IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	BRIEF ON BEHALF OF THE UNITED STATES
v.	Crim. App. No. 1394
Omar M. Gomez Boatswain's Mate Second Class (E-5) United States Coast Guard, Appellant	USCA Dkt. No. 16-0336/CG

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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II. Issue Presented[1]

WHETHER THE MILITARY JUDGE ERRED BY PERMITTING TWO COMPLAINING WITNESSES TO TESTIFY ON SENTENCING THAT APPELLANT WAS RESPONSIBLE FOR THEIR PREGNANCY COMPLICATIONS WITH NO EVIDENCE CONNECTING HIS MISCONDUCT TO THE COMPLICATIONS.

III. Statement of Statutory Jurisdiction

The Coast Guard Court of Criminal Appeals (CGCCA) had jurisdiction over Appellant's case because the convening authority approved a sentence that included a dishonorable discharge and confinement for eight years. Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1). This Court has jurisdiction because it granted Appellant's petition for review. Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

IV. Statement of the Case

Appellant was tried by a general court-martial. On December 7, 2013, a panel of members with enlisted representation convicted him, contrary to his pleas, of the following:

Charge	Offense	Article	Specs	Victims
I	Orders Violation (Sex. Harassment)	92	1	SF
II	Maltreatment	93	3	SW, JL, SF

[1] This brief was prepared with assistance from LT Rory Haley, USCG, an intern in the Coast Guard's Office of Military Justice and second-year student at Georgetown University Law Center.

III	False Official Statement	107	1	
IV	Aggravated Sexual Contact*	120	1	SW
	Aggravated Sexual Assault*	120	1	HH
	Indecent Exposure*	120	2	
	Abusive Sexual Contact	120	2	MS, JL
	Aggravated Sexual Contact	120	1	SW
V	General Disorder	134	1	MS

*Denotes 2007-2012 UCMJ

10 U.S.C. §§ 892, 893, 907, 920, 934 (2012). The members sentenced Appellant to be confined for eight years, to be reduced to pay grade E-1 and to be dishonorably discharged from the Coast Guard. J.A. at 68. The convening authority approved the sentence as adjudged. J.A. at 30. On December 14, 2015, the CGCCA affirmed the findings and sentence as approved. J.A at 15. This Court granted Appellant's petition for grant of review on April 1, 2016.

V. Statement of Facts

Appellant was convicted of sexually assaulting a civilian woman, HH, and of a litany of other sexual misconduct toward four female subordinates. At issue in this case is the presentencing testimony of two of the victims, MS and SW. Both women were junior personnel, assigned to the CGC GALLATIN's deck force, under Appellant's direct supervision. J.A. at 84, 98.

During a social event, Appellant took MS's digital camera and photographed his penis. J.A. at 85-86. On another occasion, he called MS into the male berthing area while she was conducting an accountability round and exposed his penis and

testicles to her. J.A. at 92-94. Appellant also slapped MS on the buttocks while she was running laps on the boat deck. J.A. at 90. He slapped her buttocks again while she was going through a hatch. *Id.* When MS reported her pregnancy to Appellant, he squeezed her breast and offered to help her abort her baby by taking her on a bumpy boat ride or throwing her down the stairs. J.A. at 92. Appellant was convicted of indecent exposure for the incident in the berthing area (Charge IV, Specification 6), for abusive sexual contact for touching MS on the buttocks and breast (Charge IV, Specification 8), and of a general disorder for using MS's camera to photograph his penis (Charge V, Specification 1).

