IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

JAMES T. CUNNINGHAM
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0027/AF

Crim. App. Dkt. No. ACM 40093

REPLY BRIEF

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Pursuant to Rule 19(a)(7)(B) of this Honorable Court's Rules of Practice and Procedure, Senior Airman (SrA) James Cunningham, the Appellant, hereby replies to the Government's Answer (Answer), dated February 13, 2023.

ARGUMENT ON BRIEF-WIDE ISSUES

This Court Cannot Be Certain That SrA Cunningham Was Sentenced on the Basis of the Evidence Alone Just Because a Military Judge Sentenced Him

Through its Answer, the Government chose to make this case a legal referendum on whether this Court can find prejudice because a Military Judge sitting alone sentenced SrA Cunningham. The Government started and closed its "Summary of the Argument" section with, "Appellant suffered no prejudice from the admission of C.M.'s unsworn PowerPoint statement especially given the military judge alone forum" and "Appellant chose to be sentenced by a military judge. And the military judge is presumed to filter out impermissible argument." Answer at 10, 12. The Government permeated its Answer with arguments that because this was a Military Judge alone sentencing case, there can be no prejudice. *See, e.g.,* Answer at 10, 12, 16, 19-20, 27, 29-31, 45, 51, and 55-57. This Honorable Court should reject the Government's effort to hollow out the test for prejudice for the reasons set forth below.

1. *This Court Cannot Presume the Military Judge Knew the Law Because There is Clear Evidence to the Contrary*

"Military judges are presumed to know the law and to follow it *absent clear evidence to the contrary.*" *United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007) (citation omitted) (emphasis added). For both issues, there is "clear evidence" that the Military Judge did not properly apply the law.

First, in regard to the improper PowerPoint production, the Military Judge erred in allowing C.M. to give an unsworn statement that was not "oral, written, or both" despite the plain text of Rule for Courts-Martial (R.C.M.) 1001 and Defense Counsel's objection. Thus, he did not know the law or follow it. A PowerPoint presentation is not a "statement" in and of itself, nor is it "oral" or "written." *See United States v. Edwards*, 82 M.J. 239, 244 (C.A.A.F. 2022) (explaining the definitions of oral and written statements). More problematic, however, is the Military Judge's acknowledgment that he had viewed the PowerPoint production and his statement, "To me, that's proper victim impact including psychological, social impact directly relating to or arising from the offense to which the accused has been found guilty." JA at 121. So, the Military Judge not only erroneously allowed C.M. to give an improper unsworn statement, but he also thought it was proper—meaning he would consider it as part of his sentence. In fact, the Military Judge told the parties he would "give it the weight that it deserves," meaning that he

would at least give it *some* weight, as opposed to *none* by not considering it. Answer at 20.

Second, for the improper argument, the Military Judge asked Trial Counsel, "Do you have a case?" when she first raised the issue of false statements as matters in aggravation. JA at 092. The Military Judge then said, "I mean, I am familiar with a line of cases that talk about an accused's attitude as it goes to remorselessness in admitting such evidence." *Id.* The Military Judge was familiar with a *different line* of cases (remorse), but not with cases for the current issue (false statements as aggravation). When Defense Counsel stated that they were not able pull up the case, the Military Judge responded, "I haven't either." JA at 093. Trial Counsel then withdrew its intent to offer said evidence. *Id.* As such, this Court cannot presume that the Military Judge knew it was improper to consider false statements as aggravating factors. Additionally, the Military Judge did not acknowledge that Trial Counsel made any improper arguments, nor did he take any curative measures. JA at 180-85.

The combined effect of these two errors rebuts the presumption that the Military Judge knew and followed the law.

2. *Military Judges Are Not Immune from the Effects of Advocacy, Persuasion, or Emotion.*

Justice Thomas said, "I tend to be morose sometimes….There are some cases that will drive you to your knees." Terry A. Maroney, *Emotional Regulation and*

Judicial Behavior, 99 CALIF. L. REV. 1485, n. 7 (2011) [hereinafter "*Emotional Regulation*"]. Likewise, Justice Frankfurter explained that "[J]udges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process." *Pennekamp v. Florida*, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring). Likewise, Justice Cardozo reasoned:

> I have spoken of the forces which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed [….] Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge…*The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the judges by*.

