "critical to the outcome" of a case). Given their foundational nature, appellate opinions almost universally begin their analysis by identifying the appropriate standard of review. *See, e.g.*, United States v. Gonzales, 78 M.J. 480, 483 (C.A.A.F. 2019); United States v. Armstrong, 77 M.J. 465, 468 (C.A.A.F. 2018); United States v. Guardado, 77 M.J. 90, 93 (C.A.A.F. 2017).

[25] *See* United States v. Cooper, 58 M.J. 54, 57–58 (C.A.A.F. 2003) (contrasting abuse of discretion with de novo review in the context speedy trial violations); United States v. Gaither, 41 M.J. 774, 777–79 (A.F. Ct. Crim. App. 1995) (contrasting abuse of discretion with de novo review in the context of a trial judge reviewing pretrial confinement). De novo review is defined as an "original appraisal of all the evidence." *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 n.31 (1984).

[26] United States v. Olano, 507 U.S. 725, 741 (1993) ("Whether the Government could have met its burden of showing the absence of prejudice, under Rule 52(a), if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the deviation . . . was prejudicial.").

differently depending on whether counsel objected at trial, counsel failed to object (i.e., forfeiture), or counsel affirmatively waived the issue.[27] Similarly, minor procedural errors are evaluated differently than those bearing on constitutional rights.[28]

Identifying the correct standard of review is relatively straightforward when evaluating either of these principles independently.[29] For preservation of error, appellate review is least deferential where an error is preserved and counsel provide a detailed basis for their objection on the record.[30] Conversely, deference to the lower court is at its highest where an error draws no objection at trial.[31] Similarly, appellate courts review minor errors most leniently and constitutional errors most critically.[32] However, the question is far more complex when these two axes intersect, such as where a constitutional error is not preserved at trial.[33] Forfeiture of error weighs in favor of more deference to the trial court's decision; constitutional error weighs toward less. How should an appellate court evaluate prejudice in such a circumstance? Which party bears the burden?

In *Tovarchavez*, C.A.A.F. held that the constitutional nature of the error is the dominant factor; thus, in all cases of constitutional error, the Government must disprove prejudice beyond a reasonable doubt, regardless of whether the error was preserved at trial.[34] A slim majority relied heavily on the Supreme Court's 1967 decision in *Chapman v. California* and drew

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[27] *See* Major Terri J. Erisman, *Defining the Obvious: Addressing the Use and Scope of Plain Error*, 61 A.F. L. REV. 41, 45–47 (2008); Ham, *supra* note 23, at 10.

[28] *See, e.g.*, United States v. Patton, No. ARMY 20150675, 2017 CCA LEXIS 237, at *2 (A. Ct. Crim. App. Apr. 7, 2017) ("[W]hether an error is constitutional or non-constitutional determines the level of scrutiny applied during our prejudice analysis."); *see also* Chapman v. California, 386 U.S. 18, 22–24 (1967) (distinguishing constitutional and nonconstitutional errors).

[29] United States v. Tovarchavez, 78 M.J. 458, 469–70 (C.A.A.F. 2019) (Maggs, J., dissenting).

[30] *See* Erisman, *supra* note 27; Ham, *supra* note 23, at 10. Preservation of error and the nature of the error each form a continuum, moving from more to less deference afforded to the trial court. Visually, each principle may be illustrated as a line moving from greater to lesser deference towards the trial court's decision. *See infra* apps. A, B.

[31] *See* Erisman, *supra* note 27; Ham, *supra* note 23, at 10. Waiver, which results in an appellate court's refusal to review the alleged error, represents the extreme end of the scale. *See infra* apps. A, B.

[32] *Patton*, 2017 CCA LEXIS 237, at *4–5 ("[W]hether an error is constitutional or non-constitutional determines the level of scrutiny applied during our prejudice analysis."); *see Chapman*, 386 U.S. at 22–24.

[33] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA Lexis 371, at *4–5 (A. Ct. Crim. App. July 19, 2019), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). *See infra* apps. A, B.

[34] *Tovarchavez*, 78 M.J. at 462–63.

a distinction between the Federal and military rules governing review of unpreserved errors.[35] The two dissenting justices countered that the majority's decision incorrectly deviated from more recent Supreme Court and Federal decisions, with no distinguishing basis in military statute or practice to do so.[36]

The *Tovarchavez* decision treats preserved and unpreserved constitutional errors virtually the same on appeal. This, in turn, diminishes the importance of preserving and fully litigating potential errors at trial. The C.A.A.F.'s decision is incorrect, unjustified, and contrary to judicial policy. First, C.A.A.F.'s decision departs from the Supreme Court and Federal circuits, which consistently require appellants to affirmatively establish prejudice for unpreserved errors.[37] Second, nothing in the Uniform Code of Military Justice (UCMJ) justifies deviating from this precedent or applying a different standard of review in military practice.[38] Third, *Tovarchavez* conflicts with C.A.A.F.'s own recent decisions that identify unpreserved constitutional errors yet still require the appellant to establish prejudice.[39] Fourth, requiring timely preservation of error encourages thorough litigation at trial and promotes judicial efficiency.[40]

Practitioners and Supreme Court Justices alike have bemoaned the difficulty of evaluating prejudice on appeal. The task is even more challenging when an error is not litigated at trial, leaving the appellate court with an undeveloped record to review.[41] Hence, courts historically place a

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[35] *Id.*

[36] *Id.* at 469–72 (Maggs, J., dissenting).

[37] *See, e.g.*, United States v. Cotton, 535 U.S. 625, 629 (2002); Johnson v. United States, 520 U.S. 461 (1997). Federal civilian courts evaluate a preserved error for its effect on the outcome of the trial, with more serious errors requiring the Government to prove harmlessness beyond a reasonable doubt. FED. R. CRIM. P. 52(a); United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004). Conversely, errors that were unpreserved (or forfeited) at trial require an appellant to establish "plain error," a high bar which requires an appellant to establish prejudice regardless of the nature of the error, never shifting a higher burden back to the Government. *See* FED. R. CRIM. P. 52(b); United States v. Olano, 507 U.S. 725, 734 (1993) (discussing the "plain error" test); *see also Dominguez Benitez*, 542 U.S. at 82 (discussing the high bar for relief of unpreserved errors).

[38] *Tovarchavez*, 78 M.J. at 469 (Maggs, J., dissenting).

[39] *See* United States v. Armstrong, 77 M.J. 465 (C.A.A.F. 2018); United States v. Oliver, 76 M.J. 271 (C.A.A.F. 2017).

[40] Ham, *supra* note 23, at 15–16.

[41] "Substantial confusion . . . pervades these tests because of the way in which courts discuss and apply them. Cases purporting to apply the same test sometimes articulate the test differently. Even small shifts in language may ultimately impact the application of harm assessing tests, and they certainly blur the lines between the tests." Anne Bowen Poulin, *Tests for Harm in Criminal Cases: A Fix for Blurred Lines*, 17 U. PA. J. CONST. L. 991, 1015–16

higher burden on appellants seeking relief for unpreserved errors.[42] For these reasons, C.A.A.F. should mirror the approach of the Federal civilian courts, placing the emphasis on whether errors are preserved at trial.

Part II of this article provides an overview of how appellate courts apply standards of review to evaluate prejudice and highlights critical decisions that define prejudice analysis in the Federal civilian and military courts. Part III critically analyzes C.A.A.F.'s decision in *Tovarchavez*. Finally, Part IV proposes recommendations to bring the military into conformity with Federal practice.

II. The Evolution of Plain Error and Prejudice Analysis on Appeal

A. The General Structure of Appellate Review

Two fundamental questions drive appellate review: (1) was there an error, and (2) if so, was the error prejudicial?[43] Appellate courts must answer both questions affirmatively to grant relief; if there is an error but no prejudice, relief is not warranted.[44] The applicable standard of review dictates how a court approaches these questions, and preservation of error, in turn, impacts the standard of review and determines whether the court may even take notice of the claimed error.[45] Therefore, as a preliminary

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(2015). "Defining and distinguishing reversible error, harmless error, plain error, and structural error both theoretically and practically is currently an almost hopeless task." Michael H. Graham, *Abuse of Discretion, Reversible Error, Harmless Error, Plain Error, Structural Error; A New Paradigm for Criminal Cases*, 43 CRIM. L. BULL. 955, 958 (2007). Regarding the different tests for prejudice, Justice Scalia complained:

> Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking. That is especially so when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not factfinding, but closer to divination.

Dominguez Benitez, 542 U.S. at 86–87 (Scalia, J., concurring).

[42] Ham, *supra* note 23, at 10, 15–16; *see also* Puckett v. United States, 556 U.S. 129, 135 (2009) (stating that when a defendant does not timely object to an error at trial, obtaining relief is "difficult, 'as it should be'" (quoting *Dominguez Benitez*, 542 U.S. at 83 n.9)); United States v. Young, 470 U.S. 1, 16 (1985) ("Reviewing courts are not to use the plain-error doctrine to consider trial court errors not meriting appellate review absent timely objection—a practice which we have criticized as 'extravagant protection.'" (quoting Henderson v. Kibbe, 431 U.S. 145, 154 n.12 (1977))).

[43] UCMJ art. 59(a) (1950); Ham, *supra* note 23, at 10, 17.

[44] MCM, *supra* note 2, MIL. R. EVID. 103; Ham, *supra* note 23, at 10, 16.

[45] *See* MCM, *supra* note 2, MIL. R. EVID. 103; *see also* Ham, *supra* note 23, at 10, 17. In this context, to "take notice of" a claimed error means whether the reviewing court is empowered

matter, a court must ask whether the claimed error was preserved, forfeited, or waived at trial.[46]

"[W]aiver is the 'intentional relinquishment or abandonment of a known right'"—essentially, an affirmative statement or action purposefully disclaiming any objection.[47] Waiver results in a nullity; where there has been a proper waiver, there is no error to correct on appeal.[48] "It extinguishes rights of an accused, forever banishing waived legal issues from the purview of any appellate court."[49] Hence, as a general rule, appellate courts will not review waived issues and will take notice only of errors that were properly preserved or, in some instances, forfeited at trial.[50]

1. Preservation of Error Versus Forfeiture of Error

Preservation of error requires a properly and timely lodged objection that sufficiently invokes a specific rule or principle of law.[51] An appellant's position is strongest when the claimed error is preserved at trial—an appellate court will move directly to analyzing the substantive question of whether an error occurred.[52] Depending on the error alleged, various

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to even consider and review the claim of error. United States v. Riley, 47 M.J. 276, 281 (C.A.A.F. 1997) ("[A] Court of Criminal Appeals may take notice of errors of law, whether or not they were preserved by timely objection; our Court is constrained by the rules of waiver and the doctrine of plain error.").

[46] United States v. Payne, 73 M.J. 19, 23 (C.A.A.F. 2014); United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005); Ham, *supra* note 23, at 10, 12.

[47] United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). See Ham, *supra* note 23, at 10, for a comprehensive examination of waiver. Though mere silence is generally not enough, affirmatively stating "no objection" may constitute waiver. *See, e.g.*, United States v. Ahern, 76 M.J. 194, 197 (C.A.A.F. 2017).

[48] *Ahern*, 76 M.J. at 198 ("[A] valid waiver leaves no error for us to correct on appeal." (quoting United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009))).

[49] United States v. Hardy, 77 M.J. 438, 445 (C.A.A.F. 2018) (Ohlson, J., dissenting).

[50] With few exceptions, virtually all issues are subject to waiver. Issues not subject to waiver include jurisdiction and adjudicative unlawful command influence. MCM, *supra* note 2, R.C.M. 907(b)(1); *see* United States v. Douglas, 68 M.J. 349, 356 n.7 (C.A.A.F. 2010). The rights not subject to waiver are generally of the type considered "structural;" however, every "structural error" is not per se unwaivable. *See* Weaver v. Massachusetts, 137 S.Ct. 1899 (2017); United States v. Pasay, No. ARMY 20140930, 2017 CCA LEXIS 590, at *13 (A. Ct. Crim. App. Apr. 19, 2017).

[51] MCM, *supra* note 2, MIL. R. EVID. 103(a); *see also Payne*, 73 M.J. at 23 (requiring the "same level of specificity" for objections to panel instructions as is required for evidentiary objections); *Datz*, 61 M.J. at 42 ("On its face, M.R.E. 103 does not require the moving party to present every argument in support of an objection, but does require argument sufficient to make the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context.'").

[52] MCM, *supra* note 2, MIL. R. EVID. 103; Ham, *supra* note 23, at 10, 16.

standards of review may apply to determine whether error actually exists. Generally, evidentiary rulings are tested for an "abuse of discretion,"[53] a trial court's findings of fact are reviewed under a "clearly erroneous standard,"[54] and questions of law are reviewed de novo.[55] Cases presenting mixed questions of law and fact require mixed standards of review, while a handful of issues carry other unique standards of review.[56] If a court finds there was error, it moves to the question of prejudice.[57] For preserved error, the

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[53] United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007).

> Normally, a military judge abuses his or her discretion (1) when the findings of fact upon which he or she predicates the ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his or her application of the correct legal principles to the facts is clearly unreasonable.

Colonel Jeremy Stone Weber, *The Abuse of Discretion Standard of Review in Military Justice Appeals*, 223 MIL. L. REV. 41, 49 (2015). This most deferential standard recognizes that reasonable minds, and reasonable attorneys, may disagree on certain points; so long as the military judge did not exceed the left and right limits of his or her discretion, an appellate court will let the decision stand rather than substituting its own judgment for that of the trial court. *See* United States v. Travers, 25 M.J. 61, 62–63 (C.M.A. 1987) ("[A]n abuse of discretion involves far more than a difference in . . . opinion. . . . The challenged actions must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' . . . ." (quoting United States v. Glenn, 473 F.2d 191, 196 (D.C. Cir. 1972))). This standard applies to a variety of alleged errors, such as the admissibility of evidence, *e.g.*, *Brooks*, 64 M.J. at 328, or a military judge's decision to accept a guilty plea, *e.g.*, United States v. Inabinette, 66 M.J. 320, 321 (C.A.A.F. 2008).

[54] United States v. Jones, 73 M.J. 357, 360 (C.A.A.F. 2014). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. Martin, 56 M.J. 97, 106 (C.A.A.F. 2001) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). As with abuse of discretion, the "clearly erroneous" standard weighs heavily in favor of the trial court's finding and requires far more than a mere difference of opinion. United States v. French, 38 M.J. 420, 425 (C.A.A.F. 1993) (stating that the clearly erroneous standard requires "more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." (quoting Parts & Elec. Motors Inc. v. Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988))).

[55] Ham, *supra* note 23, at 10, 17. Questions of law triggering de novo review include jurisdiction, United States v. Davis, 63 M.J. 171, 173 (C.A.A.F. 2006), statutory interpretation, *id.*, and whether the military judge provided correct panel instructions, United States v. Hills, 75 M.J. 350, 357 (C.A.A.F. 2016). Logically, de novo review generally applies to questions of law because a trial court has no discretion to misapply or misinterpret the law.

[56] United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017) (reviewing panel challenges based on implied bias under a standard "less deferential than abuse of discretion, but more deferential than de novo review"); *Jones*, 73 M.J. at 360 (regarding mixed questions of law and fact); *see also* Weber, *supra* note 53, at 66.

[57] Further explanation and discussion of these standards of review is beyond the scope of this article. See Erisman, *supra* note 27; Ham, *supra* note 23, at 10; Weber, *supra* note 53,

Government generally bears the burden of showing that the error was harmless.[58]

Conversely, forfeiture is the "failure to make timely assertion of [a] right."[59] In practice, forfeiture usually appears as silence on the record—essentially, the absence of either a clear objection preserving the error or waiver disclaiming it.[60] Forfeiture may result from a counsel's oversight or failure to recognize a possible objection, or from a purposeful, strategic decision.[61] In either instance, forfeiture leaves an appellate court in a difficult position. Objection at trial leads to a more robust record: counsel articulate their position on the issue, further testimony and evidence may be presented, and the military judge often explains the ruling.[62] This provides ample material for an appellate court on review.[63] But where the error is forfeited, an appellate court is often reviewing a vacuum and is forced to speculate.[64] Thus, timely objections and preservation of error aid appellate review and promote judicial efficiency.

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for a detailed discussion regarding the different standards of review applicable to determining whether error exists.

[58] United States v. Olano, 507 U.S. 725, 732 (1993).

[59] *Id.* at 731 (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).

[60] *Id.* at 733.

[61] *See* United States v. Williams, 50 M.J. 397, 401 (C.A.A.F. 1999) (recognizing an appellant may strategically not object to testimony); United States v. Grostefon, 12 M.J. 431, 436 (C.M.A. 1982) (recognizing "that even the most conscientious counsel and judges will occasionally overlook an error in the press of dealing with a load of cases"). The possibility of tactical non-objection complicates an appellate court's review of claims for ineffective assistance of counsel, as it requires the reviewing court to evaluate whether the failure to object to an evident error was a strategically sound decision. *See* United States v. Voorhees, 79 M.J. 5, 13 (C.A.A.F. 2019). Additionally, ineffective assistance of counsel claims "can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial." Weaver v. Massachusetts, 137 S.Ct. 1899, 1912 (2017) (quoting Harrington v. Richter, 562 U.S. 86, 105 (2011)).