In February 2012, Appellant summoned SW to a shipboard office while she was standing duty. J.A. at 100-101. When SW reported to the office, Appellant grabbed her, pushed her into a filing cabinet, and began kissing her neck and feeling her body with his hands as SW struggled to get away. J.A. at 101. Appellant touched SW's breasts, buttocks, and groin. Several months later, Appellant offered to give SW a ride back to her home. J.A. at 107-08. After they arrived, Appellant asked SW to use her bathroom. J.A. at 109. Once inside, Appellant did not go to the bathroom, but instead pinned SW on the couch. J.A. at 109-111. He pulled her pants down and touched her groin and buttocks through her underwear as SW pushed him away and told him to stop. J.A. at 111. After Appellant left SW's apartment, he sent her text messages throughout the day, indicating that he wanted

to have sex with her, and after SW sent him a message that he could not have sex with her, Appellant replied, "I want it and I'm gonna get it." J.A. at 111-112. Appellant was convicted of maltreatment of SW (Charge II, Specification 2), aggravated sexual contact (Charge IV, Specification 1), and abusive sexual contact (Charge IV, Specification 9).

During the sentencing, the government called each of the five victims. The government asked MS to "tell this panel how the crimes that the convicted had perpetrated upon you ha[ve] impacted your life." J.A. at 40. MS testified that Appellant's conduct impacted her views of the Coast Guard, career intentions, relationships with family, and intimate relationship, and that she was going to therapy as a result. J.A. at 40-41. When asked whether the process of going through a trial had been stressful, MS cited being "more aggressive, more angry… [and] more detached…" J.A. at 41. The government counsel then asked her whether the stress had any impact on her pregnancy. MS responded:

> It did, and I'm also getting help for that, um, it could be for, and the stress from this case and I found out that early on that I was supposed to have twins and one didn't make it. And with more stress from this case, I was worried for this baby that was living inside me, hopefully hoping that this stress didn't make his heart rate go up, or hopefully I was protecting him, and every time I would always go to the doctor to see my blood pressure, always ask questions if my son was okay, because that's my, that's my baby.

J.A. at 41. The government had no further questions and the defense had no cross-examination. *Id*. The record does not reflect whether MS was visibly pregnant at the time of trial.

SW also testified about the impact of Appellant's crimes on her life, stating that they had "definitely impacted tremendously." J.A. at 46. SW testified that it had been hard for her to lie to her family to prevent them from knowing what had happened to her, and that it was "hard to see my baby, because he was born premature." *Id*. When asked by trial counsel whether she believed that stress had something to do with it, she responded that she was diagnosed with pre-eclampsia[2], which was brought on by stress. *Id.*

Trial counsel then asked SW generally whether "this trial and this process" had caused her stress. SW testified to impacts on her views of the Coast Guard, career intentions, and ability to trust people. J.A. at 47. Trial counsel had no further questions and the defense asked no questions. *Id.* There was no further inquiry about the nature or causes of preeclampsia.

The other three victims also testified on sentencing. SF (victim of maltreatment) and JL (victim of maltreatment and abusive sexual contact), briefly described how Appellant's actions affected their views of the Coast Guard (they did temporarily

[2] Pre-eclampsia is a pregnancy complication characterized by high blood pressure. *Preeclampsia Definition*, MayoClinic.org, www.mayoclinic.org/diseases-conditions/preeclampsia (last visited May 28, 2016).

for SF but not for JL). J.A. at 43, 44. Both women reported stress, but stated that it was improving. J.A. at 43, 45. Trial defense counsel declined to cross examine either witness. *Id.* HH, the victim of the sexual assault, testified extensively and compellingly about the impacts of Appellant's actions: her lack of feelings of safety, the great difficulty she had telling her father what had happened, her diminished view of the military, and her uncertainty about the future. J.A. 48-52. HH's sister also testified about the impact of the crime on HH and her family members. J.A. at 54-56. Trial defense counsel declined to cross-examine HH or her sister. J.A. at 52, 56.