Green v. Murphy, 259 F.2d 591, 604-05 (3d Cir. 1958) (quoting Cardozo's *Nature of Judicial Process*, pp. 168-69; Hall's *Selected Writings of Benjamin Nathan Car[d]ozo*, p. 178) (emphasis added).

There are at least three reasons why the Military Judge would have been persuaded by the inadmissible PowerPoint presentation. First, the Government went to great lengths to highlight that this case was "horrific" and "heinous." Answer at 57. *Mais oui*! That is precisely why this Court should find error and prejudice. This is the type of murder case that would "drive" anyone, including a Military Judge, "to [their] knees." *Emotional Regulation* at n. 7; *see also* Susan A. Bandes*, Emotions In Context: Exploring The Interaction Between Emotions And Legal Institutions:*

Repellent Crimes and Rational Deliberation: Emotion and the Death Penalty, 33 VT. L. REV. 489, 490 (2009) [hereinafter "*Emotions and Legal Institutions*"] ("it is…extreme and repellent crimes that provoke the highest emotions—anger, especially, even outrage—that in turn make rational deliberation problematic for investigators, prosecutors, judges, and juries."). A "horrific" crime, even with a judge alone, does not give the Government carte blanche to say or do anything it pleases.

Second, this PowerPoint presentation did not just have the ordinary, grim evidence that one would expect to see in a murder case. Rather, the erroneous victim impact statement had emotionally moving pictures, melodies, and lyrics that were designed to carry an emotional punch. *Edwards*, 82 M.J. at 247-48. The melody and the lyrics alone were mournful. Combined with the photos and videos, the PowerPoint was a harrowing experience that would rip anyone's heartstrings out.

This leads to the third issue. The Military Judge explicitly said he thought this erroneous statement was proper and that he would consider it. Thus, this Court can be certain that he did not filter out the erroneous portions or the feelings therefrom.

3. This Court Has Found Prejudice in Multiple Military Judge Alone Cases

This Court's jurisprudence has many examples of finding prejudice in a variety of military judge alone cases or when the military judge makes an erroneous decision—including sentencing. This case should be no different:

- We hold that the military judge improperly considered the collateral administrative effect of the 'good-time' policy in determining Appellant's sentence and this error prejudiced Appellant. *United States v. McNutt*, 62 M.J. 16, 17 (C.A.A.F. 2005).

- Examination of the photographs, which are part of the record of trial, reveals that they might have had a significant effect on the military judge in his sentencing -- even though he purported to consider the evidence only in determining Wingart's rehabilitation potential. Accordingly, we conclude that the evidence was prejudicial and that the error should be remedied. *United States v. Wingart*, 27 M.J. 128, 136-37 (C.M.A. 1988).

- We therefore conclude that the military judge abused his discretion when he accepted Riley's guilty plea without questioning defense counsel to ensure Riley's knowledge of the sex offender registration consequences of her guilty plea to kidnapping a minor. *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013).

- [A] military judge alone tried appellant….[we] cannot ignore the possibility that the military judge may have been unduly influenced by the testimony of Mrs. Marchelos that she believed Melissa's account. Accordingly, we conclude that in this case the findings of guilty cannot stand. *United States v. Cameron*, 21 M.J. 59, 66 (C.M.A. 1985).

- A general court-martial composed of a military judge alone tried appellant….we are unable to conclude, however, that there was no fair risk of prejudice to appellant from this lack of representation. *United States v. Leaver*, 36 M.J. 133, 133 (C.A.A.F. 1992).

- ***We hold the rationale of Hills is equally applicable to both members and military judge-alone trials*** and that, under the circumstances of this case, Hukill was prejudiced by the admission of the propensity evidence. *United States v. Hukill*, 76 M.J. 219, 220 (C.A.A.F. 2017) (emphases added).

The Military Judge in this case did not consider benign, generic sentencing matters. Rather, he considered an erroneous PowerPoint production with lyrical music, photographs, and videos that was designed to be emotional. The powerful,

moving nature of the PowerPoint cannot be overstated. This is enough to find prejudice under this Court's jurisprudence. However, given the improper argument as well, this Court should find prejudice considering the cumulative effect of the errors.