[62] *See* United States v. Dominguez Benitez, 542 U.S. 74, 82–83 (2004) (holding that appellant's burden to establish entitlement to relief for plain error "should not be too easy for defendants" claiming it, so as to "encourage timely objections" and "reduce wasteful reversals"); *see also* United States v. Chapa, 57 M.J. 140, 145–46 (C.A.A.F. 2002) (Sullivan, J., concurring).

[63] United States v. McCarty, 45 M.J. 334, 335 n.2 (C.A.A.F. 1996) (stating that appellate review "requires a record that the appellate court can review"). This also underpins MRE 103's requirement that counsel make clear the specific grounds for their objection. MCM, *supra* note 2, MIL. R. EVID. 103(a)(1)(B).

[64] *McCarty*, 45 M.J. at 335 n.2 ("It is difficult, if not impossible, to second-guess the intent of the trial defense counsel if he or she does not make the specific objection known to the military judge.").

In order to encourage alert litigation at the trial level, appellate courts impose a higher burden, the "plain error" test, before granting relief for errors not preserved at trial.[65] To obtain relief for forfeited error, an appellant must show that there was (1) an error (2) that is "clear and obvious," which (3) resulted in prejudice.[66] This test differs from review of preserved errors in two respects. First, even if the court agrees that an error occurred at trial, the court will not move to the question of prejudice unless the unpreserved error was "clear" or "obvious."[67] Second, the appellant normally bears the burden of establishing prejudice for forfeited error.[68]

2. Establishing Prejudice

Having found error, an appellate court's second substantive question is whether the error prejudiced the appellant. Both the Federal and military rules explicitly prohibit overturning trial results on the basis of error that does not result in prejudice to the accused.[69] Federal Rule of Criminal Procedure Rule 52 (Rule 52) states: "(a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. (b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[70] Though Rule 52 codified the harmless error and plain error principles in Federal practice, it was intended as a "restatement of existing law."[71]

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[65] *See* Puckett v. United States, 556 U.S. 129, 134 (2009) (stating that the plain error test "serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them"); United States v. Frady, 456 U.S. 152, 163 (1982) (explaining that plain error review reflects the "need to encourage all trial participants to seek a fair and accurate trial the first time around").

[66] United States v. Olano, 507 U.S. 725, 734 (1993). These three prongs reflect the military interpretation of the plain error test; Federal civilian courts apply a fourth prong, discussed in more detail below. *See* United States v. Tovarchavez, 78 M.J. 458, 465 n.13 (C.A.A.F. 2019); United States v. Powell, 49 M.J. 460, 465 (C.A.A.F. 1998). Military and civilian courts articulate the specific measure for prejudice is articulated differently. *Compare* UCMJ art. 59(a) (1950) ("materially prejudices the substantial rights"), *with* FED. R. CRIM. P. 52 ("affects substantial rights").

[67] *Olano*, 507 U.S. at 734; *see also* MCM, *supra* note 2, MIL. R. EVID. 103(f).

[68] *Olano*, 507 U.S. at 734–35.

[69] UCMJ art. 59(a) (1950); FED. R. CRIM. P. 52.

[70] FED. R. CRIM. P. 52.

[71] *Id.* advisory committee's note. The Supreme Court previously recognized the doctrine of plain error as early as 1896. Wiborg v. United States, 163 U.S. 632, 658 (1896). Rule 52(b) originally included after "plain error" the words "or defect," which were removed by amendment in 2002 to alleviate any ambiguity or suggestion that the language could be read in the disjunctive. FED. R. CRIM. P. 52 advisory committee's note to 2002 amendment; *see Olano*, 507 U.S. at 732 (discussing the incorrect reading of Rule 52(b) in the disjunctive).

Article 59(a), UCMJ, similarly dictates that "[a] finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."[72] An error that does not materially prejudice the substantial rights of the accused is "harmless."[73] Article 59(a), UCMJ,[74] was adapted from the thirty-seventh Article of War (stating that a case would not be overturned unless an error "injuriously affected the substantial rights of an accused")[75] and section 472 of the U.S. Navy's *Naval Courts and Boards* publication (stating that a trial court's finding should not be set aside "[i]f there has been no miscarriage of justice").[76] Thus, the earlier military rules upon

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The Rule 52 revision was "the culmination of the criminal procedural reform project of the early twentieth century." Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 455 (2009). The American Bar Association first proposed an amendment to the Federal Judicial Code to codify the harmless error rule in 1917, which was adopted by statute in 1919. *Id.* at 443–44. However, the 1919 statute was limited in application, and lobbying for a stronger harmless error provision continued through the 1930's. *Id.* at 444–46. Following the implementation of Rule 52, Congress repealed the 1919 statute and passed a supplemental harmless error statute "to remove any lingering doubt about the status of the harmless error rule in American criminal practice." *Id.* at 454 n.130. See Harry T. Edwards, *To Err is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1173–85 (1995), and John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 66–76 (2016), for more detail on the development of the "harmless error" rule and its variants in the Federal civilian courts.

[72] UCMJ art. 59(a) (1950). Article 59, UCMJ, was part of the original Code, passed on 5 May 1950 and taking effect on 31 May 1951. Uniform Code of Military Justice, Pub. L. No. 81-506, art. 59, 64 Stat. 107, 127 (1950). The current language is identical to the 1950 act, with the exception of the word "may" substituted for the word "shall." *Compare* UCMJ art. 59(a) (1950), *with* Act of Aug. 10, 1956, Pub. L. No. 84-1028, ch. 47, § 859(a), 70A Stat. 1, 57.

[73] UCMJ art. 45(c) (2016).

[74] H.R. REP. NO. 81-491, at 28–29 (1949) ("This subdivision is an extremely important one and should be given full force and effect."). The Committee Report is silent on the question of why the specific language "material prejudice" was employed. *See* MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 553 (2015) (discussing the origins of Article 59, UCMJ).

[75] The thirty-seventh Article of War states:

> The proceedings of a court-martial shall not be held invalid, nor the findings or sentence disapproved, in any case on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of an accused . . . .

Articles of War, 41 Stat. 794 (1920) (art. 37).

[76] Section 472 fully states that "[if] there has been no miscarriage of justice, the finding of the court should not be set aside or a new trial granted because of technical errors or defects

which Article 59(a), UCMJ, is based closely mirror the language of Rule 52.

Though phrased slightly differently, Article 59(a), UCMJ, and Rule 52 are substantively analogous—under both rules, the appellate court may grant relief only if an error is prejudicial.[77] Neither rule, however, explains what it means to "materially prejudice" or "affect" substantial rights, nor which party bears the burden of proving it.

Historically, the appropriate standard for evaluating prejudice depended on both preservation of error and the nature of the error itself.[78] Where the error is preserved, the Government bears the burden of demonstrating harmlessness, but the specific test depends on the nature of the error in question.[79] The Supreme Court established the prejudice test for nonconstitutional errors in the 1946 decision of *Kotteakos v. United States*.[80] Defining and applying the test articulated in Rule 52(a), which was passed earlier that same year, the Court asked whether the error had a "substantial and injurious effect or influence in determining the jury's verdict."[81] Thus, preserved nonconstitutional error requires the Government to prove that the error did not substantially influence the court's findings.[82]

Conversely, the Supreme Court's 1967 decision in *Chapman v. California* established the prejudice test for constitutional errors.[83] The

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which do not affect the substantial rights of the accused." U.S. DEP'T OF NAVY, NAVAL COURTS AND BOARDS 244 (1944).

[77] *Compare* UCMJ art. 59(a) (1950) ("A finding or sentence of a court-martial may not be held incorrect . . . unless the error materially prejudices the substantial rights"), *with* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). The "harmless error" test of Rule 52(a) was established in *Kotteakos v. United States*. 328 U.S. 750, 776 (1946) (asking whether the error had a "substantial and injurious effect or influence in determining the jury's verdict"). Likewise, Rule 52(b) employs language similar to MRE 103(f), which states that "[a] military judge may take notice of a plain error that materially prejudices a substantial right, even if the claim of error was not properly preserved." MCM, *supra* note 2, MIL. R. EVID. 103(f).

[78] Ham, *supra* note 23, at 10, 18.

[79] United States v. Olano, 507 U.S. 725, 732 (1993).

[80] *Kotteakos*, 328 U.S. 750.

[81] *Id.* at 776.

[82] *See, e.g.*, United States v. Dominguez Benitez, 542 U.S. 74 (2004); United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019).

[83] Chapman v. California, 386 U.S. 18, 19–20 (1967). In *Chapman*, the prosecution used appellants' failure to testify as evidence of their guilt. *Id.* At the time of trial, California's constitution permitted the prosecution to make this argument to the jury, and the defendants made no objection. *Id.* at 19–20. Subsequent to trial, but prior to the case reaching the California Supreme Court, the U.S. Supreme Court's decision in *Griffin v. California*

Court's opinion focused on whether constitutional error could ever be "harmless" within the meaning of the Federal rules.[84] Rejecting the idea that such errors are per se prejudicial, the Court determined that some constitutional errors are "so unimportant and insignificant that they may . . . be deemed harmless, not requiring the automatic reversal of the conviction."[85] However, rather than requiring a "substantial and injurious effect" on the verdict (as in *Kotteakos*), the Court in *Chapman* asked "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[86] For constitutional error, the Government must eliminate any such possibility and establish that the error "was harmless beyond a reasonable doubt."[87]

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invalidated this California constitutional provision. *Id.*; Griffin v. California, 380 U.S. 609 (1965).

[84] *Chapman*, 386 U.S. at 20. Under modern practice, when there is a change in the law during the pendency of an appeal as there was in this case, the resulting error is deemed forfeited rather than waived. Johnson v. United States, 520 U.S. 461 (1997). However, the Supreme Court's opinion never discusses the issue of preservation of error. *Chapman*, 386 U.S. at 19–20. As the Supreme Court decision did not address preservation of error, the opinion similarly does not apply any version of plain error analysis. *Id.* at 21–24. Instead, the court moves directly into discussing the nature of the error in question and determining how the prejudice of the error should be evaluated. *Id.*

[85] *Chapman*, 386 U.S. at 22. Appellant's argument effectively sought to treat all constitutional errors in the same way appellate courts now treat "structural errors" (i.e., normal prejudice analysis is inapplicable because prejudice is essentially presumed). *See* Weaver v. Massachusetts, 137 S.Ct. 1899, 1907–08 (2017). In reaching its conclusion, the Court noted that Rule 52 fails to distinguish between constitutional and nonconstitutional errors. *Chapman*, 386 U.S. at 22. See Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2037–40 (2008), for a thorough explanation of the division between structural error and constitutional error which is subject to harmless error analysis.

[86] *Chapman*, 386 U.S. at 23 (quoting Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)). While acknowledging the existence of what we now call "structural errors" ("some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error") the Court emphasized that "this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal." *Id.*; *see Weaver*, 137 S. Ct. at 1907–08 (providing a current overview of "structural error"); Arizona v. Fulminante, 499 U.S. 279, 306–12 (1991) (discussing "structural defects" that by their nature defy analysis under a "harmless error" standard). The Court noted that the burden shift to the Government is consistent with the original common-law harmless error rule. *Chapman*, 386 U.S. at 24 n.9. See Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2142–51 (2018), for a detailed discussion of the legal basis for the standard articulated in *Chapman*.

[87] *Chapman*, 386 U.S. at 24. Professor Greabe argues that the *Chapman* framework "unduly privileges constitutional error vis-à-vis nonconstitutional error," and that a harmless error analysis should utilize a unitary standard. Greabe, *supra* note 71, at 64–65.

Conversely, forfeited errors traditionally require the appellant to prove prejudice, as part of the plain error test.[88] Historically, both Federal and military courts viewed plain error as an extreme remedy.[89] The Supreme Court cautioned that plain error should be corrected only when it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[90] The Court of Military Appeals similarly warned that plain error should "be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[91] Practice in the two systems began to significantly diverge only after the Supreme Court's decision in *United States v. Olano* and the C.A.A.F.'s subsequent decision in *United States v. Powell*.[92]

B. Plain Error and Prejudice Analysis in Federal Courts

1. United States v. Olano *and Federal Plain Error Review*

The Supreme Court granted certiorari in *Olano* "to clarify the standard for 'plain error' review . . . under Rule 52(b)."[93] The Court held that to grant relief for unpreserved error (1) "[t]here must be an error or defect;"[94] (2) the error "must be clear or obvious;" (3) the error "must have affected the appellant's substantial rights;" and even if those thresholds are met, (4) the court should only act if the error "seriously affect[s] the fairness, integrity

[88] United States v. Olano, 507 U.S. 725, 732 (1993); *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) ("Has Appellant shown that the error caused him to suffer material prejudice?"); United States v. Oliver, 76 M.J. 271, 275 (C.A.A.F. 2017) ("Appellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice . . . .'" (quoting United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2015) (alteration in original))).

[89] *See Olano*, 507 U.S. at 735; United States v. Fisher, 21 M.J. 327, 328–29 (C.M.A. 1986); United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir. 1980) ("The plain error rule is not a run-of-the-mill remedy. . . . [I]t is invoked 'only in exceptional circumstances [where necessary] to avoid a miscarriage of justice.'" (quoting Eaton v. United States, 398 F.2d 485, 486 (5th Cir. 1968) (alteration in original))); United States v. DiBenedetto, 542 F.2d 490, 494 (8th Cir. 1976) ("This court, along with courts in general, have applied the plain error rule sparingly and only in situations where it is necessary to do so to prevent a great miscarriage of justice.").

[90] *Olano*, 507 U.S. at 735.

[91] *Fisher*, 21 M.J. at 328–29.

[92] *Olano*, 507 U.S. 725; United States v. Powell, 49 M.J. 460 (C.A.A.F. 1998).

[93] *Olano*, 507 U.S. at 731; FED. R. CRIM. P. 52(b).

[94] "Deviation from a legal rule is 'error' unless the rule has been waived." *Olano*, 507 U.S. at 732–33. "If a legal rule was violated . . . and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733–34.

or public reputation of judicial proceedings."[95] Regarding the third prong, to affect substantial rights "in most cases . . . means that the error must have been prejudicial: It must have affected the outcome of the [trial] proceedings."[96]

Rule 52(a), governing preserved error, and Rule 52(b), governing forfeited error, contain identical language that the error must "affect[] substantial rights."[97] Consequently, preserved and forfeited errors "require the same kind of inquiry" to determine whether the error was prejudicial, "with one important difference"—where the error is forfeited, "[i]t is *the defendant rather than the Government* who bears the burden of persuasion with respect to prejudice."[98] "Normally, although perhaps not in every case,

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[95] *Id.* at 734. Treating forfeiture the same as waiver is too extreme. It would be contrary to "the rules of fundamental justice" if forfeited errors could never be noticed or corrected. *Id.* at 732. However, the Court's authority to correct plain error is "circumscribed" by Rule 52(b). *Id.* As discussed further below, C.A.A.F. has declined to apply the fourth prong of *Olano*. *See, e.g.*, United States v. Tovarchavez, 78 M.J. 458, 467 n.14 (C.A.A.F. 2019) ("This divergence from federal practice is regularly justified by the differences between Article 59, UCMJ, and [Rule] 52(b)."); *see also* United States v. Tunstall, 72 M.J. 191, 196 n.7, 196 (C.A.A.F. 2013); *Powell*, 49 M.J. at 463–65.

[96] *Olano*, 507 U.S. at 734. The Court left open the possibility that an error may "affect substantial rights" without actually being prejudicial. *Id.* at 737 ("Assuming *arguendo* that certain errors 'affec[t] substantial rights' independent of prejudice, the instant violation of Rule 24(c) is not such an error." (alteration in original)). Justice Stevens argued as much in his dissent, stating that "affects substantial rights" should not be synonymous with prejudice because some errors by their nature "undermin[e] the structural integrity of the criminal tribunal itself." *Id.* at 743 (Stevens, J., dissenting). Here, Justice Stevens appears not to be implying "structural error" per se, but rather arguing that the third and fourth prongs of the majority test should be viewed as separate and independent bases for relief (rather than reaching the fourth prong only if the third is met). Whether prejudicial or not, errors that "call into question the integrity of the jury's deliberations may harm the system as a whole" and thus "'seriously affect the fairness, integrity or public reputation of judicial proceedings' . . . making them candidates for reversal under Rule 52." *Id.* at 743–44 (Stevens, J., dissenting) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). However, later cases like *Cotton* and *Johnson* show that the Court has consistently defined the third prong to require prejudice. United States v. Cotton, 535 U.S. 625 (2002); United States v. Johnson, 520 U.S. 461 (1997); *see* Epps, *supra* note 86 (discussing the different ways to conceptualize "prejudice" and arguing for a rights-based framework, in the context of harmless error analysis under Rule 52(a)).

[97] *Olano*, 507 U.S. at 734.