The defense did not present any sentencing witnesses, but did present a brief unsworn statement and service record documents showing above average performance of duties. J.A. at 57-60, 69-81. Each side made arguments. J.A. at 61, 70. Pregnancy was mentioned once during the government's argument, as trial counsel was highlighting Appellant's lack of apology in his unworn statement: "He apologized to his Chiefs and he asked for his job back, but he didn't think it important enough to apologize to [MS] for interfering with her relationship with her husband. Or for causing stress during her pregnancy." J.A. at 70. There was no objection to this statement. Trial defense counsel did not mention pregnancy at all. No special instructions on sentencing were requested in light of any comments or

evidence received, and none were provided. J.A. at 113-115, R. 29293-337 (standard sentencing instructions provided).

VI. Argument

WHETHER THE MILITARY JUDGE ERRED BY PERMITTING TWO COMPLAINING WITNESSES TO TESTIFY ON SENTENCING THAT APPELLANT WAS RESPONSIBLE FOR THEIR PREGNANCY COMPLICATIONS WITH NO EVIDENCE CONNECTING HIS MISCONDUCT TO THE COMPLICATIONS.

A. Standard of Review

Because trial defense counsel did not object to the evidence in aggravation at trial, the issue is forfeited absent plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). To establish plain error, an appellant must demonstrate that (1) there was error, (2) the error was plain, clear, or obvious, and (3) the error materially prejudiced one of his substantial rights. *Id.* The burden is on Appellant to make each of the required showings. *Id.*

B. MS and SW's statements were proper evidence in aggravation under R.C.M. 1001(b)(4) because they embrace circumstances directly resulting from the offenses Appellant was convicted of.

Trial counsel may present evidence at sentencing "as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." Rule for Court-Martial (R.C.M.) 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012). Aggravating

circumstances include the psychological or medical impact on a victim. *Id*. In *Payne v. Tennesee*, the Supreme Court described admissible aggravation evidence as that which shows "the specific harm caused by the defendant." 501 U.S. 808, 824 (1991). But an accused is "not responsible for a never-ending chain of causes and effects." *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995).,

1. MS properly testified about the impact of the proceedings in general.

MS's testimony was proper evidence in aggravation because it discussed the impact of the legal proceedings on her physical and psychological well-being. The impact on victims of the pendency of legal proceedings is proper evidence in aggravation. *United States v. Stephens*, 67 M.J. 233, 236 (C.A.A.F. 2009). In *Stephens*, this Court found proper the testimony of a 13-year-old sexual abuse victim's father, who explained how the entire proceeding had negatively impacted his daughter. *Id.* at 235. Similarly, in *United States v. Hollingsworth*, 44 M.J. 688 (C.G. Ct. Crim. App. 1996), the Coast Guard Court of Criminal Appeals (CGCCA) considered whether it was plain error to admit expert testimony that the pendency of legal proceedings could impact a victim's ability to move on from the crime. Recognizing that "there were psychological repercussions for the [victim] in the wake of appellant's offenses" which were "not remote causes and effects," the CGCCA concluded that it was not error to recognize that "the pendency of legal

proceedings is one of the things that may affect crime victims' recovery." *Id.* at 693.

Like the testimony in *Stephens* and *Hollingsworth*, MS's testimony was proper evidence in aggravation under R.C.M. 1001(b)(4) because it described the impact of the process on her as a crime victim in the context of where she was in her life. MS's testimony embraced the impact on her of the entire proceedings. After listing a number of ways she was impacted by Appellant's crimes, MS was asked whether "going through a trial" had been stressful for her. J.A. at 41. She responded that she had become more angry, aggressive and detached. *Id.* When asked how the stress impacted her pregnancy, MS said her overall pregnancy was stressful due to an early miscarriage of one of the twins she was expecting, and that the trial added to her stress. She was concerned about how her stress would affect her unborn baby. J.A. at 41. Thus, MS was not blaming Appellant for a miscarriage, but rather describing the overall impact of the proceedings and events on her already stressful life.

2. The testimony of MS and SW was proper evidence in aggravation because the witnesses explained how stress from the crimes and trial impacted them in the context of their lives; they did not blame Appellant for pregnancy complications.