ARGUMENT ON SPECIFICS FOR THE GRANTED ISSUES

I.

IN FINDING ERROR—BUT NO PREJUDICE—THE AIR FORCE COURT FAILED TO PROPERLY APPLY *UNITED STATES V. EDWARDS*, 82 M.J. 239 (C.A.A.F. 2022) FOR A VICTIM IMPACT STATEMENT THAT INCLUDED VIDEOS, PERSONAL PICTURES, STOCK IMAGES OF FUTURE EVENTS, AND LYRICAL MUSIC THAT TOUCHED ON THEMES OF DYING, SAYING FAREWELL, AND BECOMING AN ANGEL IN HEAVEN.

1. Music Creates Physical and Emotional Responses in Humans, Thereby Providing "New Ammunition" Not Available in the Government's Case

The Government averred that "The sentimental music C.M. chose to play would not have provided 'new ammunition' that would have properly swayed the military judge." Answer at 30 (citation omitted). The Government reasoned that this was because C.M.'s loss was apparent from her testimony. *Id*.

The Government, however, ignores the power that music can have on people in general, and members of a court specifically. For example, "Music has the power to produce varying physical responses of which we are aware, such as tears and goose bumps; it may also cause less-noticeable physical reactions including

decreased blood pressure, reduced stress, hormone suppression, and muscle relaxation." Erica A. Schroeder, *Sounds of Prejudice: Background Music During Victim Impact Statements*, 58 U. KAN. L. REV. 473, 475 (2010) [hereinafter "*Sounds of Prejudice*"]. Music also has the power to affect emotion: "[O]ne of music's best-known results is its effect on emotion….Not only have studies identified factors of music that affect emotion, more importantly, some have actually shown how music affects a listener's emotions." *Id.* at 475, 77.

As it relates to this case, the problem is that "[w]hen music is coupled with visual stimuli, such as pictures, the influence on emotion is even more prominent." *Id.* at 478. Stated in scientific terms, "[study] findings indicate that…combined presentations of congruent visual and musical emotional stimuli rather automatically evoke (strong) emotional feelings and experiences." Thomas Baumgartner, *The Emotional Power of Music: How Music Enhances the Feeling of Affective Pictures*, 1075 ESJBRR, 151-64 (2006). But more than just heightening emotion, "when musical accompaniment is added, the effect of the visual images is exacerbated; particular songs can arouse emotional memories in jurors *to the detriment of their rational decision-making capability.*" Alicia N. Harden, *Drawing the Line at Pushing 'Play': Barring Video Montages as Victim Impact Evidence at Capital Sentencing Trials*, 99 KY. L.J. 845, 863 (2010/2011) [hereinafter "*Barring Video Montages*"] (emphasis added).

Understanding the science that music can produce physical, emotional, and heightened feelings when combined with photos and videos, this Court should find that the PowerPoint production was prejudicial. The music alone created "new ammunition" that the Military Judge did not have access to in findings. Answer at 30 (citation omitted). Additionally, this Court cannot be certain that the combined, heightened effect of the pictures, videos, and music did not inure to the "detriment of [the Military Judge's] rational decision-making capability." *Barring Video Montages*, at 863.

The music was not minor or fleeting; it played for over five minutes while 52 images and 13 videos played. Given the quantity, and the scientific backing, there can be little doubt that this affected the Military Judge. *See* Brief on Behalf of Appellant, at 6-7.

2. The PowerPoint Production Was Not Cumulative to What Was Already Before the Military Judge.

The Government generally argued that PowerPoint production was "cumulative of what had been properly admitted through other sources." Answer at 23. SrA Cunningham stands on his prior cumulativeness facts and arguments to rebut the Government's general point. Brief on Behalf of Appellant, at 6-7; 15-17. The Government, however, is incorrect on several specific points.