[98] *Id.* (emphasis added). The Court ascribed this burden shift to a "subtle but important difference in language . . . . While Rule 52(a) precludes error correction only if the error 'does *not* affect substantial rights', Rule 52(b) authorizes no remedy unless the error *does* 'affect substantial rights.'" *Id.* at 734–35. As discussed above, "affects substantial rights" could logically mean something different than prejudice, but case law has, over time, collapsed this term to be essentially synonymous with prejudice. *See supra* note 96. Though earlier Supreme Court decisions such as *Young*, *Frady*, and *Atkinson* do not explicitly discuss the

the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)."[99]

Though *Olano* concerned nonconstitutional error, the Court squarely rejected the idea that constitutional errors are exempt from the rules of forfeiture and plain error analysis: "'No procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right . . . .'"[100] Preservation of error, rather than the nature of the right at issue, frames the Court's analysis: "Whether the Government could have met its burden of showing the absence of prejudice . . . if respondents had not forfeited their claim of error, is not at issue here. This is a plain-error case, and it is respondents who must persuade the appellate court that the deviation . . . was prejudicial."[101]

Olano's fourth prong, admonishing that courts should correct only errors "seriously affect[ing] the fairness, integrity, or public reputation of judicial proceedings," reflects the "established appellate practice" that noticing and correcting plain error is a matter of judicial discretion that courts should apply sparingly.[102] This principle is reflected in the language

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parties' burdens in establishing plain error, Rule 52 was itself merely a "restatement of existing law." United States v. Young, 470 U.S. 1 (1985); United States v. Frady, 456 U.S. 152 (1982); United States v. Atkinson, 297 U.S. 157 (1936); FED. R. CRIM. P. 52 advisory committee's note. The annotation to the early draft of Rule 52 explained that the Rule rejected, "as did Congress in [the 1919 harmless error statute], the older doctrine that prejudice should be presumed from the commission of error," suggesting that the party claiming the error would henceforth carry the burden of establishing prejudice. Fairfax, *supra* note 71, at 452. Though the military is not bound by the language of Rule 52, C.A.A.F. also places the burden for establishing plain error on the appellant. *Powell*, 49 M.J. at 464–65.

[99] *Olano*, 507 U.S. at 735 (emphasis added). The court hedges slightly, allowing for the possibility of "a special category of forfeited errors that can be corrected regardless of their effect on the outcome" and "errors that should be presumed prejudicial"—here, the Court essentially recognizes the notion of "structural error." *Id.* Notably however, the Court never references *Chapman*, even when discussing these theoretical exceptions to the defendant's burden.

[100] *Id.* at 731 (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)). In *Olano*, alternate jurors were present during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c). *Id.* at 728–29. Because there was no objection at trial, the error was forfeited and the Ninth Circuit reviewed for plain error. *Id.* at 730.

[101] *Id.* at 741.

[102] *Id.* at 736 (quoting *Atkinson*, 297 U.S. at 160). The Court emphasized that this fourth prong, invoking the reviewing court's discretion, is distinct from the third prong, requiring prejudice: an error may "affect the fairness, integrity or public reputation of judicial proceedings" without relation to any impact on the outcome of the trial, and conversely an effect on an accused's substantial rights does not independently satisfy the fourth prong—"otherwise the discretion afforded by Rule 52(b) would be illusory." *Id.* at 736–37. If the

of Rule 52(b) ("may be noticed") but is also rooted in the earliest case law discussing plain error, far predating the codification of plain error in the federal rules.[103]

2. The Federal Consensus Following Olano

Though *Olano* concerned nonconstitutional error, the Supreme Court's subsequent decisions have clearly established that *Olano*'s plain error test applies equally to cases of constitutional error. The Court's first two opportunities to apply *Olano* to constitutional error were in *United States v. Johnson*[104] and *United States v. Cotton*.[105] In both cases, petitioners argued that the alleged constitutional errors were "structural" in nature, essentially making the errors per se prejudicial and not subject to the usual burden required for plain error relief.[106]

The Supreme Court firmly rejected these arguments. In *Johnson*, the Court warned that:

> [A]ny unwarranted expansion of Rule 52(b) . . . "would skew the Rule's 'careful balancing of our need to

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first three prongs of the "plain error" test are met, a court "has authority to order correction, but is not required to do so." *Id.* at 735. "Rule 52(b) is permissive, not mandatory." *Id.*

[103] FED. R. CRIM. P. 52(b); *see Atkinson*, 297 U.S. at 160 ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."); *see also* Crawford v. United States, 212 U.S. 183, 194 (1909) (discussing the court's discretion in noticing unpreserved error); Wilborg v. United States, 163 U.S. 632, 658 (1896) (discussing the court's "liberty" to correct an unpreserved error).

[104] In *Johnson*, the trial judge, rather than the jury, decided whether a false statement to a grand jury was "material" for the purposes of a false material declaration charge—essentially making a finding as to an element of the offense rather than submitting that question to the jury. Johnson v. United States, 520 U.S. 461, 463–64 (1997). The petitioner successfully argued on appeal that this violated his constitutional right to have the jury determine his guilt as to each element of the charged offense. *Id.*; *see* United States v. Gaudin, 515 U.S. 506, 509–10 (1995) (holding that the Fifth Amendment's Due Process Clause and Sixth Amendment right to a jury trial require that a jury determine a defendant's guilt as to each element of the charged crime).

[105] In *Cotton*, the respondents' indictments failed to allege a fact that increased the statutory maximum sentence of the charge, a constitutional error not objected to at trial. United States v. Cotton, 535 U.S. 625, 627 (2002); *see* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) ("[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (quoting United States v. Jones, 526 U.S. 227, 243 (1999)).

[106] *Cotton*, 535 U.S. at 633; *Johnson*, 520 U.S. at 466.

> encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.'" Even less appropriate than an unwarranted expansion of the Rule would be the creation out of whole cloth of an exception to it, an exception which we have no authority to make.[107]

Thus, forfeited error—even when constitutional—is directly subject to *Olano*'s plain error test.[108] In both cases, the Court skipped the prejudice analysis (*Olano*'s third prong) and decided the case on the fourth prong of the plain error test. In *Johnson*, because "the evidence . . . was 'overwhelming'" and "essentially uncontroverted," the error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings."[109] The language and analysis in *Cotton* is virtually identical.[110] However, while the Court ostensibly sidestepped the prejudice analysis, deciding on other grounds, the Court notably identified prejudice as the respondent's burden and *did not* require the Government to prove that the forfeited constitutional error was harmless beyond a reasonable doubt.[111]

In both *Johnson* and *Cotton*, the Court did not shy away from the constitutional nature of the errors. The Court acknowledged that *Cotton*

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[107] *Johnson*, 520 U.S. at 466 (quoting United States v. Young, 470 U.S. 1, 15 (1985)). The Court further noted that no prior instances recognizing "structural error" involved a direct appeal from a Federal conviction; instead, "structural error" usually arose from an appeal of state courts, reviewing errors arising under state rules. *Id.* Because this case involved a purely Federal conviction, it fell firmly within the scope of Rule 52, and "the seriousness of the error claimed [did] not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.*

[108] *Id.* Though the Court's reasoning focuses on the restrictions of Rule 52, which is not independently applicable to the military, that rule is itself a restatement of existing law regarding plain error review. *See Atkinson*, 297 U.S. at 160.

[109] *Johnson*, 520 U.S. at 467–70. Regarding the fourth prong's requirement that the error "seriously affect the fairness, integrity, or public reputation of judicial proceedings," the Court emphasized that "it would be the reversal of a conviction such as this which would have that effect. 'Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule.'" *Id.* at 470 (quoting ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 50 (1970)).

[110] *Cotton*, 535 U.S. at 633. Applying the plain error test and finding clear and obvious error, the Court concluded it "need not resolve whether respondents satisfy [the prejudice requirement] of plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" where the evidence supporting the conviction was "overwhelming" and "essentially uncontroverted." *Id.* at 633–34.

[111] *Id.* at 632–33.

concerns Fifth Amendment rights, just as *Johnson* concerned Sixth Amendment rights, but concluded in both cases that "the important role" of the rights at issue did not prevent the Court "from applying the longstanding rule 'that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . .'"[112] Neither opinion referenced or cited *Chapman* a single time, strongly suggesting that *Chapman* simply does not apply when testing for plain error.[113] In fact, the Court highlighted and discussed the constitutional nature of the errors for the explicit purpose of emphasizing that the usual rules of forfeiture and plain error apply *regardless* of the seriousness of the rights at issue.

The Court reiterated the distinction between preserved and unpreserved errors in *United States v. Dominguez Benitez*.[114] Whereas the Government bears the prejudicial burden for preserved error, the defendant must prove prejudice where the error is unpreserved, regardless of the constitutional nature of the error:

> [T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it, and for several reasons, we think that burden should not be too easy for defendants . . . . [T]he standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error.[115]

The *Dominguez Benitez* opinion went on to explicitly distinguish cases in which "the Government has the burden of addressing prejudice," which

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[112] *Id.* at 634 (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).

[113] Though overruling by implication is generally disfavored, the omission of any reference to *Chapman* is conspicuous in light of *Chapman*'s dictate "requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967); *see* Agostini v. Felton, 521 U.S. 203, 237 (1997) (discussing the dictate that overruling by implication is disfavored); United States v. Pack, 65 M.J. 381, 383 (C.A.A.F. 2007) (same); *see also* Greabe, *supra* note 71, at 79 (discussing plain error review as a separate and distinct category from constitutional errors challenged on direct review under *Chapman*). Conversely, *Chapman* remains the standard for evaluating preserved constitutional errors. United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004) ("When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case."); *see* Gamache v. California, 562 U.S. 1083 (2010) (discussing the continued applicability of *Chapman*'s burden shift in certain circumstances).

[114] *Dominguez Benitez*, 542 U.S. 74.

[115] *Id.* at 82.

are subject to *Chapman*, from those cases where "the burden is on a defendant to show prejudice."[116] As recently as 2016, the Court again affirmed the appellant's burden, stating that to obtain relief for plain error, "[the appellant] must 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different."[117]

Though the error in *Chapman* was unpreserved, the Court's opinion and analysis ignored that fact and instead focused wholly on testing the potential harmlessness of constitutional errors—the opinion failed to mention the issue of forfeiture a single time and omitted any discussion of the lack of objection at trial.[118] However, it is clear that in the decades following *Chapman*, the Court clarified the delineation between testing for preserved error and testing forfeited error—in the latter case, the plain error test controls regardless of the constitutionality of the error.[119]

Consistent with the Supreme Court, the Federal circuits have explicitly distinguished the application of *Chapman* (to preserved errors) from *Olano*'s plain error test (for forfeited errors). In *United States v. Hastings*, the Fourth Circuit acknowledged that constitutional error would normally implicate *Chapman*, but "[b]ecause [appellant] failed to object in a timely fashion to the instruction . . . [the court] cannot simply review to determine whether the instructional error was harmless beyond a reasonable doubt."[120] Instead, the court "turn[s] to the manner in which that standard is to be applied on plain-error review, when the defendant rather than the Government bears the burden of proof."[121] Similarly, in *United States v.*

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[116] *Id.* at 81 n.7.

[117] Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016) (quoting *Dominguez Benitez*, 542 U.S. at 82).

[118] *Chapman*, 386 U.S. at 20–21.

[119] That *Chapman* itself addressed an unpreserved error seems, initially, at odds with the post-*Olano* direction of the Court. The *Chapman* decision has long drawn scrutiny as being unclear and perhaps even unnecessary—Justice Traynor criticized the decision for failing to cite or recognize either the Federal harmless-error statute or Rule 52(a), which seemingly apply to the question the *Chapman* court sought to answer. Graebe, *supra* note 71, at 80 (citing TRAYNOR, *supra* note 109, at 1). One possible explanation for *Chapman*'s distinct approach to a forfeited error is the fact that *Chapman* concerned Supreme Court review of an appeal from a state supreme court concerning a state court criminal conviction, whereas *Olano*, *Johnson*, and *Cotton* concerned reviews of convictions originating in Federal district court. United States v. Cotton, 535 U.S. 625, 628 (2002); Johnson v. United States, 520 U.S. 461, 463 (1997); United States v. Olano, 507 U.S. 725, 727 (1993); *Chapman*, 386 U.S. at 18.

[120] United States v. Hastings, 134 F.3d 235, 243 (4th Cir. 1998).

[121] *Id.* The court further elaborated:

Wihbey, the First Circuit conceded that a constitutional error normally requires the Government to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[122] However, "[a] very different standard is applied when a party forfeits an error by failing to make a contemporaneous objection"—in those instances, the court has the "discretion to reverse only for 'plain error' . . . that was 'prejudicial' to the defendant in that it 'affected the outcome of the [trial court] proceedings.'"[123]

Currently, every Federal appellate court subjects unpreserved constitutional error to the plain error test, imposing on the appellant the burden of establishing prejudice.[124] As the Seventh Circuit stated in *United States v. Cardena*:

> [E]ven a jury-instruction error of constitutional dimension is subject to the familiar requirement that the error have harmed the defendant. . . . [T]he plain error must have affected the defendant's substantial rights such that there is a reasonable probability that but for the error the outcome of the trial would have been different. The analysis "requires the same kind of inquiry" as [preserved error] review, except that the burden is on the defendant to show prejudice. Defendants have not satisfied their heavy

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> As the Supreme Court made clear in *Olano* . . . the two modes of analysis differ significantly. On review for plain error, the defendant bears the burden of establishing that he has been prejudiced by an unpreserved error; in contrast, harmless-error review requires the Government to demonstrate that a preserved error was harmless.

Id. at 243 n.8.

[122] United States v. Wihbey, 75 F.3d 761, 769 (1st Cir. 1996) (quoting *Chapman*, 386 U.S. at 24).

[123] *Id.*

[124] *See* United States v. Tovarchavez, 78 M.J. 458, 471 n.4 (C.A.A.F. 2019) (Maggs, J., dissenting) (first citing United States v. Soto, 720 F.3d 51, 57 (1st Cir. 2013); then citing United States v. Bruno, 383 F.3d 65, 78 (2d Cir. 2004); then citing United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001); then citing United States v. Hughes, 401 F.3d 540, 547 (4th Cir. 2005); then citing United States v. Mudekunye, 646 F.3d 281, 289 (5th Cir. 2011); then citing United States v. Yancy, 725 F.3d 596, 600–01 (6th Cir. 2013); then citing United States v. Cardena, 842 F.3d 959, 979 (7th Cir. 2016); then citing United States v. Elmardoudi, 501 F.3d 935, 943–44 (8th Cir. 2007); then citing United States v. Moreland, 622 F.3d 1147, 1158 (9th Cir. 2010); then citing United States v. Turrietta, 696 F.3d 972, 976, 983–84 (10th Cir. 2012); then citing United States v. Margarita Garcia, 906 F.3d 1255, 1260 (11th Cir. 2018); and then citing United States v. McGill, 815 F.3d 846, 875 (D.C. Cir. 2016)).

> burden of showing that the error affected their substantial rights.[125]

Thus, even when the error is constitutional, the "heavy" burden of demonstrating prejudice remains on the appellant.[126] As one commentator noted, constitutional due process "does not guarantee a process that is entirely error-free. The interests in the finality of verdicts and in conserving resources encourage a Government-friendly approach to harm assessment."[127]

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[125] *Cardena*, 842 F.3d at 998 (citations omitted).

[126] *Id.*; *see* United States v. Benford, 875 F.3d 1007, 1017 (10th Cir. 2017) (explicitly acknowledging the constitutional dimension of the unpreserved error, but stating that "[appellant] has the burden to 'show a reasonable probability that, but for the error,' the outcome of the proceeding would have been different" (quoting Molina-Martinez v. United States, 136 S. Ct. 1338, 1343 (2016))). The Tenth Circuit acknowledged that the plain error test is applied "less rigidly when reviewing a potential constitutional error," recognizing that it is naturally easier for an appellant to establish prejudice when the nature of the error is more significant. *Benford*, 875 F.3d at 1016–17.

[127] Poulin, *supra* note 41, at 1037 (citation omitted); *see also* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one."). There are multiple specific exceptions where constitutional errors are evaluated differently in Federal courts: an appellant carries the burden of establishing prejudice when alleging Sixth Amendment violations involving competence of counsel, Due Process violations regarding *Brady* disclosures, or allegations of false testimony at trial. Poulin, *supra* note 41, at 1001–04. Claims of ineffective assistance of counsel require an appellant to show a reasonable probability that, but for their counsel's incompetence, they would have obtained a different outcome. Strickland v. Washington, 466 U.S. 668, 694 (1985). To obtain relief where the Government fails to turn over exculpatory evidence, an appellant must demonstrate that said evidence was "material," which is the case "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)). The analysis of *Brady* violations is distinct because the "materiality" test is a preliminary question as to whether an error exists; "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial." *Bagley*, 473 U.S. at 678. Ironically, these are all instances in which one would not expect a defendant to object because the error generally would only be discovered after trial, yet the Court's analysis seems to place a higher burden on appellants in these instances of constitutional error. This is because, rather than presupposing the existence of a trial error, "in these cases a defendant must make a showing of prejudice even to establish that there is a constitutional right to be asserted"—the question of prejudice is incorporated into the threshold determination of whether an error exists. Edwards, *supra* note 71, at 1178. Functionally, the effect is the same insofar as an appellant is required to bear the burden of prejudice where a constitutional right is implicated. These tests "reflect[] the judgment that certain government interests outweigh concerns with fairness to the defendant," much in the same way that the plain error test reflects the judgment that the policy interests favoring timely preservation of error may be properly weighed against fairness to the defendant.