Aggravating circumstances must be "directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). In *Rust*, 41 M.J. at 478, this Court explained the parameters of "directly relating to or

resulting from"—while this is a standard higher than "mere relevance," the accused was not "responsible for a never ending chain of causes and effects." *Id.*

However, the runaway chain of consequences cautioned against in *Rust* are different from general victim-impact testimony that, rather than blaming an accused for a particular outcome, describes impact in the context of the surrounding circumstances. Military courts have recognized the importance of explaining the impact of crimes in context of surrounding circumstances. In *United States v. Mullens*, this Court determined that evidence of the accused's prior abuse of his children was admissible to show the "true impact" of the charged offenses upon his family members. 29 M.J. 398, 400. (C.M.A. 1990). Even when an accused has pled guilty to a lesser offense, a victim is generally allowed to explain on sentencing the events as he or she experienced them. *United States v. Terlap,* 57 M.J. 344, 348 (C.A.A.F. 2002). The fact that a particular unit is highly operational or tight-knit may be properly highlighted to show the impact of an accused's crimes. See, e.g. *United States v. Armon*, 51 M.J. 83, 87 (C.A.A.F. 1999). Courts have also recognized the importance of context in cases of pure victim impact. *Hollingsworth*, 44 M.J. at 693 (noting that pending legal proceedings can affect victim recovery put victim's present psychological state "in proper context.")

MS and SW did not state that Appellant caused their pregnancy complications. Rather, they explained how the stress that Appellant did cause impacted their lives.

There is no question that Appellant's crimes caused stress to his victims. A victim's explanation of how a crime impacts her in the context of her life is not the same as blaming an accused for a "never ending chain of causes and effects." *Rust*, 41 M.J. at 478. MS explained how the additional stress of "this case" exacerbated an already stressful pregnancy. J.A. at 41. When asked about the general impact of Appellant's crimes on her life, SW said it was hard to see her baby, who was born premature. J.A. at 46. When asked whether stress had something to do with that, she said, "I was diagnosed with preeclampsia, which is brought on by stress." *Id.* Neither stated that Appellant caused the pregnancy complication, but rather mentioned the pregnancies as examples of the negative impact on their lives of the stress Appellant caused them.

In MS's case, there is an additional layer of relevance between her stressful pregnancy at the time of trial and Appellant's offenses: MS was victimized by Appellant while she was pregnant. J.A. at 91-92. It is not a logical leap to say that a person abused by a supervisor during a pregnancy might suffer stress due to that abuse during a subsequent pregnancy.

SW and MS's testimony that Appellant's actions, and the general process, caused them stress, and that the stress was especially problematic for them because they were pregnant, is evidence directly resulting from or relating to Appellant's crimes as defined by R.C.M. 1001(b)(4).

3. Even if SW and MS's statements were hearsay or improper lay opinions, they are considered under the plain-error analysis because Appellant did not object at trial.

Lay witness opinions are limited to opinions or inferences rationally based on the perception of witnesses, helpful to the trier of fact, and not based on scientific or specialized knowledge. Mil. R. Evid. 701, MANUAL FOR COURTS–MARTIAL, UNITED STATES (2012 ed.). Like all evidentiary rulings, military judges' application of Mil. R. Evid. 701 are reviewed for abuse of discretion. *United States v. Byrd*, 60 M.J. 4, 6 (C.A.A.F. 2004). Hearsay is inadmissible, but may be considered by the court if admitted without objection, unless there is plain error. *United States v. Toro*, 37 M.J. 313, 316 (C.M.A. 1993). In this case, Appellant did not object at trial on any grounds, including these, to MS and SW's testimony referencing their pregnancy complications.

Citing *United States v. Hall*, 58 M.J. 90, 93 (C.A.A.F. 2003), Appellant suggests that there is a Confrontation Clause issue that could change this Court's analysis of the hearsay issue. But *Hall* concerns testimony on the merits. This Court has found the Confrontation Clause inapplicable to post-conviction, non-capital presentence proceedings. *United States v. McDonald*, 55 M.J. 173, 175 (C.A.A.F. 2001) (addressing propriety of telephonic testimony on sentencing).