First, the Government claimed that the "information conveyed" from the PowerPoint production was evident from sworn testimony. Answer at 23-22. This

overlooks the fact the "medium is the message." Marshall McLuhan, *Understanding the Media: The Extensions of Man* 23-35 (1964). Meaning the form, method, and vehicle used to deliver the information has a powerful effect on how that information is perceived. In this case, the medium of the PowerPoint in-and-of-itself was not cumulative nor was the effect the PowerPoint created. The PowerPoint allowed C.M. to combine music, videos, photos, text, and transitions into one product that was greater than each individual part. C.M. used the PowerPoint to great effect: Her unsworn statement created a feeling and experience that her sworn testimony never could have. The PowerPoint production was raw, heart-rending, and tragic. Because she had already explained her loss under oath, the PowerPoint production and effect was *in addition to* her testimony. In this sense, the PowerPoint production did "little more than to inflict a gratuitous injury on the accused" and inflame the passions of the Military Judge. *United States v. Wingart*, 27 M.J. 128, 136 (C.M.A. 1988); *See also Edwards*, 82 M.J. at n. 5.

Second, the Government argued that "like C.M.'s sworn testimony" the music included "themes of dying, saying farewell, and becoming an angel in heaven." Answer at 24. C.M. never mentioned Z.C. becoming an "angel" or "heaven." Equating "themes" with "music" is a false equivalence. Furthermore, the lyrics, the melody, and their effect was not available prior to the erroneous PowerPoint

production. As discussed above, there was no music *combined with* pictures and videos prior to the PowerPoint product, which created a new, impermissible effect.

Third, the Government argued it had entered into evidence six individual photos and "60 separate photographs," so the pictures in the PowerPoint were cumulative. Answer at 24. This overlooks the fact that the "60 separate photographs" were thumbnail sized photos on one piece of paper. JA at 210. Because of the medium (paper) and size (thumbnails), these pictures are not close to having the impact that the photos in the PowerPoint production did. Even C.M. admitted the low probative value of the photos entered into evidence when she introduced her PowerPoint: "So, during the trial you have all seen pictures of [Z.C.] both good and bad. *But none of them* portray the love that I have for him and what was truly taken from me." JA at 122 (emphasis added).

Fourth, the Government failed to articulate its view on how the thirteen videos in the PowerPoint production were cumulative (apart from grouping them into its theme argument). However, the videos were not cumulative because they *show* Z.C. and C.M. in ways that would not be possible while testifying under oath (or using a proper victim impact statement).

WHEREFORE, SrA Cunningham respectfully requests this Court reverse the Air Force Court's decision by finding prejudice under *Edwards*, remand the case

back to the Air Force Court, and direct that the Air Force Court order a new sentencing rehearing without the erroneous victim impact statement.

II.

TRIAL COUNSEL'S SENTENCING ARGUMENT WAS IMPROPER UNDER *UNITED STATES V. WARREN*, 13 M.J. 278 (C.M.A. 1982) AND *UNITED STATES V. NORWOOD*, 81 M.J. 12 (C.A.A.F. 2021), RESPECTIVELY, WHEN SHE 1) ARGUED THAT SRA CUNNINGHAM'S UNCHARGED, FALSE STATEMENTS WERE AGGRAVATING EVIDENCE AFTER SHE HAD PREVIOUSLY CITED CASE LAW TO THE MILITARY JUDGE THAT SAID FALSE STATEMENTS WERE NOT ADMISSIBLE AS EVIDENCE IN AGGRAVATION; AND 2) TOLD THE MILITARY JUDGE THAT HE HAD SEEN THE MEDIA AND THE WORLD WAS WATCHING, TO JUSTIFY HER SENTENCE RECOMMENDATION.

ARGUMENT ON BOTH IMPROPER COMMENTS

1. *SrA Cunningham Did Not Waive His Right to Be Sentenced on the Basis of the Evidence Alone*

The Government argued that "the affirmative action of telling the military judge that the defense did not object to the Government's sentencing argument when asked was a deliberate decision that constitutes waiver." Answer at 37. This Court should reject that argument for several reasons.