C. Plain Error and Prejudice Analysis in Military Courts

Historically, the military interpretation of plain error was based entirely on Supreme Court precedent and mirrored Federal civilian practice. As discussed above, Article 59(a), UCMJ, restricts military courts from granting relief except where an error of law "materially prejudices the substantial rights of the accused."[128] Though Article 59, UCMJ, does not include an explicit plain error provision similar to Rule 52(b), plain error is codified in MRE 103, which requires that parties preserve errors through objections but permits "taking notice of plain errors that materially prejudice substantial rights although they were not brought to the attention of the military judge."[129]

The concept of plain error has been a part of military jurisprudence since the original passage of the UCMJ. As early as 1951, in *United States v. Masusock*, the Court of Military Appeals—the predecessor to C.A.A.F.—recognized an exception to the general rule of waiver where "the alleged error would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial

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Poulin, *supra* note 41, at 1003. Similarly, Professor Greabe argues that the Supreme Court has historically (and correctly) drawn a distinction between correcting ongoing constitutional violations (for which remedy is constitutionally necessary) and providing post hoc substitutionary remedies for wholly completed constitutional wrongs, which are "contingent and subject to being withheld in circumstances where their negative effect on the public interest would be too great." Greabe, *supra* note 71, at 90–91.

[128] UCMJ art. 59(a) (1950). The courts of criminal appeals also conduct a full review of the record and may "affirm only such findings of guilty, and the sentence . . . as the Court[s] find[] correct in law and fact . . . ." UCMJ art. 66(d)(1) (2017). Consequently, the courts of criminal appeals are empowered to grant relief based on the factual sufficiency of a case, not merely for errors of law. *See, e.g.*, United States v. Whisenhunt, No. ARMY 20170274, 2019 CCA LEXIS 244 (A. Ct. Crim. App. June 3, 2019).

[129] MCM, *supra* note 2, MIL. R. EVID. 103; United States v. Masusock, 1 C.M.R. 32 (C.M.A. 1951). The MREs were adopted in 1980. Exec. Order No. 12198, 45 Fed. Reg. 16932 (Mar. 12, 1980). "[Military Rule of Evidence] 103(a) was adapted from the corresponding federal rule of evidence, with the exception that the military rule requires that the ruling 'materially prejudices a substantial right,' whereas the federal rule requires that the error 'affects a substantial right.'" MIL. JUST. REV. GRP., *supra* note 74, at 555 (quoting MCM, *supra* note 2, MIL. R. EVID. 103). The military rule parallels Federal Rule of Evidence (FRE) 103, which itself was based upon Federal Rule of Criminal Procedure 52(b). FED. R. CRIM. P. 52 advisory committee's note; *see* Lieutenant Colonel Frederic I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5, 13 (1990) (stating that, consistent with Article 36, UCMJ, the MREs were drafted from "a fundamental philosophical position: military evidentiary law should be as similar to civilian law as possible."). The only difference between MRE 103 and FRE 103 is a substitution of the language "material prejudice" to substantial rights in place of "affects substantial rights." *Compare* MCM, *supra* note 2, MIL. R. EVID. 103, *with* FED. R. EVID. 103.

proceedings.'"[130] "It should be apparent," the court continued, "that to hold otherwise would result in an inefficient appellate system, interminable delays in the final disposition of cases, and careless trial representation."[131]

In *United States v. Fisher*, C.A.A.F. provided the most thorough articulation (pre-*Olano*) of plain error review in the military.[132] Relying heavily on Supreme Court precedent, the Court of Military Appeals departed from an earlier view that certain errors were per se reversible, explaining:

> It has become clear . . . that "[a] *per se* approach to plain error review is flawed." . . . This approach permits counsel for the accused to remain silent, make no objections, and then raise an instructional error for the first time on appeal. This undermines "our need to encourage all trial participants to seek a fair and accurate trial the first time around." Moreover, without viewing the error in the context of the facts of the particular case, "[i]t is simply not possible for an appellate court to assess the seriousness of the claimed error."
>
> In order to constitute plain error, the error must not only be both obvious and substantial, it must also have "had an unfair prejudicial impact on the jury's deliberations." The plain error doctrine is invoked to rectify those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings." As a consequence, it "is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result."[133]

Thus, prior to *Olano* and C.A.A.F.'s subsequent decision in *United States v. Powell*, military plain error was rooted in Supreme Court precedent,

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[130] *Masusock*, 1 C.M.R. at 34 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). The "miscarriage of justice" language was similarly reflected in section 472 of the U.S. Navy's *Naval Courts and Boards* publication, from which Article 59(a), UCMJ, was derived. *See supra* note 76.

[131] *Masusock*, 1 C.M.R. at 34.

[132] United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

[133] *Id.* at 328–29 (first quoting United States v. Young, 470 U.S. 1, 16 n. 14 (1985); then quoting United States v. Frady, 456 U.S. 152, 163 (1982); then quoting *Young*, 470 U.S. at 16; then quoting *Young*, 470 U.S. at 16 n.14; then quoting *Atkinson*, 297 U.S. at 160; and then quoting *Frady*, 456 U.S. at 163 n.14).

followed Federal civilian practice, and placed no importance on perceived distinctions between Article 59, UCMJ, and Rule 52.

1. Powell *and Military Plain Error Review*

Powell, a case of unpreserved nonconstitutional error, marked the beginning of the military's unjustified departure from Federal civilian practice.[134] The Navy-Marine Corps Court of Criminal Appeals found plain and obvious error affecting substantial rights, but declined to grant relief under *Olano*'s fourth prong because the error "did not seriously affect the fairness, integrity, or public reputation of the court-martial."[135] The C.A.A.F. granted review to clarify the military's plain error analysis in light of *Olano*.[136] Unfortunately, rather than provide clarity, "[t]he majority opinion in [*Powell*] muddies the water."[137]

a. Powell *Incorrectly Distinguishes Military and Federal Practice*

In *Powell*, C.A.A.F. correctly recognized that the service courts of criminal appeals are not bound by the restriction of plain error review in the same manner as customary appellate courts.[138] Because Article 66(c), UCMJ, permits the courts of criminal appeals to affirm only those findings and sentence they find "correct in law and fact," they possess "plenary authority" to notice and correct any error that materially prejudices an appellant, regardless of preservation or forfeiture—the statutory authority granted by Article 66, UCMJ, overrides the customary common law restriction on correcting unpreserved error.[139] Conversely, C.A.A.F. is governed by Article 67, UCMJ, and functions primarily as a traditional court of discretionary review that is bound by the limitations of plain error.[140] However, while C.A.A.F. acknowledged that it was limited by plain error,

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[134] United States v. Powell, 49 M.J. 460, 461–62 (C.A.A.F. 1998). *Powell* concerned inappropriate evidence admitted during the sentencing phase of appellant's trial. *Id.*

[135] United States v. Powell, 45 M.J. 637, 641 (N-M. Ct. Crim. App. 1997), *aff'd*, 49 M.J. 460.

[136] *Powell*, 49 M.J. at 461.

[137] *Id.* at 466 (Sullivan, J., concurring).

[138] *Id.* at 464–65 (majority opinion).

[139] UCMJ art. 66(c) (2017); *Powell*, 49 M.J. at 464–65. Thus, in this case, the Navy-Marine Corps Court of Criminal Appeals could have noticed and corrected the alleged error without applying *Olano*'s plain error test. *Powell*, 49 M.J. at 464; *see* United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991).

[140] UCMJ art. 67 (2016); *Powell*, 49 M.J. at 464; *Claxton*, 32 M.J. at 162. Additionally, C.A.A.F. conducts mandatory reviews of capital cases and cases specifically referred to the court by service Judge Advocates General. UCMJ art. 67(a)(1)–(2) (2016).

the court declared that plain error was *not* governed by *Olano*.[141] *Olano*, C.A.A.F. reasoned, solely concerns the plain error rule codified in Rule 52(b), whereas military plain error is independently based on "Article 59(a), Mil. R. Evid. 103, RCM 920(f), RCM 1005(f), and [the court's] decision in *Fisher*."[142]

The attempt by C.A.A.F. to distinguish itself from other Federal courts is flawed. Though *Olano* was written as an explanation of Rule 52(b), Rule 52 is simply a codification of existing Supreme Court precedent.[143] Indeed, C.A.A.F. bases its own plain error jurisprudence on that same Supreme Court precedent, which predates the codification of plain error in either the Federal or military rules.[144] To say that *Olano* is an interpretation of the Federal rules, and is thus inapplicable to the military, is a distinction without a difference—both the Federal and military rules regarding plain error derive from the same binding Supreme Court jurisprudence.[145]

This is particularly evident in C.A.A.F.'s curious attempt to distance itself from *Olano*'s fourth prong. In C.A.A.F.'s view, *Olano*'s first three prongs define "plain error," whereas the fourth prong limits and defines a court's "discretionary power" to provide relief.[146] The court reasoned that because Article 59(a), UCMJ, already limits military courts' authority to correct error, *Olano*'s fourth prong is unnecessary and inapplicable to the military.[147] But in *Fisher*, C.A.A.F. relied on the language of *Olano*'s fourth prong, quoting the Supreme Court's opinion in *Atkinson* that plain error should only be corrected when the error "seriously affect[s] the fairness,

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[141] *Powell*, 49 M.J. at 464.

[142] *Id.*

[143] *See* FED. R. CRIM. P. 52 advisory committee's note; United States v. Atkinson, 297 U.S. 157 (1936).

[144] *See* United States v. Fisher, 21 M.J. 327, 328 (C.M.A. 1986) (citing *Atkinson*, 297 U.S. 157); United States v. Masusock, 1 C.M.R. 32, 34 (C.M.A. 1951) (same). In at least one instance, the highest military court directly cited Rule 52(b) as authority for the principle of plain error review in a military case. United States v. Stephen, 35 C.M.R. 286, 289 (C.M.A. 1965).

[145] *Powell*, 49 M.J. at 466 (Sullivan, J., concurring) ("In my view, our decision in *Fisher* was based on the Supreme Court's decision in *United States v. Young*. Our decision in this case, likewise, should be based on the more recent Supreme Court decisions in *United States v. Olano*, and *Johnson v. United States*." (citations omitted)).

[146] *Id.* at 465 (majority opinion).

[147] Article 59(a), UCMJ, limits the court to correcting errors that materially prejudice substantial rights. UCMJ art. 59(a) (1950). Following *Powell*, any reference to or application of *Olano*'s fourth prong disappeared from the court's analysis, though C.A.A.F. never explicitly disavowed it until its decision in *Tovarchavez*. United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019); *see* Erisman, *supra* note 27, at 63.

integrity or public reputation of judicial proceedings."[148] The discretionary language of *Olano*'s fourth prong is something that C.A.A.F. previously imposed on itself, and only after *Olano* did the court decide that this limiting language for some reason no longer applied.[149]

The *Powell* decision stated that military plain error analysis is not based on *Olano* because it interprets a Federal rule, but is instead based on military decisions like *Fisher*.[150] However, *Olano* and *Fisher* cite, quote, and rely on the exact same case law defining plain error.[151] The court's attempt to distinguish itself from Federal practice is circular at best.[152]

b. Powell *Confuses the Prejudice Analysis*

The *Powell* court's confusion reached a crescendo when the opinion attempted to explain prejudice. Seemingly uncertain of how to square *Olano*'s third prong with the prejudice requirement of Article 59(a), UCMJ, C.A.A.F. stated: "Under a plain error analysis, appellant had the burden of persuading the court below that there was plain error. Only after appellant met his burden of persuasion did the burden shift to the Government to show that the error was not prejudicial."[153] Thus, the court declared that

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[148] *Fisher*, 21 M.J. at 329 (quoting *Atkinson*, 297 U.S. at 160).

[149] More curious still, C.A.A.F. continued to reference with approval the policy values underlying *Olano*'s fourth prong, and the discretionary nature of plain error relief, long after the *Powell* decision. As recently as 2012, C.A.A.F. stated that it may notice forfeited error while "keeping in mind the need 'to encourage timely objections and reduce wasteful reversals;' and to 'respect the particular importance of the finality of guilty pleas.'" United States v. Humphries, 71 M.J. 209, 214 (C.A.A.F. 2012) (quoting United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004)).

[150] *Powell*, 49 M.J. at 464.

[151] United States v. Olano, 507 U.S. 725, 732 (1993); *Fisher*, 21 M.J. at 329; *see Humphries*, 71 M.J. at 220 (Stucky, J., dissenting) ("We originally adopted the Supreme Court's plain error test.").

[152] The C.A.A.F.'s reasoning is also incorrect insofar as it states that the Article 59, UCMJ, requirement for prejudice makes any further restriction on the court's discretion unnecessary and redundant. If that were the case, *Olano*'s third and fourth prongs would also be redundant—instead, the Supreme Court emphasized that the third prong's requirement for prejudice and the fourth prong's limit on judicial discretion are separate and independent standards. *See supra* note 102.

[153] *Powell*, 49 M.J. at 464–65. The court also noted that, "[i]n cases involving constitutional error, the Government must convince an appellate court beyond a reasonable doubt that the error was not prejudicial." *Id.* at 465 n.*. Interestingly, C.A.A.F. observes that obtaining relief for plain error is more difficult in the military than in Federal courts because the requirement for prejudice is higher. *Id.* at 464–65. While *Olano* merely requires that an error "affects substantial rights," military courts face the additional restriction of Article 59(a), UCMJ, which requires that the error "materially prejudice substantial rights," a higher threshold. *Id.* In *Olano*, the Supreme Court acknowledged that plain error will usually have affected

an appellant must establish all three prongs of plain error (including the third, establishing material prejudice), which will then trigger a *fourth* step in which the Government may then disprove prejudice, a fundamentally illogical progression.[154]

The court has continued to struggle with this issue in subsequent cases. In *United States v. Carter* and *United States v. Paige*, C.A.A.F. stated that an appellant must meet all prongs of plain error (meaning the appellant must affirmatively establish that material prejudice exists), which then triggers a subsequent step in which the Government has the opportunity to prove that prejudice does *not* exist.[155] At times, the court appeared to confuse whether the burden shift occurs after appellant establishes plain error or is simply part of the third prong of the plain error analysis.[156]

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the outcome of a trial but declined to decide whether "affecting substantial rights is always synonymous with prejudice," leaving open the possibility for a plain error affecting substantial rights but not actually prejudicing an appellant. *Olano*, 507 U.S. at 735. However, the Court later clarified that "affects substantial rights" as used in Rule 52 means "a prejudicial effect on the outcome of a judicial proceeding." *Dominguez Benitez*, 542 U.S. at 81. Consequently, the terms are effectively synonymous.

[154] Under this language, this burden shift would occur in all cases, even in ones involving nonconstitutional error. In cases of constitutional error, the Government would simply have a higher burden of proof. *See, e.g.*, United States v. Carpenter, 51 M.J. 393, 396 (C.A.A.F. 1999) (stating that after an appellant establishes plain error, the burden shifts to the Government to show that the error was not prejudicial). This burden shift appears to originate in *Powell* and is not present in Federal civilian plain error review.

[155] United States v. Carter, 61 M.J. 30, 34 (C.A.A.F. 2005). In *Carter*, the trial counsel improperly commented on the appellant's constitutional right to remain silent during closing argument. *Id.* at 31–33. The court articulated the plain error test as: "Appellee must show that there was error, that the error was plain, and that the error materially prejudiced his substantial rights. Once Appellee meets his burden of establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable doubt." *Id.* at 33 (citation omitted). In *Paige*, the court similarly stated:

> [Appellant] meets the plain error standard if he establishes that "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." "Once [appellant] meets his burden of establishing plain error, the burden shifts to the Government to convince us that this constitutional error was harmless beyond a reasonable doubt."

United States v. Paige, 67 M.J. 442, 450 (C.A.A.F. 2009) (first quoting United States v. Maynard, 66 M.J. 242, 244 (C.A.A.F. 2008); and then quoting *Carter*, 61 M.J. at 33).

[156] "The third prong of [the plain error analysis] asks whether the error materially prejudiced Appellee's substantial rights. In the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt." *Carter*, 61 M.J. at 35 (citing *Powell*, 49 M.J. at 463–65).

As the court eventually acknowledged, this framework is fundamentally illogical, especially when applying the *Chapman* standard—if an appellant proves that an error resulted in material prejudice to substantial rights, meaning the error had an effect on the outcome of the trial, then it is impossible for the Government to then prove that such an error is harmless beyond a reasonable doubt.[157]

c. The C.A.A.F.'s Creeping Paternalism

Following *Powell*, C.A.A.F.'s rejection of *Olano*'s fourth prong paired with the burden shift to the Government fueled a steady expansion of plain error relief. By 2008, one commentator observed that the court had "so expanded its interpretation of the rule that it no longer represent[ed] a doctrine to be used in exceptional circumstance, but [was] instead employed as a matter-of-course analysis in run of the mill cases."[158]

This trend was controversial among C.A.A.F.'s own judges. In a lengthy dissent in *Paige*, Judge Stucky distanced himself from the court's liberal expansion of plain error, citing C.A.A.F.'s own precedent that plain error be "used sparingly" and referencing the Supreme Court's admonition that trial participants "seek a fair and accurate trial the first time around."[159] After comparing the military and Federal rules, he concluded:

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[157] If prejudice to substantial rights were defined differently than affecting the outcome of a case, C.A.A.F.'s burden shift might remain logically sound. *See Olano*, 507 U.S. at 743 (Stevens, J., dissenting) (discussing the potential difference between "affecting substantial rights" and prejudice to the outcome of the case). However, C.A.A.F.'s interpretation of material prejudice as requiring an effect on the outcome of the case renders the burden shift impossible. *See, e.g.*, United States v. Robinson, 77 M.J. 294, 297 (C.A.A.F. 2018) ("The third prong is satisfied if the appellant shows 'a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different.'" (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (alteration in original))). In *Tovarchavez*, A.C.C.A. highlighted the illogical consequences of this burden-shifting analysis. United State v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371, at *9–10 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). The C.A.A.F. eventually acknowledged the error in a footnote and explicitly disavowed this analysis. *Tovarchavez*, 78 M.J. at 465 n.13.