Because Appellant did not object to the evidence he now complains of on any grounds, he is limited to a plain-error analysis. *Maynard*, 66 M.J. at 244.

4. The military judge has no *sua sponte* duty to conduct a Mil. R. Evid. 403 Analysis for each piece of sentencing evidence.

Just because military judges who rule on evidentiary questions are required to conduct a Mil. R. Evid. 403 balancing test does not mean that military judges who do not *sua sponte* conduct such analysis commit error. *United States v. Green*, 21 M.J. 633, 636 (A.C.M.R. 1985) *petition denied*, 22 M.J. 349 (C.M.A.1986) (reasoning that it is "too paternalistic and contrary to the intent of the Military Rules of Evidence" to place the burden on a military judge to *sua sponte* apply the Mil. R. Evid. 403 balancing test every time the government offers adverse information during presentencing proceedings in the absence of a specific and timely objection from the defense counsel.)

Appellant cites *United States v. Quarles*, 25 M.J. 761, 777 (N-M Ct. Crim. App. 1987), arguing that "error under Mil. R. Evid. 403can be plain error." App. Br. at 14. But *Quarles* does not stand for the premise that Mil. R. Evid. 403 alone can – or should—be the basis for plain error in admitting sentencing evidence. In *Quarles,* the accused was charged with sexually abusing his young children. The military judge had admitted evidence of the accused's possession of lubricants, adult pornography, and a phone-sex phone number on the merits for consideration for "the limited purpose of its tendency, if any, to show the accused's consciousness of guilt" or "its tendency, if any, to establish the alleged victim's knowledge of sexually explicit acts." *Id.* On appeal, Quarles raised an error based

on trial counsel's findings argument, which relied heavily on the sexual items found in the home and other uncharged misconduct. Appellant raised the issue of the trial counsel's findings arguments on appeal. The Navy Marine Corps Court of Criminal Appeals (NMCCA) took issue not only with the trial counsel's findings argument, but also with the military judge's admission of the uncharged misconduct in the first place. The NMCCA commented that "even if some of the evidence was marginally relevant, it was plain error not to have excluded it under the provisions of Mil. R. Evid. 403 as being more prejudicial than probative." *Id.* at 776. As such, *Quarles* does not stand for the proposition that a military judge's failure to *sua sponte* weigh evidence under Mil. R. Evid. 403 absent objection is plain error.

C. Even if there was error, such error was not plain, clear or obvious, because Appellant has failed to show that the military judge should be faulted for taking no action absent an objection.

The United States does not concede that error occurred, but even assuming there was error, that error was not plain or obvious. An error is not plain or obvious if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection. *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F.2009). The Supreme Court has found that an error is "plain" when it is "obvious" or "clear under current law." *United States v. Olano*, 507 U.S. 725 (1993). "Put another way, an error is 'plain' if it is 'so

egregious and obvious' that a trial judge and prosecutor would be ‘derelict’ in permitting it in a trial held today.” *United States v. Thomas*, 274 F.3d 655, 667 (2d Cir. 2001) (citing *United States v. Gore*, 154 F.3d 34, 43 (2d Cir. 1998)).

In *Maynard*, the appellant was convicted of absence without authority. 66 M.J. at 242. During the pre-sentencing hearing, the government introduced “anti-war” materials found in the appellant’s room and statements he made to another soldier. Defense did not object. This Court found no plain error in admission of these materials, because the evidence did not “so obviously lack a direct relationship to the AWOL offense that the military judge was obliged to take *sua sponte* action.” *Id*. at 245.