First, as mentioned in SrA Cunningham's original Brief, this Court decided *United States v. Norwood* six days after SrA Cunningham's case. 81 M.J. 12 (C.A.A.F. 2021). As such, this Court should "apply the clear law at the time of the appeal"—*Norwood*—to find the error was forfeited and not waived. *United States v.*

Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019). The Government took exception with this argument and stated, "'changes in the law' did not spring from *Norwood*…On the contrary, this Court in *Norwood* reiterated that it had *repeatedly* held that a court-martial must reach a decision based only on the facts in evidence." Answer at 37 (quotations omitted) (emphasis in original). This argument cuts both ways: If *Norwood* "*repeatedly*" held that trial counsel cannot comment on matters not in evidence, that means Trial Counsel's arguments in this case referencing the media were plain error—by the Government's own admission in its Answer.

This Court did not find waiver in at least one other case where the law was "unsettled," when a military judge asked defense counsel if they had objections. *United States v. Schmidt*, 82 M.J. 68, 71, 73 (C.A.A.F. 2022) ("When asked whether he had any objection to that instruction, Appellant's trial defense counsel stated, 'I do not, sir. There is no definition…in the Benchbook.'"); *see also United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011) ("[W]e look to the state of the law at the time of trial, and we will not find waiver where subsequent case law opened the door for a colorable assertion of the right to confrontation where it was not previously available.") (quotations and citations omitted).

Second, this Court should consider the procedural guidance in *United States v. Olano*:

> [W]aiver is the intentional relinquishment or abandonment of a known right….Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.

507 U.S. 725, 733, (1993). Here, the Military Judge's question lacked the formality that typically accompanies the "relinquishment or abandonment of a known right;" that is, the Military Judge's question was pro forma. *Id.* The Military Judge never told SrA Cunningham, or counsel, what right he was relinquishing. The Military Judge did not involve SrA Cunningham, so he did not "participate personally in the waiver," so it is unclear if SrA Cunningham's choice was "particularly informed or voluntary." *Id.* This is unlike an instruction issue where the Defense Counsel participates in drafting the instructions, reviews them in depth, and has conversations about the proposed instructions with the Military Judge. Thus, these factors cut against finding waiver.

Third, and finally, this Court has "a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege." *Sweeney*, 70 M.J. at 303-04. While improper argument is considered prosecutorial misconduct, this Court has said that is the start of the analysis, not the end: "In some cases, improper comments may not only violate an R.C.M. but also may result in a constitutional violation." *United States v. Cueto*, 82 M.J. 323, 333 (C.A.A.F. 2022).

In this case, both improper arguments trespassed on SrA Cunningham's right to be sentenced on the basis of the evidence alone: First, with arguments on uncharged misconduct; and second, on Trial Counsel's references to the media which were comments—and veiled threats—on matters not in evidence.

Counsel's improper arguments went to SrA Cunningham's due process right to be sentenced on properly admitted and competent evidence.[1] *See generally Anthony v. Louisiana*, 143 S. Ct. 29, 33 (2022) (Sotomayor, J., dissenting on denial of certiorari) ("When these dangers arise [*inter alia*, referencing evidence outside of the record], they implicate due process because they jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury.") (citations and quotations omitted); *Cueto*, 82 M.J. at 333 ("The Supreme Court's decision in *Taylor v. Kentucky*…is illustrative. In that case, a prosecutor improperly made arguments based on evidence not in the record and improperly suggested that the defendant's indictment was evidence of his guilt. The Supreme Court held that the defendant had

[1] If this Court were to find that the improper argument was a due process, constitutional violation, it would presumably change the Government's prejudice burden to harmless beyond a reasonable doubt. *See United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) ("Regardless of whether there was an objection or not, '[i]n the context of a constitutional error, the burden is on the Government to establish that the comments were harmless beyond a reasonable doubt.'"). This Court decided *Flores* in the context of findings argument. *Id.* While SrA Cunningham is not aware of any case applying *Flores*' rationale to sentencing, SrA Cunningham is also not aware of any case that would prohibit its rationale in sentencing. Regardless, SrA Cunningham stands on his prior prejudice arguments. Brief on Behalf of Appellant, at 52-55.

been denied due process because the trial judge had not corrected these errors.") (citations omitted); *United States v. McDonald*, 55 M.J. 173, 176 (C.A.A.F. 2001) ("In summary, the Constitution requires that evidence admitted during sentencing must comport with the utilitarian purpose of the Due Process Clause, i.e., reliability, and procedural-due-process requirements."); *United States v. Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial.").