[158] Erisman, *supra* note 27, at 64. This undermines the very basis of the rule, as "the heart of plain error is that it places the burden of persuasion on the appellant to demonstrate that plain error exists." *Id.* at 65.

[159] *Paige*, 67 M.J. at 453 (Stucky, J., dissenting in part and concurring in the result) (quoting United States v. Frady, 456 U.S. 152, 163 (1982)). Judge Stucky specifically attacked the burden-shifting language of *Powell* as "dictum . . . that was based on *United States v. Adams*, a case in which neither the issue granted for review nor this Court's opinion discussed plain

> Although the Supreme Court has not spoken directly on this issue, it has suggested that the plain error test need not be changed to accommodate non-structural, constitutional errors. If the error alleged is constitutional, the standard is the same; it just becomes easier for the appellant to meet his burden of showing "a reasonable probability that, but for the error, the result of the proceeding would have been different."
>
> In a plain error case, as opposed to one in which the error is preserved, the burden of persuasion never shifts to the government; it remains with the appellant, although the government has the opportunity to argue why the error is not prejudicial. When a military appellant meets the heavy burden of establishing "material" (significant) prejudice—a reasonable probability that, but for the error the result would have been different—it is impossible for the government to show the error was harmless beyond a reasonable doubt. By conflating the third prong of the plain error standard with the harmless beyond a reasonable doubt test for constitutional error, the majority incorrectly shifts the burden of persuasion from Appellant to the Government.[160]

Nevertheless, within a few years, the court solidified its position that constitutional plain error required a burden shift to the Government.[161] The majority's rejection of the logical, precedential, and policy-based objections to broadening plain error review is characteristic of the court's increasingly

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error," and rejected the notion that *Olano*'s fourth prong is inapplicable to C.A.A.F. *Id.* at 453–54 (citation omitted).

[160] *Id.* at 454 (citations omitted).

[161] The court continued to muddle whether the burden shift followed an appellant first establishing prejudice or whether the third prong of prejudice itself contained the burden shift, exemplified by its opinion in *United States v. Sweeney*:

> Under plain error review, this Court will grant relief only where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused. Where, as here, the alleged error is constitutional, the prejudice prong is fulfilled where the Government cannot show that the error was harmless beyond a reasonable doubt.

United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011) (citing United States v. Harcrow, 66 M.J. 154 (C.A.A.F. 2008)).

paternalistic approach.[162] One contemporary practitioner observed that C.A.A.F. had effectively eliminated any distinction between plain error and ordinary appellate review, to the point of "damag[ing] the stability and efficiency of the military justice system."[163]

2. Recent C.A.A.F. Decisions Applying Plain Error

The C.A.A.F.'s more recent cases, immediately prior to *Tovarchavez*, continued to vary widely in the application of plain error review. In some cases of constitutional error, the court applied *Chapman* and imposed a burden shift within the third prong of the plain error test, thereby requiring the Government to demonstrate harmlessness beyond a reasonable doubt as a predicate to determining whether plain error exists.[164] In other cases, the court expressed the plain error test in its traditional form, simply stating that the appellant bears the burden on all three prongs of the plain error test, to include establishing prejudice.[165]

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[162] In some instances, the court veered even further from conventional plain error analysis. In *United States v. Wolford*, C.A.A.F. reviewed a forfeited constitutional error regarding panel instructions. United States v. Wolford, 62 M.J. 418, 419 (C.A.A.F. 2006). Finding the error forfeited rather than waived, C.A.A.F. stated "[a]ccordingly, we review [appellant's] instructional claims de novo." *Id.* at 420. If constitutional error is found, it "must be tested for prejudice under the standard of harmless beyond a reasonable doubt." *Id.* The *Wolford* opinion makes no distinction between preserved and unpreserved constitutional errors, nor does it mention plain error review, further highlighting the confused and uneven approach of the court. The court eventually distanced itself from the *Wolford* opinion in favor of plain error review for forfeited instructional errors. *See* United States v. Davis, 76 M.J. 224, 229 (C.A.A.F. 2017).

[163] Erisman, *supra* note 27, at 64. Then-Major Erisman's observations are consistent with the broader view that C.A.A.F. has tended towards a paternalistic approach.

> The military justice system is often labeled "paternalistic," meaning appellate courts are more willing to protect the interests of the accused or a convicted [S]ervice[ ]member than their civilian counterparts might be in an effort to ensure that the discipline aspect of the military justice system does not come at the expense of justice.

Weber, *supra* note 53, at 77. In an early case analyzing forfeiture and waiver, Judge Crawford observed that "[t]he majority continues to swim in a sea of paternalism." United States v. Scalarone, 54 M.J. 114, 119 (C.A.A.F. 2000) (Crawford, J., dissenting).

[164] United States v. Jones, 78 M.J. 37, 44–45 (C.A.A.F. 2018) ("Plain error occurs 'where (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the accused.' . . . When a constitutional issue is reviewed for plain error, the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." (quoting *Sweeney*, 70 M.J. at 304)); *see* United States v. Payne, 73 M.J. 19, 25–26 (C.A.A.F. 2014).

[165] United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) ("[T]he appellant has the burden of demonstrating '(1) error that is (2) clear or obvious and (3) results in material

In reviewing unpreserved constitutional error in *United States v. Robinson*, C.A.A.F. stated that "[t]he third prong [of plain error] is satisfied if the appellant shows 'a reasonable probability that, but for the error claimed, the outcome of the proceeding would have been different.'"[166] The court concluded the appellant "failed to meet *his burden* of showing that 'but for [this error] the outcome of the proceeding would have been different.'"[167] Likewise, in *United States v. Williams*, C.A.A.F. stated that for an unpreserved constitutional error it was the appellant who "must demonstrate (1) error, (2) that is clear or obvious at the time of appeal, and (3) prejudicial."[168] In both instances, the court neither explicitly shifted the burden of showing prejudice nor asked whether the error was harmless beyond a reasonable doubt.[169]

The most perplexing examples of the court's confused approach are in *United States v. Riggins* and *United States v. Oliver*, two recent cases of

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prejudice to his substantial rights.'" (quoting United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014))); *see* United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007); United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005); United States v. Rodriguez, 60 M.J. 87, 88–89 (C.A.A.F. 2004).

[166] United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018) (quoting United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017)). *Robinson* concerned an unpreserved instructional error alleging that the military judge omitted the necessary mens rea when instructing the panel on the elements of Article 92, UCMJ. *Id.* This implicated constitutional error by potentially lowering the burden of proof necessary to obtain a conviction. *See* Elonis v. United States, 575 U.S. 723 (2015) (discussing the necessity of a minimum mens rea in criminal statutes).

[167] *Robinson*, 77 M.J. at 300 (quoting *Lopez*, 76 M.J. at 154) (alteration in original) (emphasis added).

[168] United States v. Williams, 77 M.J. 459, 462 (C.A.A.F. 2018). *Williams* concerned an unpreserved *Hills* error, wherein the military judge instructed that evidence for Charge I could be considered as propensity evidence for Charge II but gave no explicit instruction that evidence of Charge II could be used in a similar fashion as propensity evidence for Charge I. *Id.* The A.C.C.A. relied on this distinction, where "the propensity instruction flowed in only one direction," to uphold the conviction and find Charge I untainted by improper propensity evidence. United States v. Williams, No. ARMY 20130582, 2017 CCA LEXIS 24, at *2 (A. Ct. Crim. App. Jan. 12, 2017). The C.A.A.F. ultimately disagreed, setting aside the conviction as to Charge I. *Williams*, 77 M.J. at 464.

[169] *Id.* at 463; *see* United States v. Guardado, 77 M.J. 90 (C.A.A.F. 2017). In *Guardado*, reviewing an unpreserved *Hills* error, the court articulated the test as follows: "This Court has repeatedly held that plain error occurs when: (1) there was error, (2) such error was clear or obvious, and (3) the error materially prejudiced a substantial right of the accused. The burden lies with Appellant to establish plain error." *Guardado*, 77 M.J. at 93 (citations omitted). The court never discussed a burden shift to the Government or explicitly stated that the applicable test for prejudice requires harmlessness beyond a reasonable doubt. In ultimately finding prejudice, C.A.A.F. merely stated that it was "not convinced that the erroneous propensity instruction played no role in Appellant's conviction." *Id.* at 94–95.

constitutional error concerning lesser-included offenses.[170] In *Riggins*, where the constitutional error was preserved, C.A.A.F. stated that for "preserved constitutional errors . . . the Government bears the burden of establishing that the error is harmless beyond a reasonable doubt."[171] But in *Oliver*, where the same error was unpreserved, the court stated that "[a]ppellant must show 'that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right to notice,'" never mentioning the *Chapman* standard or any burden shift to the Government.[172] These cases, seemingly linking the application of *Chapman* to whether the error was preserved, appear to track exactly with Federal practice. It was in this unsettled landscape that the appellate courts reviewed *United States v. Tovarchavez*.[173]

III. Criticism of C.A.A.F.'s Decision in *Tovarchavez*

In *Tovarchavez*, A.C.C.A. effectively summarized the questions before the court and the confused state of the law:

> In this case of forfeited error, does this court determine whether the error was harmless under Article 59(a), UCMJ? Or, as the forfeited error is constitutional, do we determine whether the error was harmless beyond a reasonable doubt? Does appellant have the burden of establishing plain error? Or, to sustain the conviction, is the [G]overnment required to prove constitutional harmlessness?[174]

Concluding that C.A.A.F.'s language in recent opinions like *Riggins* and *Oliver* was purposeful, A.C.C.A. determined that for unpreserved errors,

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[170] United States v. Oliver, 76 M.J. 271 (C.A.A.F. 2017); United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016).
[171] *Riggins*, 75 M.J. at 85.
[172] *Oliver*, 76 M.J. at 275 (quoting United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2015)); *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) (asking, of a constitutional error, "[h]as Appellant shown that the error caused him to suffer material prejudice?").
[173] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019). As previously discussed, this was the second time that A.C.C.A. reviewed *Tovarchavez*; the court previously reviewed the case and remanded it for a *Dubay* hearing concerning the performance of trial defense counsel. United States v. Tovarchavez, No. ARMY 20150250, 2017 CCA LEXIS 602, at *3–4 (A. Ct. Crim. App. Sept. 7, 2017), *aff'd*, No. ARMY 20150250, 2018 CCA LEXIS 371 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019).
[174] *Tovarchavez*, 2018 CCA LEXIS 371, at *4.

the appellant bears the burden of establishing prejudice, regardless of the constitutionality of the error.[175]

The C.A.A.F. roundly rejected A.C.C.A.'s analysis, ultimately holding that in all cases of constitutional error, the Government must prove harmlessness beyond a reasonable doubt, regardless of preservation of error.[176] The court further explained:

> The proper distinctions . . . are between preserved and forfeited error and constitutional and nonconstitutional rights. Forfeited errors are subject to plain error review, while preserved errors are not. Under Article 59, UCMJ, all errors of law—preserved or not—must have prejudiced an appellant's rights, and the test we employ to determine prejudice depends on the nature of the right.[177]

Prejudice, in C.A.A.F.'s view, is tested wholly upon the nature of the error, independent from preservation of error and the plain error test.[178] Consequently, when the error is constitutional, prejudice is evaluated the same whether the error is preserved or forfeited; the only difference in cases of forfeiture is the plain error requirement that the error be clear and obvious. "Clear and obvious" is a bar so low it rarely plays a role in judicial analysis.[179] The C.A.A.F. itself acknowledges that plain error review "in most cases, will turn on the question of prejudice."[180] Thus, in most cases of constitutional error, *Tovarchavez* renders preservation of error meaningless.

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[175] *Id.* at *14–16 ("If appellant meets his burden of establishing plain error, the inquiry ends and we are not required to reach the question of whether the error was harmless beyond a reasonable doubt."). The A.C.C.A.

> struggled to understand the burden shift articulated in *Paige*. As a matter of logic, if appellant has established material prejudice to a substantial right, how could the [G]overnment ever be able to show that the error was harmless beyond a reasonable doubt? On appeal, an error in a case cannot simultaneously: 1) materially prejudice appellant's rights; and 2) be harmless beyond a reasonable doubt.

Id. at *9.

[176] United States v. Tovarchavez, 78 M.J. 458, 462–63 (C.A.A.F. 2019).

[177] *Id.* at 469 n.18.

[178] *Id.*

[179] *See* Erisman, *supra* note 27, at 64 ("This part of the test is rarely an issue, as long as the record is sufficiently developed to support a conclusion that error actually occurred. The court does not even always expressly address this prong of the analysis.").

[180] United States v. Humphries, 71 M.J. 209, 213 (C.A.A.F. 2012).

Historically, the primary advantage to preserve error for appeal has been to secure more favorable appellate review.[181] Preserving an error not only brings it to the appellate court's attention but also shifts the burden to the Government to affirmatively disprove prejudice; otherwise, when the error is forfeited, it remains an appellant's uphill fight to prove that an error warrants relief.[182] But, following *Tovarchavez*, once a constitutional error is found to be "clear and obvious," military appellate courts apply the same test for prejudice that they would have applied had the error been properly preserved at trial. That standard, harmlessness beyond a reasonable doubt, is so high that it is difficult to overcome under the best of circumstances, even more so when an objection was not lodged at trial and the issue is not fully litigated on the record. Proving harmlessness beyond a reasonable doubt is so difficult that, in some cases, such as those involving *Hills* error, it begins to function like "structural error:" inherently prejudicial, always requiring reversal.[183]

In reaching this erroneous conclusion, C.A.A.F. has held that "the overwhelming weight" of the court's precedent favors applying the *Chapman* test to all constitutional errors, and that the unique language of Article 59(a), UCMJ, distinguishes military plain error from Federal practice under Rule 52.[184] The C.A.A.F.'s decision is flawed for four reasons: (1) it is contrary to Supreme Court precedent, (2) it is not justified by Article 59(a), UCMJ, (3) it is inconsistent with C.A.A.F.'s own jurisprudence, and (4) it is contrary to judicial policy.

A. *Olano*, not *Chapman*, Governs Review of Forfeited Errors

The C.A.A.F.'s paternalistic approach is directly contrary to Supreme Court precedent, which has clearly abandoned *Chapman* as applied to

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[181] *See* Ham, *supra* note 23, at 19.

[182] *Compare* United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019), *and* United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016), *with* United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011).

[183] *See* Weaver v. Massachusetts, 137 S.Ct. 1899, 1907–08 (2017) (discussing structural error); TRAYNOR, *supra* note 109, at 43 (1970) (requiring that an error be harmless beyond a reasonable doubt "comes close to automatic reversal"). The C.A.A.F. has explicitly stated that a *Hills* error is not prejudicial per se. United States v. Guardado, 77 M.J. 90, 94 (C.A.A.F. 2017) ("There are circumstances where the evidence is overwhelming, so we can rest assured that an erroneous propensity instruction did not contribute to the verdict . . . ."). However, decisions actually finding no prejudice are rare. *See, e.g.*, *Tovarchavez*, 78 M.J. 458; United States v. Williams, 77 M.J. 459 (C.A.A.F. 2018); *Guardado*, 77 M.J. 90; United States v. Hukill, 76 M.J. 219, 222 (C.A.A.F. 2017); *but see* United States v. Moore, 77 M.J. 198 (C.A.A.F. 2018); United States v. Luna, 77 M.J. 198 (C.A.A.F. 2018).

[184] *Tovarchavez*, 78 M.J. at 463.

forfeited errors in favor of a strict application of *Olano*.[185] The Supreme Court's decision in *Olano*, its subsequent decisions in *Cotton* and *Johnson*, and the interpretive consensus among the Federal circuits demonstrate that preservation of error is the dominant consideration in determining the standard of review for prejudice on appeal. The C.A.A.F.'s attempt to distinguish itself from *Olano* and to cling to *Chapman* commits the very sin for which it condemned A.C.C.A.: "grasping at thin reeds" in support of its conclusion.[186]

Though *Chapman* concerned an unpreserved error, the issue of preservation or forfeiture was not material to the Supreme Court's analysis or holding.[187] *Chapman* focused on distinguishing structural errors ("some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error") from constitutional errors that may not be prejudicial ("errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless").[188] The C.A.A.F.'s analysis, however, was unconcerned with the Supreme Court's intent: "whatever the Supreme Court's primary concern," the majority states, "*Chapman* itself clearly involved forfeited constitutional error."[189] The C.A.A.F. latched on to this fact, ignoring over fifty years of intervening case law, as support for its conclusion that *Chapman* must continue to govern cases of unpreserved constitutional error.[190]

The C.A.A.F. similarly rejects the notion that *Olano* superseded *Chapman* because *Olano* concerned nonconstitutional error.[191] But, as

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[185] *See* United States v. Cotton, 535 U.S. 625 (2002); Johnson v. United States, 520 U.S. 461, 470 (1997).

[186] *Tovarchavez*, 78 M.J. at 464. The C.A.A.F.'s analysis reads into *Olano* an unwritten exception that it does not apply to forfeited constitutional errors. This exception is not stated by the Supreme Court and that has not been interpreted by any other affected circuit.

[187] Chapman v. California, 386 U.S. 18, 22–23 (1967).

[188] *Id.*

[189] *Tovarchavez*, 78 M.J. at 465.