The fact that a military judge has such “wide discretion” when it comes to evidence in aggravation, (*Rust*, 41 M.J. at 478) limits the universe of circumstances where a military judge could truly be faulted for failing to take *sua sponte* action. An example of a military judge’s broad discretion to admit victim-impact testimony can be found in *United States v. Ashby*, 68 M.J. 108 (C.A.A.F. 2009). This case concerned the second trial of a military pilot in command of an aircraft that crashed into a civilian cable car system, killing all passengers. While Ashby was acquitted of all charges related to the crash itself in the first trial, he was then tried and convicted by a second general court-martial for destroying a video of the crash. Over defense objection, the military judge permitted three family members

of victims to testify about impact of the lost video on their ability to find closure. *Id*. at 121. The testimony of the relatives was emotional and poignant, especially given that the accused was being sentenced for obstruction of justice. One witness, for example stated "I'm suffering. It's painful and I'm suffering."*Id*. at 120. Another, when asked who the members of her family were, responded, "I don't have anybody anymore. They are all dead." *Id*. This Court found that the admission of this testimony was not an abuse of discretion because the military judge properly recognized the potential prejudicial effect and limited testimony only to the effect the missing tape had on the witness's ability to process their loss. *Id.*

As the CGCCA stated in the opinion below, while there are cases where sentencing evidence is clearly too attenuated to be admissible under R.C.M. 1001(b)(4), or clearly too prejudicial to meet the balancing test under Mil. R. Evid. 403, this is not such a case. *United States v. Gomez,* No. 1341 (C.G. Ct. Crim. App. Dec 14, 2015)(J.A. at 10). Rather, the military judge cannot be faulted for failing to intervene precisely because the military judge would have had so much discretion to allow the testimony had it been challenged. As in *Ashby*, even though the testimony in question might have been outside the norm, it is quite possible that the military judge might have admitted the evidence after conducting a proper analysis and balancing test, because she would have had "wide discretion" to do so *Rust,* 41

M.J. at 478. The military judge's ruling would then be entitled to significant deference, since "when a military judge conducts a proper balancing test under Mil. R. Evid. 403 on the record, her ruling will not be overturned absent a clear abuse of discretion." *Stephen*, 67 M.J. at 235.

In this case, because the military judge cannot be faulted for not intervening, and had there been an objection, the military judge could have made a ruling within her wide discretion, and received significant deference on review, there is no plain error.

D. Appellant cannot show that any error materially prejudiced his substantial rights because he received a fair sentence for the crimes he committed.

Appellant has also failed to demonstrate prejudice. In his brief, he argues that he was "substantially prejudiced" because he was blamed for pregnancy complications, resulting in a harsher sentence than what he would have otherwise received. App. Br. at 15. But Appellant has failed to make this showing because the record reflects that he was appropriately sentenced for the serious crimes he committed. This Court has previously evaluated prejudice due to erroneous evidentiary rulings by weighing (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Kerr,* 51 M.J. 401, 405 (C.A.A.F.1999) (citing *United States v. Weeks*, 20 M.J. 22, 25 (C.M.A.1985)).

When it comes to errors in sentencing evidence, this Court has generally used the *Kerr* test by weighing the strength of each side's sentencing case, the relative role of the evidence in the government's sentencing case, and, ultimately, by determining whether the accused would have gotten the same punishment but for the evidence in question.

In *United States v. Hardison*, 64 M.J. 279 (C.A.A.F. 2007), for example, the appellant was convicted of marijuana use, and at sentencing the government introduced, without objection, evidence of her pre-service drug use through enlistment documents. *Id.* at 279. In conducting its analysis, this Court weighed the defense and prosecution sentencing cases. *Id.* at 284. This Court found that Hardison was prejudiced because her sentencing case was strong: four positive evaluations, no negative evaluations, no prior disciplinary history, admission to making a mistake, and lack of other aggravating testimony. When compared to the government's relatively weak sentencing case, "it [was] not evident that Appellant so clearly deserved her bad-conduct discharge such that the evidence or pre-service drug use was irrelevant to the member's decision." *Id.*