For these reasons, this Court should find that this case is analogous to a "defense counsel's mere failure to timely object" and "continue to review unobjected to prosecutorial misconduct and improper argument for plain error." *United States v. Andrews*, 77 M.J. 393, 398, 399 (C.A.A.F. 2018).

2. Trial Counsel's Comments Were Not "Improvisation" and Their Meaning Requires No Inference

The Government explained that "summation is not a 'detached exposition,' with every word 'carefully constructed . . . before the event[.]' Because closing and sentencing arguments often require 'improvisation,' courts will 'not lightly infer' that every statement is intended to carry 'its most dangerous meaning.'" Answer at 35 (citations omitted).

In this case, the opposite is true; Trial Counsel's arguments were not "improvisation"—they were, in fact, "carefully constructed" before she gave her argument. *Id*. The audio of Trial Counsel's argument reveals two things. First, Trial Counsel wrote down her argument and essentially read it to the Military Judge. JA at 229 (Ellsworth_20210218-2008_01d70631d023a4c0 (Government Sentencing Argument, pages 1347 – 1354, Audio Disc). She audibly turned the pages of her written argument on at least two locations. *Id.* at 5:14-15; 19:24. This means she did not improvise. She was prepared and calculated. This deserves less tolerance than had she been swept up in the emotion of argument.

Second, because she wrote down her argument and read it, one can easily hear where she placed her emphasis. For example, during her volley of "tells lie, after lie, after lie, after lie until we finally get a piece of the truth," her tone was slow, deliberate, and purposeful. *Id.* at 09:40. It was planned for effect. *Id.* Likewise, when she told the Military Judge that he had "seen the media" and "the world is watching," she placed a particularly sharp emphasis on "the world is watching." *Id.* at 21:00-21:20. In fact, she almost said that phrase earlier in this portion of her argument, but she then realized that she did not mention "the witness testimony talking about the media interest" so she cut herself off. *Id*. Her emphasis on the "world is watching" sounds acerbic. *Id*.

The Government's argument that SrA Cunningham is "interpreting trial counsel's remarks in the most sinister light" falls apart when confronted with the tone and plain meaning of the words. Answer at 12. No "inference" is needed to understand that both of these arguments are comments on facts not in evidence or on uncharged misconduct.

3. The Quality of the Improper Argument Matters, Not the Quantity Per Se

The Government said that "trial counsel's comments did not 'permeate' the entire argument. Evaluating any error against the entire record, any misconduct was cabined to a small portion of trial counsel's argument on the ninth, and final, day of trial." Answer at 54 (citation omitted). While the quantity of improper argument is certainly a factor that this Court can consider, it is not dispositive. For example, in *United States v. Frey*, this Court found Trial Counsel's argument to be error even though "this comment comprises three sentences in eight pages of sentencing argument." 73 M.J. 245, 249 (C.A.A.F. 2014). This Court continued, "one is hard pressed to imagine many statements more damaging than the implication that someone who has been convicted of molesting a single child will go on to molest many more." *Id.* Notably, both arguments were comments on matters not in evidence (recidivism and references to the media).

ARGUMENT ON UNCHARGED, FALSE STATEMENTS AS AGGRAVATING EVIDENCE

1. The Government Failed to Analyze the Case Law at Issue

The Government argued, "Appellant contends trial counsel's argument was plain error under *Warren*. But *Warren* is distinguishable." Answer at 39 (citation omitted). The Government then pointed out that *Warren* dealt with an accused who testified under oath. *Id.*

SrA Cunningham already made this distinction and concession in his Brief. Brief on Behalf of Appellant, at 33 ("If this Court treats uncharged, false statements in the same way the Supreme Court and the Court of Military Appeals treated false testimony under oath, then Trial Counsel's argument is plain and obvious error because she tied SrA Cunningham's alleged lies to aggravation evidence."). SrA Cunningham then argued that if "This Court Does Not Find the Supreme Court's and the Court of Military Appeal's Precedent Applies, Air Force Court Precedent Is Directly on Point." *Id.* at 34.