[190] *Id.* at 466. *Chapman* itself was decided twenty-six years before the Supreme Court clarified the plain error test in *Olano*. United States v. Olano, 507 U.S. 725, 728–29 (1993); *Chapman*, 386 U.S. at 22–23.

[191] *Tovarchavez*, 78 M.J. at 467. The majority acknowledges that the Federal circuits have departed from this interpretation of *Chapman*'s reach and "regularly evaluate prejudice . . . from forfeited constitutional errors by requiring an appellant to establish that, 'had the error not occurred, there is a "reasonable probability" that' the outcome would have been different." *Id.* at 466 (quoting United States v. Guzman, 419 F.3d 27, 30 (1st Cir. 2005)). However, the majority declines to follow the universal interpretation of the Federal circuits because the majority does not find "a satisfactory rationale for the federal courts' side stepping of *Chapman*." *Id.*

with *Chapman*, C.A.A.F. ignores the main thrust of the Supreme Court's decision. *Olano* was decided on the basis of the forfeiture of error, not whether the right in question was constitutional, and the *Olano* Court went so far as to reiterate explicitly that constitutional errors are equally subject to the rules of forfeiture and plain error.[192]

The C.A.A.F.'s analysis in this regard misses the forest for the trees. The myopic focus on *Chapman* ignores the subsequent case law clarifying that constitutional errors are evaluated differently depending on preservation or forfeiture. Federal circuit courts have explicitly applied this interpretation to forfeited constitutional errors for over twenty years.[193] If the Federal courts' interpretation of *Olano* is misplaced, the Supreme Court has had ample opportunity to correct the issue. Instead, the Court has repeatedly denied certiorari in these cases.[194] "All of the other United States Courts of Appeals that hear criminal cases agree with this position; none of them applies the *Chapman* harmlessness beyond a reasonable doubt test when reviewing forfeited constitutional objections. Among all these [F]ederal courts, [C.A.A.F.] is the outlier, and [C.A.A.F.'s] position is incorrect."[195]

The majority's opinion in *Tovarchavez* briefly acknowledged *Johnson* and *Cotton* in a footnote, but promptly distinguished these cases because the Supreme Court "side stepped the issue of prejudice and resolved the case[s] on the fourth prong of *Olano*."[196] The court again misses the point. Faced with two instances of forfeited constitutional error, the Supreme Court applied the test from *Olano*, articulated that prejudice was the

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[192] *See Olano*, 507 U.S. at 731 ("'No procedural principle is more familiar to this Court, than that a constitutional right,' or a right of any other sort, 'may be forfeited . . . by the failure to make timely assertion of the right . . . .'" (quoting Yakus v. United States, 321 U.S. 414, 444 (1944))).

[193] *See* United States v. Hastings, 134 F.3d 235, 243 (4th Cir. 1998); United States v. Wihbey, 75 F.3d 761 (1st Cir. 1996).

[194] *See, e.g.*, United States v. Garcia, 906 F.3d 1255, 1260 (11th Cir. 2018), *cert. denied*, 139 S. Ct. 2027 (2019); United States v. McGill, 815 F.3d 846, 875 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 58 (2017); United States v. Cardena, 842 F.3d 959, 998 (7th Cir. 2016), *cert. denied*, 138 S. Ct. 247 (2017); United States v. Soto, 720 F.3d 51, 57 (1st Cir.), *cert. denied*, 571 U.S. 930 (2013); United States v. Elmardoudi, 501 F.3d 935, 943–44 (8th Cir. 2007), *cert. denied*, 552 U.S. 1120 (2008); United States v. Vazquez, 271 F.3d 93, 98 (3d Cir. 2001), *cert. denied*, 536 U.S. 963 (2002). Similarly, the Supreme Court did not exercise the opportunity present in cases like *Johnson* and *Cotton*, involving plain error evaluation of forfeited constitutional error, to clarify any misunderstanding among the lower courts. United States v. Cotton, 535 U.S. 625 (2002); Johnson v. United States, 520 U.S. 461 (1997).

[195] *Tovarchavez*, 78 M.J. at 471 (Maggs, J., dissenting).

[196] *Id.* at 467 n.15 (majority opinion).

appellant's burden, and made no reference whatsoever to either *Chapman* or the harmless beyond a reasonable doubt standard.[197] As the Supreme Court further explained in *Dominguez Benitez*:

> When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case. *See Chapman v. California*, 386 U.S. 18, 24 . . . (1967) ("[T]he court must be able to declare a belief that [constitutional error] was harmless beyond a reasonable doubt"). When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard. *Brecht v. Abrahamson*, 507 U.S. 619, 638 . . . (1993). If the burden is on a defendant to show prejudice in the first instance, of course, it would be easier to show a reasonable doubt that constitutional error affected a trial than to show a likely effect on the outcome or verdict.[198]

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[197] *Cotton*, 535 U.S. 625; *Johnson*, 520 U.S. 461; *Tovarchavez*, 78 M.J. at 469–70 (Maggs, J., dissenting) (noting that "the Supreme Court in subsequent cases has not applied *Chapman*'s test when reviewing forfeited constitutional objections"). Earlier in its opinion, C.A.A.F. compliments A.C.C.A. for noticing how the court abandoned its burden shift in *Paige* without having explicitly overruled it, yet C.A.A.F. is unwilling to read between the lines of its higher court in the same manner. *Tovarchavez*, 78 M.J. at 465 n.13 (majority opinion).

[198] United States v. Dominguez Benitez, 542 U.S. 74, 81 n.7 (2004). In *Brecht v. Abrahamson*, the Court distinguished direct and collateral review of constitutional errors, specifically in the context of a habeas claim. Brecht v. Abrahamson, 507 U.S. 619, 635–36 (1993). The Court noted that "[o]verturning final and presumptively correct convictions on collateral review because the State cannot prove that an error is harmless under *Chapman* undermines the States' interest in finality and infringes upon their sovereignty over criminal matters." *Id.* at 637. Ultimately, the Court found that "[t]he imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error." *Id.* The correct test for the constitutional error was whether it "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* While *Brecht* concerned collateral review of habeas claims, it demonstrates a number of important principles equally applicable to direct review of forfeited constitutional errors. *Brecht* demonstrates that (1) *Chapman* is not universally applicable to all constitutional errors, regardless of how they are raised—the seriousness of the error is not the sole factor in determining what prejudicial standard applies; (2) the procedural posture of an error is at least as important as its constitutional magnitude; and (3) the interests of judicial efficiency and finality of judgments

The Court drew a clear dichotomy between those instances in which the Government has the burden of addressing prejudice (citing *Chapman*) and those instances in which "the burden is on a defendant to show prejudice in the first instance."[199] The Court went on to clarify that, based on *Olano*, the primary difference between review of preserved error and plain error "is that the burden of persuasion shifts from Government to defendant."[200]

In light of the Supreme Court's language in *Dominguez Benitez* and the Court's clear application of the plain error test in *Johnson* and *Cotton*, the Court's intent is clear: those cases where the Government must prove harmlessness beyond a reasonable doubt of a *preserved* constitutional error (*Chapman*) are separate and distinct from cases where an appellant must establish prejudice of *forfeited* error under plain error review (*Olano*).

B. The C.A.A.F. Incorrectly Distinguishes Military and Federal Practice

The limited differences between the military and Federal rules do not provide a legitimate military necessity or distinction to support C.A.A.F.'s deviation from *Olano*. Nevertheless, echoing the reasoning in *Powell*, C.A.A.F. seeks to distinguish Article 59(a), UCMJ, and characterize *Olano* as a case only applicable to Rule 52, rather than a case governing plain error review generally.[201] Ironically, the *Tovarchavez* majority explicitly invoked the principle that, "[a]bsent articulation of a legitimate military necessity or

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should be weighed against the seriousness of an error. Concerns over finality of judgments are equally applicable to military courts. *See, e.g.*, United States v. Paige, 67 M.J. 442, 452 (C.A.A.F. 2009) (Stucky, J., dissenting) (citing the "need to encourage all trial participants to seek a fair and accurate trial the first time around"); Loving v. United States, 64 M.J. 132, 156 (C.A.A.F. 2006) (discussing "the importance of finality and efficiency in the military justice system"). To the extent that additional precautions or review are merited in the military system, that need is satisfied by the de novo review of the service courts of criminal appeals. *See* UCMJ art. 66(c) (2017).

[199] *Dominguez Benitez*, 542 U.S. at 81 n.7.

[200] *Id.* at 82 n.8.

[201] United States v. Powell, 49 M.J. 460, 464 (C.A.A.F. 1998). The court distinguished Article 59(a), UCMJ, from the Federal rules' framework, where preserved and forfeited errors are addressed separately. *Id.* at 467; FED. R. CRIM. P. 52(a)–(b). This is flawed reasoning. Article 59(a), UCMJ, does not define prejudice, nor does it limit the court from considering additional factors. Rather Article 59(a), UCMJ, states the overall minimum bar for when a case may be overturned. UCMJ art. 59(a) (1950). By C.A.A.F.'s logic, since Article 59(a), UCMJ, does not distinguish between preserved and unpreserved errors, C.A.A.F. should make no distinction at all in how it evaluates such errors on appeal, whether they be constitutional versus nonconstitutional or preserved versus forfeited. But, of course, C.A.A.F. augments the requirements of Article 59(a), UCMJ, in other instances, such as when imposing the additional requirement that an unpreserved error be "clear or obvious" as part of plain error review.

distinction, . . . this Court has a duty to follow Supreme Court precedent."[202] At best, the court's references to military distinction appear to apply selectively, in the manner that most conveniently supports the majority's conclusion.

As discussed above, though Article 59(a), UCMJ, and Rule 52 differ slightly in structure and language, they are similar in substance and effect: both provide a baseline that must be met before a court can grant relief.[203] Rule 52(b) and MRE 103 both recognize the importance of preserving error but codify the courts' ability to notice unpreserved plain error.[204] Federal and military courts both cite and rely on the same common law basis for plain error, which predates the doctrine's codification in either system, and neither set of rules explicitly differentiates between constitutional and nonconstitutional error.[205]

In actuality, Article 59(a), UCMJ, is entirely compatible with the plain error test articulated in *Olano*. As C.A.A.F. acknowledged in *Powell*, the principal difference between the military and Federal rules is in the language used to describe prejudice—"material prejudice" versus "affects substantial rights."[206] However, the Supreme Court has clarified that

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[202] The majority stated that there is no "legitimate military justification" for the court to evaluate Article 59(a), UCMJ, "material prejudice" differently for preserved and unpreserved errors, nor is there any justification for the court to deviate from its own precedent regarding *Chapman*. *Tovarchavez*, 78 M.J. at 466 (quoting United States v. Cary, 62 M.J. 277, 280 (C.A.A.F. 2006)).

[203] UCMJ art. 59(a) (1950); FED. R. CRIM. P. 52. Article 59(a), UCMJ, is derived from the thirty-seventh Article of War, which largely mirrored the Federal language. *See* MIL. JUST. REV. GRP., *supra* note 74.

[204] UCMJ art. 59(a) (1950); FED. R. CRIM. P. 52. Furthermore, the Military Justice Review Group (MJRG) suggested that the *MCM* adopt additional plain error rules similar to Rule 52(b). *See* MIL. JUST. REV. GRP., *supra* note 74, at 556.

[205] *See* United States v. Olano, 507 U.S. 725, 736 (1993); United States v. Fisher, 21 M.J. 327 (C.M.A. 1986); United States v. Masusock, 1 C.M.R. 32 (C.M.A. 1951). *Chapman*'s standard remains applicable to preserved error in both systems. *Tovarchavez*, 78 M.J. at 468; *see Dominguez Benitez*, 542 U.S. 74; United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016). The C.A.A.F. stated that "federal courts regularly evaluate prejudice arising from preserved errors based on the nature of the right." *Tovarchavez*, 78 M.J. at 468 (citing United States v. Hasting, 461 U.S. 499 (1983); Kotteakos v. United States, 328 U.S. 750 (1946)). However, *Hasting* and *Kotteakos* both involved preserved error, in addition to predating *Olano*.

[206] It is for this reason that subsequent military decisions adopted the first three prongs of *Olano* almost verbatim, merely substituting the "material prejudice" language of Article 59, UCMJ, in place of "affects substantial rights." United States v. Powell, 49 M.J. 460, 464–65 (C.A.A.F. 1998); *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018); United States v. Knapp, 73 M.J. 33, 36 (C.A.A.F. 2014); United States v. Brooks, 64 M.J. 325, 328 (C.A.A.F. 2007); United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005); United States v. Rodriguez, 60 M.J. 87, 88–89 (C.A.A.F. 2004).

"affects substantial rights" as used in Rule 52 means "a prejudicial effect on the outcome of a judicial proceeding."[207] Thus, "material prejudice" as interpreted in the military and "affects substantial rights" as interpreted in Federal courts are now functionally identical.

Because Article 59(a), UCMJ, requires "material prejudice" but makes no explicit distinction between preserved and unpreserved errors, C.A.A.F. argues it is "settled practice" to "assess prejudice—whether an error is preserved or not—based on the nature of the right" (i.e., whether or not the error is constitutional).[208] But as the *Tovarchavez* dissent rightly noted, Article 59(a)

> establishes a test of material prejudice, not a test of harmlessness beyond a reasonable doubt. [The C.A.A.F.] must accept this "balance achieved by Congress" . . . unless [the UCMJ's] provisions are unconstitutional. Accordingly, . . . [C.A.A.F.] must review errors for material prejudice under Article 59(a), UCMJ, *unless the United States Constitution requires [C.A.A.F.] to apply a different test*.[209]

Put differently, the majority has no authority to sua sponte impose a *higher* standard of review than what is required by the plain language of Article 59(a), UCMJ, and by the Supreme Court.

The Federal consensus concerning plain error rightly recognizes that *Olano* and subsequent cases clearly place the emphasis on preservation of error rather than the nature of the error itself.[210] The C.A.A.F.'s attempt to distinguish Article 59(a), UCMJ, from Rule 52 fails to sufficiently articulate

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[207] *Dominguez Benitez*, 542 U.S. at 81.

[208] *Tovarchavez*, 78 M.J. at 466–67.

[209] *Id.* at 469 (Maggs, J., dissenting) (citations omitted) (emphasis in original); *see* Greabe, *supra* note 71, at 81 (arguing that "the remedy *Chapman* implicitly promises is not constitutionally compelled").

[210] The C.A.A.F. acknowledged the lengthy history of dissent within its own ranks on this very point but noted that the court has "repeatedly rejected the argument . . . [that C.A.A.F.] either should or must follow the plain error doctrine applied in the federal courts." *Id.* (citing United States v. Humphries, 71 M.J. 209, 220–22 (C.A.A.F. 2012) (Stucky, J., dissenting); United States v. Paige, 67 M.J. 442, 452–54 (C.A.A.F. 2009) (Stucky, J., dissenting in part and concurring in the result); United States v. Gilley, 56 M.J. 113, 127–30 (C.A.A.F. 2001) (Sullivan, J., concurring in part and dissenting in part); United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000) (Sullivan, J., concurring); United States v. Wilson, 54 M.J. 57, 60–62 (C.A.A.F. 2000) (Sullivan, J., concurring in part and dissenting in part); *Powell*, 49 M.J. at 466 (Sullivan, J., concurring in the result)).

"a legitimate military necessity or distinction" that would obviate the court's "duty to follow Supreme Court precedent."[211] The C.A.A.F.'s argument is particularly ironic because, as the *Powell* court explained, the plain language of Article 59(a), UCMJ, actually imposes a higher burden on an appellant than Rule 52.[212] Twenty years later, the *Tovarchavez* court used this distinction between Article 59(a), UCMJ, and Rule 52 to depart from Federal practice and justify a far *lower* burden for the appellant.

C. *Tovarchavez* Conflicts with C.A.A.F.'s Own Precedent

The C.A.A.F.'s opinion is inconsistent with its own jurisprudence. The majority claims a "long-standing and settled precedent" of applying *Chapman* to forfeited constitutional errors, further arguing that there is a "clear direction running through [the court's] case law."[213] As demonstrated, the court's past language and analysis is anything but clear or consistent; time after time, the court has failed to apply *Chapman* to constitutional errors and assigns the prejudicial burden to the appellant.[214]

Casually dismissing inconsistent prior decisions, the *Tovarchavez* court appears shockingly unconcerned with the lack of linguistic precision in prior opinions. The court acknowledged the omission of any "harmless beyond a reasonable doubt" language in past cases, but argued that "the overall structure and conclusion of those cases clearly embrace and apply *Chapman*."[215] As to those cases in which the court specifically stated it was the appellant's burden to show material prejudice, C.A.A.F. shrugged off this language as the "unremarkable incantation of a statutory requirement."[216] According to the majority, the court has always applied *Chapman*, even when the court's plain language stated something else—

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[211] *Powell*, 49 M.J. at 466 (quoting United States v. Cary, 62 M.J. 277, 280 (C.A.A.F. 2006)).
[212] *Id.* at 464 ("[T]he military rules have a higher threshold than the federal rules in that they require plain error to 'materially prejudice' substantial rights.").
[213] *Tovarchavez*, 78 M.J. at 463, 465; *see* United States v. Armstrong, 77 M.J. 465, 469 (C.A.A.F. 2018) (discussing the court's failure to apply *Chapman* to constitutional errors); United States v. Oliver, 76 M.J. 271, 275 (C.A.A.F. 2017) (same); United States v. Riggins, 75 M.J. 78, 85 (C.A.A.F. 2016) (same).
[214] *See Armstrong*, 77 M.J. at 469; United States v. Robinson, 77 M.J. 294 (C.A.A.F. 2018); *Oliver*, 76 M.J. at 275; *Riggins*, 75 M.J. at 85.
[215] *Tovarchavez*, 78 M.J. at 463. The majority similarly rejected any suggestion that it was previously unclear in its decisions in *Guardado* and *Williams*. *Id.* at 464. Despite the imprecise language in those cases, the court stated that "the absence of the precise 'harmless beyond a reasonable doubt' articulation . . . notwithstanding, it is . . . clear that both decisions rely on the *Chapman* standard." *Id.* Notably, neither *Guardado* nor *Williams* cite to *Chapman* at any point.
[216] *Id.*

practitioners and lower courts should have simply read between the lines.[217] The court's analysis again seems to apply selectively—the court chastised A.C.C.A.'s decision for assuming too much and "overrul[ing] by implication," while simultaneously criticizing A.C.C.A. for *failing* to infer and read in the *Chapman* standard, even in those cases where it was never explicitly invoked by the court.[218]

The court's opinion provided no explanation for its differing approach in cases like *Riggins* and *Oliver*, failing to acknowledge those decisions at all.[219] Rather than providing an "unremarkable incantation of a statutory requirement," the court explicitly invoked harmlessness beyond a reasonable doubt where the error was preserved in *Riggins*,[220] but required that the "[a]ppellant . . . 'show that under the totality of the circumstances in this case, the Government's error . . . resulted in material prejudice to [his] substantial, constitutional right" where the same error was forfeited in *Oliver*.[221] The C.A.A.F.'s approach in *Riggins* and *Oliver* should not be viewed as an erroneous outlier; rather, it is an example of the correct approach, where the court acted consistently with Federal practice.