In *United States v. Patterson*, 54 M.J. 75 (C.A.A.F. 2000), this Court also analyzed the impact of erroneous sentencing evidence, coming to a different conclusion. Patterson was convicted of sexually abusing a child over a period of several years. This Court found that erroneously admitted sentencing evidence did

not materially prejudice Patterson's substantial rights because the sentencing evidence in question was a small part of the government's sentencing case, which otherwise called for severe punishment of the accused based on the outrageousness of the offenses and grave impact on the child victim. *Id.* at 78-79.

In this case, the testimony in question was very short and not at all a central focus of the sentencing case. Unlike the sensational or dramatic events in *Rust* or *Ashby,* it simply involved two victims stating that the crimes and the process had been stressful, which negatively impacted them even more because they were pregnant. The government put on a strong sentencing case, including the testimony of all five of Appellant's victims, based on numerous aggravating factors admitted during the merits and during sentencing. *See* R.C.M. 1001(f)(2)(permitting consideration on sentencing of any evidence properly introduced on the merits before findings). In contrast, Appellant put on a minimal sentencing case limited to Appellant's expression of regret and evidence of his generally positive performance record prior to being convicted of victimizing five women. The government's sentencing case did not rely on the evidence at issue. Ultimately, despite facing 120 years of confinement and the government's argument for 20 to 30 years, Appellant walked away with a relatively lenient sentence considering he was convicted of sexually assaulting, abusing, and harassing five different victims.

Each of the five victims described in detail the abuse that Appellant perpetrated on them during the case on the merits. HH described at the experience of waking up to Appellant, whom she had never met before, sexually assaulting her. J.A. at 48-52. MS testified that Appellant, her first Coast Guard supervisor, took pictures of his penis on her camera (J.A. at 85), exposed his penis to her while she was doing her job (J.A. at 92), slapped her buttocks as she exercised and moved through the ship (J.A. at 90), and, when she informed him of her pregnancy, grabbed her breast and offered to help her "get rid of" her baby (J.A. at 92). SF, also new to the Coast Guard, testified that Appellant, her supervisor, subjected her to numerous sexual comments despite her rejections of his advances. J.A. at 97. Another new report, JL, testified that Appellant, her immediate supervisor, not only made continual rude or sexual comments to her, but also abused her while she was on watch, grabbing her breasts and crotch as she tried to get away. J.A. at 116. SW testified that was tricked by Appellant into entering an isolated office while she was standing watch, and, once inside, Appellant pushed her into a filing cabinet and started kissing her and touching her breasts, buttocks and groin as she tried to push him away. J.A. at 100-02. SW testified that Appellant did the same thing after tricking her into letting him into her home. J.A. at 107-111.

Each of the victims testified at sentencing. HH, the 20-year-old victim of the sexual assault, testified at length about the impact Appellant's crimes had on her.

She now feels so unsafe that she got an attack dog and a concealed weapon. J.A. at 49. She talked about how difficult it was for her family, especially her father, to find out she was sexually assaulted. *Id.* Nearly two years after the assault, HH still needed weekly counseling to deal with the crime. J.A. at 52. HH's sister also testified compellingly about the impact of the crime on HH and her entire family, as well as the family's diminished view of the military. J.A. at 55-56.

MS's sentencing testimony was short and did not focus on her pregnancy. Rather, she spoke at much greater length on how the events impacted her Coast Guard career plans and her intimate relationship with her husband. J.A. at 40-41. She stated she was going to therapy to overcome these problems. J.A. at 40. SW's testimony similarly did not focus entirely on her pregnancy. She also cited a negative impact on her views of the Coast Guard, difficulty trusting others, and difficulty hiding what had happened from her family. J.A. at 46-47. SF and JL also testified on sentencing, describing their struggles with their views of the Coast Guard as a result of Appellant's actions and general stress resulting from trial. J.A. at 43-44.

The trial counsel's sentencing arguments focused on the breach of trust between subordinates and supervisors, and the predatory nature of Appellant's repeated actions, which included abusing the victims when they were isolated from others. Trial counsel also highlighted Appellant's lack of apology to the victims.

J.A at 64. But the weight of the trial counsel's sentencing case was in the seriousness of the sexual assault offense against HH. Trial counsel emphasized the horror of the event: "Here, we have a complete stranger. He found her in a vulnerable position, while sleeping. He decided to walk over to her, pin her down, put his hand over her mouth, and force himself on her." J.A. at 63.

The defense sentencing case, in contrast, was relatively weak. Trial defense counsel did not cross-examine any sentencing witness. Appellant presented no witnesses of his own, and no statements or affidavits about the character of his service or any other extenuating or mitigating matters. He presented only a summary of his enlisted evaluations, showing above-average performance, a copy of his awards, none of which indicated acts of heroism or valor, and a copy of a monthly financial statement, purportedly showing he pays child support. J.A. at 69-82. Appellant made a very brief unsworn statement, calling his crimes a "misunderstanding." He apologized to his family, friends, shipmates, and the Coast Guard, but not specifically to the victims. J.A. at 57-58. At no point during MS and SW's testimony, or the government's sentencing argument did the trial defense team object. See *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001), (stating that defense's counsel's lack of objection to government sentencing argument is "some measure of [its] minimal impact.)

Appellant faced a maximum of 120 years and four months of confinement, a fine, total forfeitures, reduction to E-1, and a dishonorable discharge. During presentencing argument, the government asked for 20 to 30 years of confinement and a dishonorable discharge. J.A. at 62. The defense urged members to impose no more than five years of confinement and did not mention punitive discharge at all. J.A. at 66. Article 56, UCMJ was amended on December 26, 2013 by the National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1705 (2013). As amended, Article 56 provides that a dishonorable discharge is mandatory for all offenses violating subsections (a) or (b) of Article 120. While this amendment did not apply to Appellant, it is a strong indicator that a dishonorable discharge would be appropriate where an individual is convicted even of a single specification of sexual assault. The members gave Appellant a very lenient sentence compared to the maximum punishments available and the sentence requested by trial counsel: eight years of confinement, reduction to E-1 and a dishonorable discharge.

This case is distinct from *Hardison* where admission of recruitment documents may have driven the bad-conduct discharge absent other significant aggravation. *Hardison*, 64 M.J. at 284. It is difficult, if not impossible, to argue that the testimony of SW or MS as it touched on pregnancy tipped the balance with regard to any aspect of Appellant's sentence. Rather, this case is like *Patterson*, because

Appellant received the punishment he deserved—perhaps one more lenient than he deserved—for his egregious crimes. Omar Gomez sexually assaulted a stranger and abused and harassed four of his young subordinates. The egregious circumstances of the sexual assault and repeated abuse of subordinates aboard an operational cutter, and lack of extenuation and mitigation resulted in Appellant's sentence. Even assuming Appellant could show the admission of MS and SW's pregnancy testimony was plain error, he absolutely cannot show that he was prejudiced, because he got a reasonable, even lenient sentence for the crimes he committed. Having failed to meet his burden, he is not entitled to relief.

VII. Conclusion

The Coast Guard Court of Criminal Appeals correctly found that Appellant failed to demonstrate plain error that was materially prejudicial to his substantial rights. As such, he is not entitled to relief from this Court.

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VIII. Certificate of Compliance

This brief complies with the type-volume limitation of Rule 24(c) because it contains 5,790 words. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in proportional typeface with Times New Roman 14-point typeface.

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IX. Certificate of Service

I certify that a copy of the foregoing was electronically submitted to the Court on 1 June 2016, and that opposing counsel, LT Philip Jones, USCG, was copied on that email at philip.a.jones@navy.mil.

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