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[217] The court acknowledged its language could have been "more precise" but excused the different articulations by reference to *Fahy v. Connecticut*, a 1963 Supreme Court case requiring "a reasonable possibility that the evidence complained of might have contributed to the conviction," a description which *Chapman* stated was no different than the "harmless beyond a reasonable doubt" standard. *Id.* (citing Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963)). Thus, C.A.A.F.'s somewhat loose language in *Guardado* and *Williams* was apparently an intentional reference to a 1963 case as interpreted by a 1967 decision.

[218] *Id.* at 463–65. Perplexingly, in the same section of the opinion in which the court accuses A.C.C.A. of seeking to "overul[e] by implication," the majority utilized a footnote to complement A.C.C.A. for that exact practice:

> For example, while the ACCA understood that it was bound by our decision setting forth the burden-shifting prejudice analysis in *United States v. Paige*, it noted that our recent cases reviewing forfeited constitutional error have omitted *Paige*'s burden shift, and it rightly emphasized the illogic of that burden-shifting standard. We agree this standard is illogical, because, of course, material prejudice in this context means that the constitutional error is not harmless beyond a reasonable doubt.

Id. at 465 n.13 (citations omitted). Thus, C.A.A.F. chastises A.C.C.A. for drawing inferences from C.A.A.F.'s omission of certain language ("harmless beyond a reasonable doubt") in recent decisions like *Guardado* and *Williams*, but congratulates it for drawing the correct inference from C.A.A.F.'s omission of other language in those same cases.

[219] *Oliver*, 76 M.J. at 273; *Riggins*, 75 M.J. at 85.

[220] *Riggins*, 75 M.J. at 85.

[221] *Oliver*, 76 M.J. at 273 (alteration in original) (quoting United States v. Humphries, 71 M.J. 209, 215 (C.A.A.F. 2012)).

D. Judicial Policy Favors a Strict Application of Plain Error Review

The court's decision, diminishing the value and impact of preserving errors at trial, is contrary to judicial policy. Nearly thirty years ago, the highest military appellate court recognized in *United States v. Fisher* that plain error should only be "invoked to rectify those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings'" and "be used sparingly, solely in circumstances in which a miscarriage of justice would otherwise result."[222] The court understood that liberal application of plain error relief "permits counsel for the accused to remain silent, make no objections, and then raise an . . . error for the first time on appeal[, which] undermines '[the court's] need to encourage all trial participants to seek a fair and accurate trial the first time around.'"[223] Preservation of error encourages alert and thorough litigation at the trial level, where facts and the record are best developed for later review on appeal. Incentivizing proper preservation of error in turn incentivizes competent performance by counsel and overall judicial efficiency.[224]

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[222] United States v. Fisher, 21 M.J. 327, 328–29 (C.M.A. 1986) (first quoting United States v. Atkinson, 297 U.S. 157, 160 (1936); and then quoting United States v. Frady, 456 U.S. 152, 163 n.14 (1982)).

[223] *Id.* at 328 (quoting *Frady*, 456 U.S. at 163).

[224] *See* Ham, *supra* note 23, at 10, 15–16; *see also* United States v. Dominguez Benitez, 542 U.S. 74 (2004); see generally *United States v. Dubay*, 37 C.M.R. 411 (C.M.A. 1967), for a discussion of remands for factfinding hearings. Regarding the policy reasons in favor of timely objections, the Oregon Court of Appeals provided the following oft-quoted synopsis:

> There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to a court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right. The principal rationale, however, is judicial economy. There are two components to judicial economy: (1) if the losing side can obtain an appellate reversal because of error not objected to, the parties and public are put to the expense of retrial that could have been avoided had an objection been made; and (2) if an issue had been raised in the trial court, it could have been resolved there, and the parties and public would be spared the expense of an appeal.

State v. Applegate, 591 P.2d 371, 373 (Or. Ct. App. 1979), *quoted in* United States v. Chapa, 57 M.J. 140, 145–46 (2002) (Sullivan, J., concurring in part and in the result); *see* United States v. Collins, 41 M.J. 428, 430 (C.A.A.F. 1995) ("It is important for the objection to be

The values described in *Fisher*—creating a fully developed record at trial and promoting judicial efficiency and finality—remain equally valid today. The C.A.A.F. acknowledged as recently as 2012 that plain error relief is discretionary and "preserves the 'careful balance . . . between judicial efficiency and the redress of injustice.'"[225] As the Supreme Court wrote in *Puckett v. United States*:

> [The plain error rule] serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from "sandbagging" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.[226]

made at the trial level so that it can be resolved there to avoid the expense of an appeal." (quoting United States v. Jones, 37 M.J. 321, 323 (C.M.A. 1993))).

[225] *Humphries*, 71 M.J. at 214 (quoting Puckett v. United States, 556 U.S. 129, 135 (2009)); *see* Military Justice Act of 2016: Section-by-Section Analysis, JUD. PROC. PANEL 13, http://jpp.whs.mil/Public/docs/03_Topic-Areas/01-General_Information/13_MJRG_MilitaryJusticeAct_2016_SecAnalysis.pdf (last visited Mar. 11, 2021) (noting that the proposed amendments to Article 45, UCMJ, "aim to improve the efficiency and effectiveness of appellate review" and "the larger goal of encouraging error correction at the trial stage").

[226] *Puckett*, 556 U.S. at 134. In addition to the risk of unnecessary and costly reversals, the Court's reference to "sandbagging" is particularly interesting. Litigants at trial often choose not to object for a variety of strategic reasons. *E.g.*, United States v. Williams, 50 M.J. 397, 401 (C.A.A.F. 1999) (recognizing that an appellant may strategically not object to testimony). In light of C.A.A.F.'s decision, where the risks of an unpreserved objection to constitutional error are minimized, such "sandbagging" may only be further encouraged. *But see* Fairfax, *supra* note 85, at 2070–71 (arguing that appellate reversals incentivize the prosecution and judge to notice errors at trial, ultimately outweighing the risk of sandbagging). It is unclear at this stage what effect this may have on claims of ineffective assistance of counsel—failure to object to a plain and obvious constitutional error might often be deficient performance under the *Strickland* standard, but when there is less strategic risk to allowing the error to pass without objection, the analysis may change. *See* Strickland v. Washington, 466 U.S. 668, 694 (1985). Even if a lack of objection is seen as deficient under *Strickland*, it seems unlikely to be prejudicial when C.A.A.F. will still apply the strictest prejudicial review to the underlying error itself. *See id.* Thus, rather than encouraging competent litigation, C.A.A.F.'s decision is more likely to excuse poor performance.

Allowing an error to go uncorrected and a record undeveloped exacerbates the problem at the appellate level. Because C.A.A.F. lacks factfinding power, the court is generally stuck with the record it receives.[227] Hypothesizing about the prejudicial effect of an error is already a difficult task—one Justice Scalia likened to "divination"[228]—asking the court to do so when the record surrounding the issue is silent is magnitudes harder.

The Supreme Court has "repeatedly cautioned that '[a]ny unwarranted extension' of the [plain error rule] would disturb the careful balance it strikes between judicial efficiency and the redress of injustice; and that the creation of an unjustified exception to the Rule would be '[e]ven less appropriate.'"[229] Favoring finality of judgments, the Court has specifically declined to apply *Chapman* to forfeited constitutional error.[230] The C.A.A.F., in contrast, has embraced paternalism, virtually eliminating the distinction between preserved and unpreserved constitutional errors.[231] The C.A.A.F.'s position is incorrect. "[T]he standard should enforce the policies that underpin [plain error] generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error."[232] Preservation of error should take precedence, as it does in Federal civilian courts, with the *Chapman* standard applying only when the error is preserved.

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[227] United States v. Murphy, 50 M.J. 4, 13 (C.A.A.F. 1998).

[228] *Dominguez Benitez*, 542 U.S. at 86–87 (Scalia, J., concurring). This principle is apparent in C.A.A.F.'s requirement that the bases for certain objections or admissions of evidence be made clear at trial in order to trigger appellate review:

> [I]f evidence is excluded at trial because it is inadmissible for the purpose articulated by its proponent, the proponent cannot challenge the ruling on appeal on the ground that the evidence could have been admitted for another purpose. A purpose not identified at trial does not provide a basis for reversal on appeal.

United States v. Palmer, 55 M.J. 205, 208 (C.A.A.F. 2005); *see* United States v. McCarty, 45 M.J. 334, 335 n.2 (C.A.A.F. 1996) (stating that appellate review "requires a record that the appellate court can review").

[229] *Puckett*, 556 U.S. at 135–36 (first quoting United States v. Young, 470 U.S. 1, 15 (1985); and then quoting Johnson v. United States, 520 U.S. 461, 466 (1997)).

[230] *See* United States v. Cotton, 535 U.S. 625 (2002); *Johnson*, 520 U.S. 461; *see also* Edwards, *supra* note 71, at 1185 ("Supreme Court jurisprudence over the past three decades encompasses both a tightening of the standard for finding plain error and a broadening of the applicability of the doctrine of harmless error.").

[231] *See* Erisman, *supra* note 27, at 57–59.

[232] *Dominguez Benitez*, 542 U.S. at 82.

IV. Recommendations and Conclusion

In *Tovarchavez*, C.A.A.F.'s application of the incorrect standard led to the erroneous dismissal of a sound conviction, created confusion by departing from Supreme Court precedent, and undermined the systemic policy considerations that favor preservation of error at trial. Three changes would have avoided this misguided decision and, going forward, would correct military plain error review: (1) adoption of the Federal approach to plain error review; (2) application of *Olano*'s fourth prong; and (3) passage of an amended Article 59(b), UCMJ that mirrors Rule 52(b).

A. The C.A.A.F. Should Follow Federal Practice in Plain Error Review

Consistent with the universal practice in the Federal circuits, C.A.A.F. should apply plain error review without regard to the constitutional nature of the error. Discussing the problems with varying tests for prejudice in Federal courts, Professor Anne Poulin writes:

> [T]he courts should reduce the number of tests to a manageable number of meaningfully defined tests. In all cases in which the defendant bears the burden of establishing harm, the courts should apply the same test. When the issue is [preserved] error, the burden falls on the [G]overnment, and the test should be more demanding.[233]

Under plain error review, the appellant should fully bear the burden of establishing prejudice for both constitutional and nonconstitutional errors.[234] Preserved error, conversely, should be subject to the prejudice tests articulated in *Kotteakos* and *Chapman*, where the Government bears the burden of establishing the harmlessness of nonconstitutional and constitutional errors.[235]

First, there is no justification for military courts to differ from the Supreme Court's approach.[236] Second, this model encourages thorough

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[233] Poulin, *supra* note 41, at 1041.

[234] Professor Poulin argues that the variety phrasings for the appellant's burden should be unified into a single test that requires a showing of "a reasonable likelihood or significant possibility" of harm. *Id.* at 1044.

[235] *See id.* at 1041.

[236] United States v. Tovarchavez, 78 M.J. 458, 469 (C.A.A.F. 2019) (Maggs, J., dissenting). The MJRG suggested that the *Manual for Courts-Martial* adopt additional plain error rules similar to Rule 52(b); further detail on specific recommendations was to be included in the

litigation at trial, promotes judicial economy, and ensures finality of judgments. Third, to the extent constitutional errors should afford more protections to an appellant, that concern is already protected in a normal plain error analysis—where an appellant's constitutional rights are infringed, it is inherently easier for an appellant to demonstrate a reasonable possibility that the error had some effect on the trial.[237] By rejecting this approach in *Tovarchavez*, C.A.A.F. defied the Supreme Court's clear intent and undermined the foundational purpose of plain error.

In *Tovarchavez*, the question of which standard of review to apply was outcome determinative.[238] If the court had applied the correct, customary standard, requiring that the appellant establish material prejudice for unpreserved error, the appellant would not have been able to meet that burden.[239] Applying the correct standard would have properly preserved this conviction, in addition to bringing C.A.A.F. into proper conformity with Federal practice and binding precedent.

B. The C.A.A.F. Should Apply *Olano*'s Fourth Prong

Consistent with the Supreme Court and Federal practice, C.A.A.F. should apply *Olano*'s fourth prong when conducting plain error review, evaluating whether the alleged error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[240] The C.A.A.F.'s conclusion that *Olano*'s fourth prong is merely a product of the Federal rules that has no military application is misguided.[241] As discussed, both Federal and military plain error are rooted in the same common law, and relief for plain error has been directly tied to whether the error affects the

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second part of the MJRG's report, which was unfortunately never published. *See* MIL. JUST. REV. GRP., *supra* note 74, at 556.

[237] *See* United States v. Paige, 67 M.J. 442, 454 (C.A.A.F. 2009) (Stucky, J., dissenting in part and concurring in the result) ("If the error alleged is constitutional, the standard is the same; it just becomes easier for the appellant to meet his burden of showing 'a reasonable probability that, but for the error, the result of the proceeding would have been different.'" (quoting *Dominguez Benitez*, 542 U.S. at 81–82 n.7)); *but see* Webster v. Doe, 486 U.S. 592, 618 (Scalia, J., dissenting) (arguing that the deprivation of a statutory right may, in practice, be more valuable to a claimant than a constitutional right); Greabe, *supra* note 71, at 97 (arguing that the "assumption is unwarranted" that constitutional violations are more likely to compromise the accuracy of a verdict).

[238] United States v. Tovarchavez, No. ARMY 20150250, 2018 CCA LEXIS 371, at *21–22 (A. Ct. Crim. App. July 19, 2018), *vacated*, 78 M.J. 458 (C.A.A.F. 2019).

[239] *Id.*

[240] United States v. Olano, 507 U.S. 725, 734 (1993).

[241] *See Tovarchavez*, 78 M.J. at 467 n.14; United States v. Tunstall, 72 M.J. 191, 196 n.7 (C.A.A.F. 2013).

"fairness, integrity or public reputation of judicial proceedings" from the earliest cases in both the military and Federal systems.

The language of *Olano*'s fourth prong originated in the Supreme Court's 1936 decision in *Atkinson*—predating both Article 59(a), UCMJ, and Rule 52—and was a facet of military jurisprudence for decades.[242] In *Masusock*, the Court of Military Appeals quoted *Atkinson*, agreeing that plain error relief is appropriate only when "the alleged error would result in a manifest miscarriage of justice, or would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.'"[243] Again, in *Fisher*, C.A.A.F. approvingly quoted this same language.[244] Even in *Powell*, where C.A.A.F. ostensibly distanced itself from Federal practice, the court nevertheless referenced *Fisher* as the basis of military plain error jurisprudence.[245] Plain error is not a statutory creation; it is a creature of common law, found in both the military and Federal courts, which was subsequently codified in both sets of rules. The concept's codification in a Federal rule does not eliminate the continuing applicability of the common law doctrine to military cases.

As a policy matter, there is no justification for C.A.A.F. to give appellants additional protection by declining the discretion granted by *Olano*'s fourth prong. Military appellants already benefit from a complete appellate review of the record, as mandated by Article 66, UCMJ.[246] *Olano*'s fourth prong balances judicial economy and timely litigation at trial with the overriding need to avoid manifest injustice that would threaten the integrity of the entire system.[247] By granting relief absent *Olano*'s fourth prong, "the majority disturbs the careful balance the plain error doctrine was meant to strike between judicial efficiency and the redress of justice."[248] Furthermore, *Olano*'s fourth prong recognizes the importance of public perception to the criminal justice system, a factor on which military courts are typically especially focused.[249] In *Tovarchavez*, application of *Olano*'s

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[242] United States v. Atkinson, 297 U.S. 157, 160 (1936).
[243] United States v. Masusock, 1 C.M.R. 32, 34 (C.M.A. 1951) (quoting *Atkinson*, 297 U.S. at 160).
[244] United States v. Fisher, 21 M.J. 327, 328–29 (C.M.A. 1986) (quoting *Atkinson*, 297 U.S. at 160).
[245] United States v. Powell, 49 M.J. 460, 464 (C.A.A.F. 1998).
[246] *See id.* at 463–65.
[247] *See Atkinson*, 297 U.S. at 160.
[248] United States v. Humphries, 71 M.J. 209, 222 (C.A.A.F. 2012) (Stucky, J., dissenting).
[249] *See, e.g.*, United States v. Boyce, 76 M.J. 242, 248–50 (C.A.A.F. 2017) (stating that apparent unlawful command influence is measured by whether it places "'an intolerable strain' on the public's perception of the military justice system" such that "an objective,

fourth prong would have given the court the discretion to recognize that the error and the result did not undermine confidence in the military system such as to require reversal.

As *Powell* correctly notes, while the courts of criminal appeals are bound to conduct a full appellate review under Article 66, UCMJ, C.A.A.F. is a court of discretionary review bound only by Articles 59 and 67, UCMJ.[250] Article 59(a), UCMJ, establishes only a minimum threshold for relief, such that courts may not overturn a judgment absent material prejudice to an appellant's substantial rights.[251] There is neither a legal nor logical reason that binding Supreme Court precedent cannot impose *additional* restrictions on C.A.A.F.—namely, that even if an error materially prejudices an accused, C.A.A.F. should not reverse unless the matter "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[252]

C. Amend Article 59, UCMJ, to Reflect Rule 52

To avoid further confusion and correct the military's application of plain error, Congress should amend Article 59, UCMJ, to include a new section that adopts plain error language similar to Rule 52(b), as follows: "A plain error that materially prejudices the substantial rights of the accused may be considered even though it was not brought to the court's attention."[253] The Military Justice Review Group (MJRG) recommended

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disinterested observer, fully informed of all the facts and circumstances, would [*not*] harbor a significant doubt about the fairness of the proceeding." (quoting United States v. Salyer, 72 M.J. 415 (C.A.A.F. 2013) (alteration in original))); United States v. Toohey, 63 U.S. 353, 362 (C.A.A.F. 2006) (stating that, even absent actual prejudice, appellate courts may still provide relief for post-trial delay where "the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system.").

[250] UCMJ art. 67(a)(3) (2016); *Powell*, 49 M.J. at 464; *see Humphries*, 71 M.J. at 221 (Stucky, J., dissenting) ("We asserted in *Powell* that the fourth prong of the Supreme Court's plain error test . . . applies only to courts exercising discretionary powers of review. In reviewing this case, this Court is exercising its discretionary powers of review." (citations omitted)).

[251] UCMJ art. 59(a) (1950).

[252] United States v. Olano, 507 U.S. 725, 734 (1993). Article 59(a), UCMJ, merely restrains military appellate courts from acting unless an error "materially prejudices the substantial rights of the accused." UCMJ art. 59(a) (1950). It is a restriction on authority, not an affirmative requirement that the court act in any particular case.

[253] The current Article 59(b), UCMJ, concerning lesser-included offenses, would be restyled as Article 59(c), UCMJ. The MJRG suggested similar revisions to the *Manual for Courts-Martial*. *See supra* note 236.

this change in its 2015 report, presumably to avoid the kind of result C.A.A.F. reached in *Tovarchavez*.[254]

The C.A.A.F.'s decision in *Tovarchavez* is predicated entirely on distinguishing military practice under Article 59, UCMJ, from Federal practice under Rule 52. Congressional action aligning the structure and language of Article 59, UCMJ, to more closely match Rule 52 would demonstrate the legislative intent that military courts conform to Federal practice in this regard. Furthermore, it would completely eliminate C.A.A.F.'s basis for distinguishing military plain error and would compel the court to follow *Olano*, adopting the Federal approach to plain error review.

As military court rules and procedures were formalized and codified, they historically mirrored Federal practice.[255] Today, that trend continues with the most recent revisions to the *Manual for Courts-Martial*.[256] Amending Article 59, UCMJ, to mirror Rule 52 would be consistent with that trend and with the MJRG's recommendation, and it would compel C.A.A.F. to reverse the erroneous decision in *Tovarchavez*. Following the 1946 passage of Rule 52, Congress passed a harmless error statute "to remove any lingering doubt about the status of the harmless error rule in American criminal practice," and to guard against "the mistaken belief" that Rule 52 did not apply to all Federal appellate courts.[257] Congress can and should exercise its power to correct C.A.A.F.'s erosion of plain error review and similarly remove any doubt about the status of plain error in military criminal practice.

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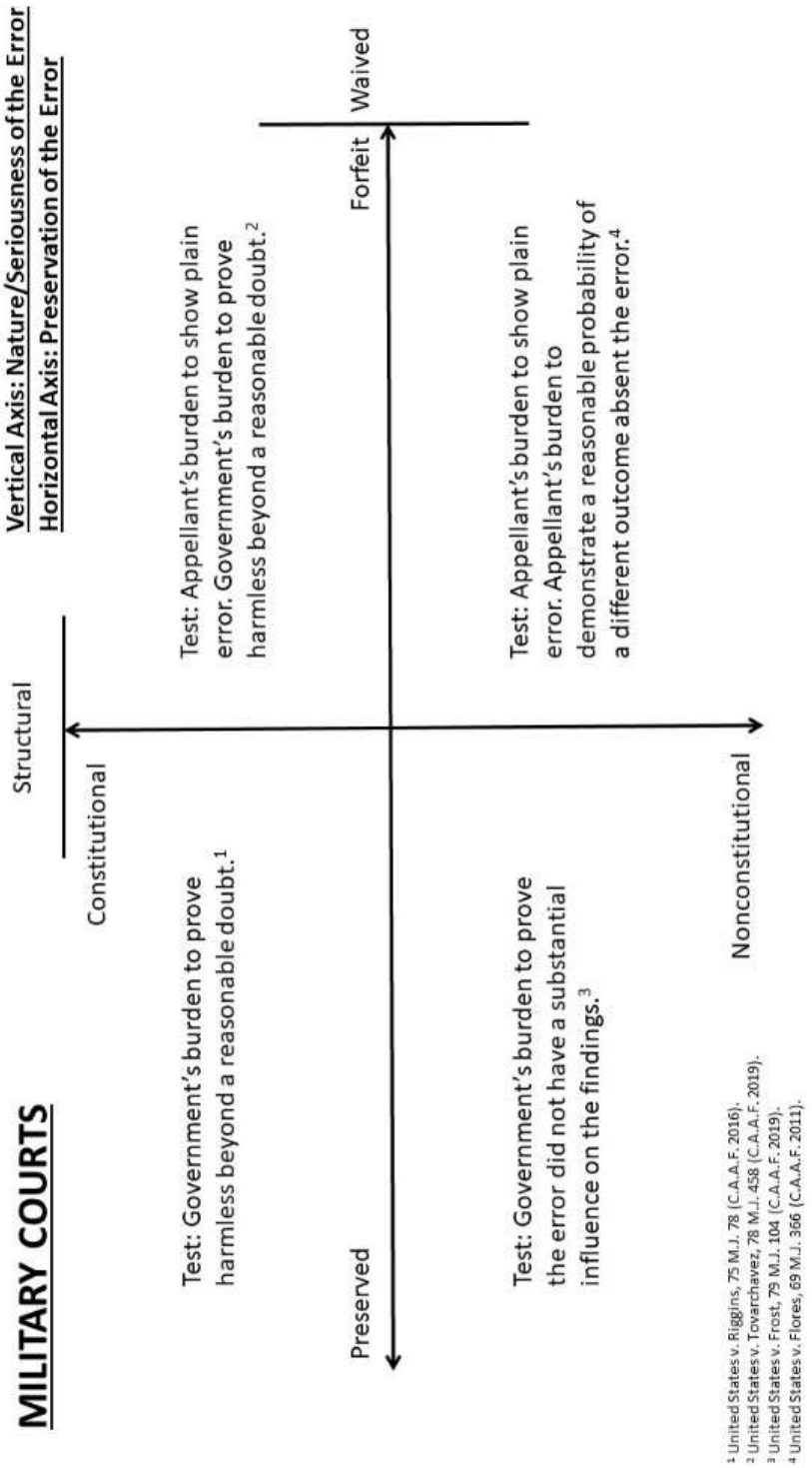
[254] *See* MIL. JUST. REV. GRP., *supra* note 74, at 556.

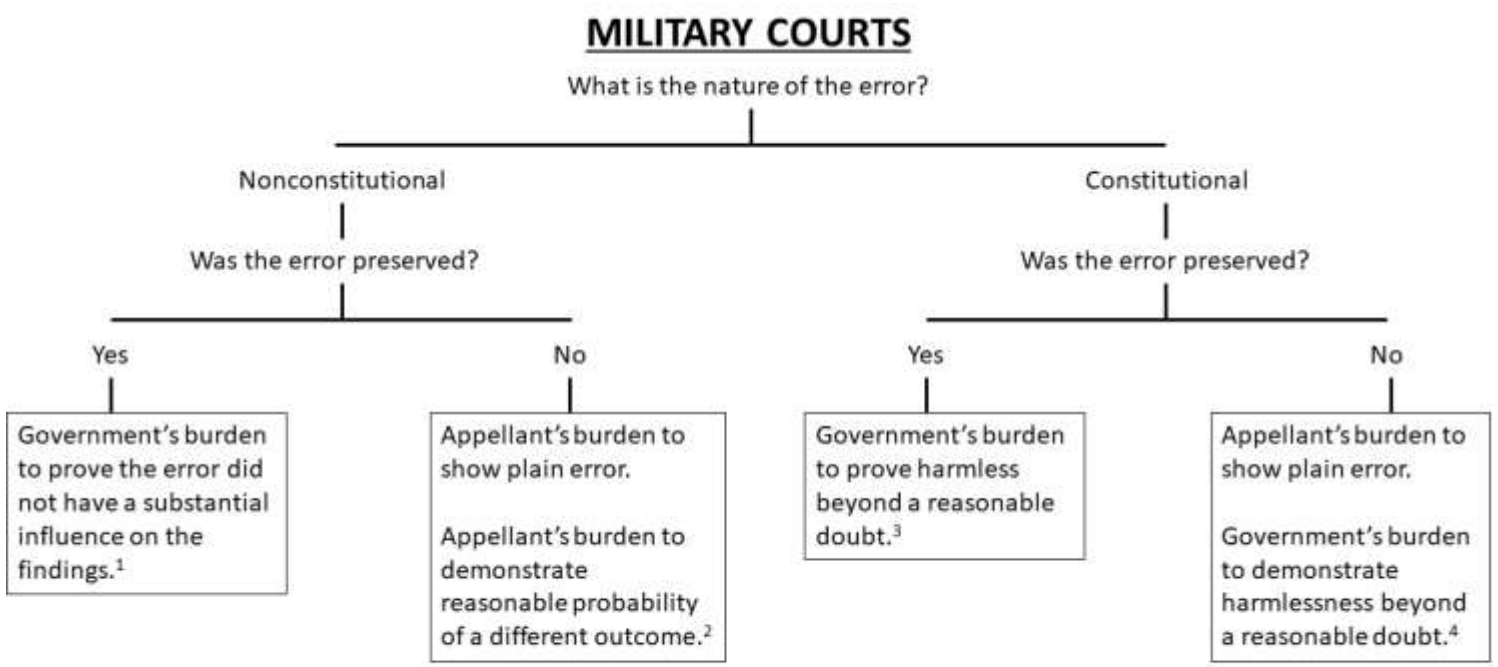
[255] *See generally* Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970). For example, MRE 103 parallels FRE 103, which itself was based on Rule 52(b). The only difference between MRE 103 and FRE 103 is a substitution of the language "material prejudice" to substantial rights with "affects substantial rights." *Compare* MCM, *supra* note 2, MIL. R. EVID. 103, *with* FED. R. EVID. 103 advisory committee's note; *see* Lederer, *supra* note 129, at 9–15 (discussing how the intent of the MRE was to adopt the existing FRE to the maximum extent practicable).

[256] *See* Frederic I. Lederer, *From Rome to the Military Justice Acts of 2016 and Beyond: Continuing Civilianization of the Military Criminal Legal System*, 225 MIL. L. REV. 512 (2017); MIL. JUST. REV. GRP., *supra* note 74 (discussing the historical relationship between the military and Federal harmless error rules and recommending new rules analogous to Rule 52(b)).

[257] Fairfax, *supra* note 71, at 454 n.130.

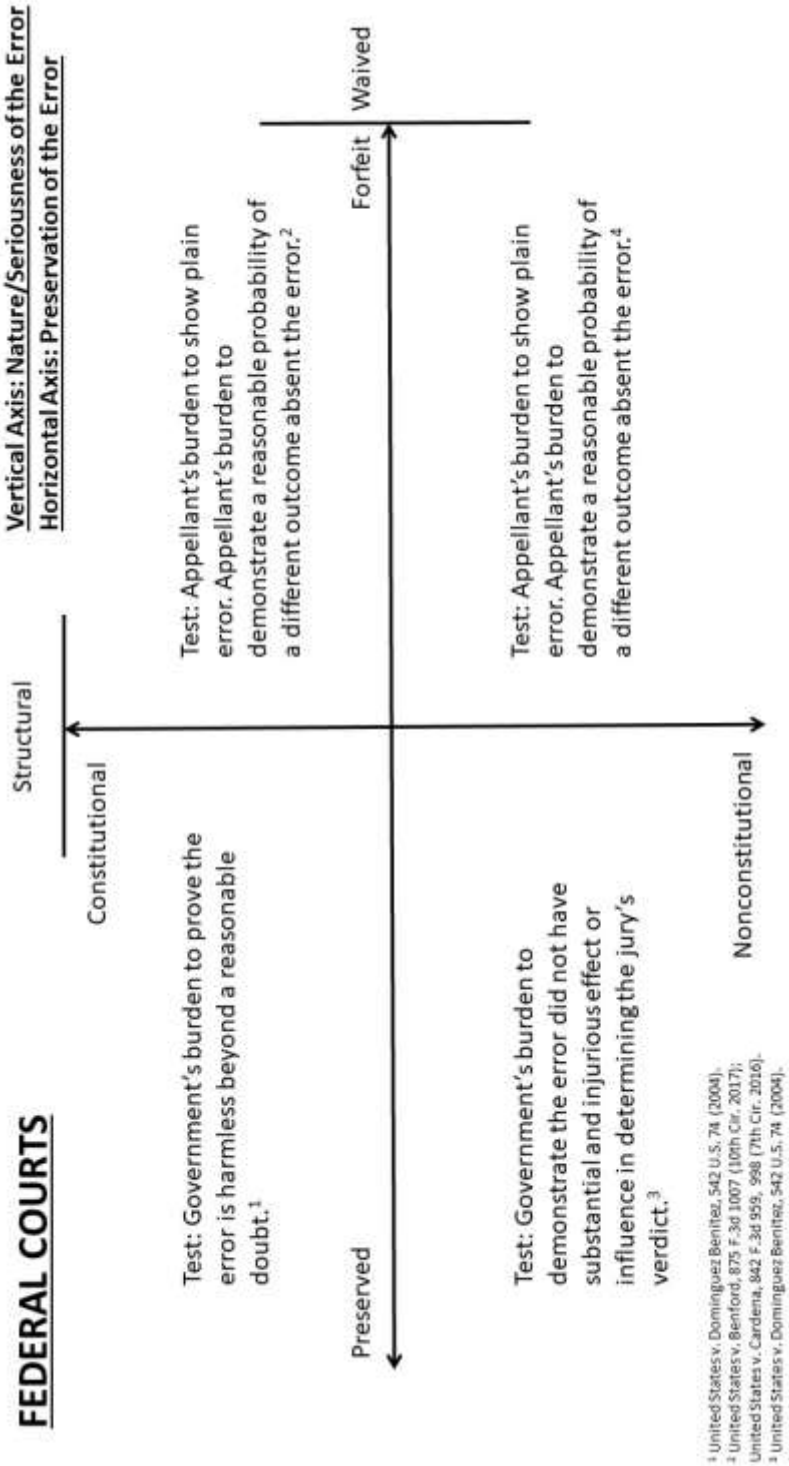
Appendix A. Prejudice Analysis in Military Courts





[1] United States v. Frost, 79 M.J. 104 (C.A.A.F. 2019).
[2] United States v. Flores, 69 M.J. 366 (C.A.A.F. 2011).
[3] United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016).
[4] United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019).

Appendix B. Prejudice Analysis in Federal Courts



FEDERAL COURTS
Was the error preserved or forfeit?
Preserved Error
What is the nature of the error?
Constitutional
Government's burden to demonstrate harmlessness beyond a reasonable doubt.[1]
Nonconstitutional
Government's burden to demonstrate the error did not have substantial and injurious effect or influence in determining the jury's verdict.[2]
Forfeit Error
What is the nature of the error?
Constitutional
Appellant's burden to show plain error.
Appellant's burden to demonstrate a reasonable probability of a different outcome.[3]
Nonconstitutional
Appellant's burden to show plain error.
Appellant's burden to demonstrate a reasonable probability of a different outcome absent the error.[4]
[1] United States v. Dominguez Benitez, 542 U.S. 74 (2004).
[2] Id.
[3] United States v. Benford, 875 F.3d 1007 (10th Cir. 2017); United States v. Cardena, 842 F.3d 959, 998 (7th Cir. 2016).
[4] United States v. Olano, 507 U.S. 725 (1993).