Given that SrA Cunningham already distinguished the case law, it was unanticipated that the Government would repeat his argument and then fail to engage the Air Force Court's caselaw that holds Trial Counsel cannot argue false official statements as matters in aggravation. Brief on Behalf of Appellant, at 34-36; 38-39. Indeed, being published cases, they were binding upon Trial Counsel and the

Military Judge. This Court should adopt those cases' rationale for the reasons previously explained. *Id.*

2. "Medical Impact" Was a Legal and Factual Impossibility

The Government claimed that "Because the lies Appellant told directly related to his indifference about Z.C. receiving proper treatment for his injuries and Z.C. ultimately died, trial counsel did not err, no less plainly err, by arguing these as aggravating 'medical impact' on Z.C. under R.C.M. 1001(b)(4)." Answer at 42.

The Government's argument has several problems, however. First, given that the Government charged and convicted SrA Cunningham of murder, "medical impact" was not legally possible under R.C.M. 1001(b)(4). 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) (emphasis added). Here, the first element of the offense of murder is that the victim is dead. Since the law considers the victim dead, "medical impact" cannot result "from the offense[] of which" SrA Cunningham was found guilty.

While this may seem to be a technical reading of R.C.M. 1001(b)(4), this Court has engaged in this analysis. In *United States v. Gordon*, this Court explained:

> The standard for admission of evidence under this rule [1001(b)(4)] is not the mere relevance of the purported aggravating circumstances to the offense. *See* Mil. R. Evid. 401 and 402. Instead a higher standard is required, namely, the aggravating circumstances proffered must directly relate to or result from the accused's offense.

31 M.J. 30, 36 (C.M.A. 1990). The Court then found:

> With this more demanding standard in mind, we turn to the challenged testimony of Colonel Power. His initial opinion was that appellant's offense had an adverse impact on his soldiers' confidence in one another. However, we note that in the present case, appellant was found guilty of only negligent acts of commission. He negligently dove off the boat and rocked the boat, thereby causing it to take on water and sink. The particulars of this offense involved no finding that appellant omitted or failed to help Private Andrews once the boat sank and his peril was realized. In fact the evidence was heavily disputed on this point. Accordingly, this portion of Colonel Power's testimony was inadmissible under RCM 1001(b)(4) because it did not directly relate to or result *from the offense of which the accused has been found guilty*.

Id. (emphasis in original). This Court further refined the principle after *Gordon*:

> Regarding the strength of the connection required between admitted aggravation evidence and the charged offense, this Court has consistently held that the link between the R.C.M. 1001(b)(4) evidence of uncharged misconduct and the crime for which the accused has been convicted must *be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime*.

United States v. Hardison, 64 M.J. 279, 281-82 (C.A.A.F. 2007) (emphasis added).

The same factors are persuasive in SrA Cunningham's case. The "particulars of this offense involved no *finding* that appellant omitted or failed to help" Z.C. "once his peril was realized." *Id.* (emphasis added). As such, and because Z.C.'s death was an element of the offense, "medical impact" could not result "from the offense." R.C.M. 1001(b)(4).

Furthermore, if the Government wanted to use SrA Cunningham's statements as matters in aggravation, it could have charged him with obstruction of justice, dereliction of duty, or even added his failure to assist Z.C. as one of the "intentional

acts" that compromise an element of this particular murder charge. A false official statement charge was not the Government's only option. Answer at 39.

The second reason this Court should not adopt the Government's "medical impact" argument is that no one relied on, detrimentally or otherwise, SrA Cunningham for his medical insight. *See generally*, JA at 006 ("Detective SW questioned Appellant's story with skepticism"). In fact, the investigators who interrogated SrA Cunningham told him that they knew he was not telling the truth and insinuated that the doctors knew he was lying as well:

> The same people that I deal with on a weekly, if not daily, basis, the ***same people that have talked to me about children injuries and stuff like that, that have given me the training to know that this injury didn't happen by him being in a bouncer***. This injury ain't going to happen from a 5[-]month-old just dropping 2 or 3 feet on carpeted ground, okay. I know that for a fact, to the point of -- I have several kids myself, one of which is the same age as your kid, has fallen off a bed from higher than that and nothing happens. It doesn't happen, okay. ***It's time to start giving the truth. We can't keep lying about this stuff***.

Id. (emphases added). Furthermore, the evidence is clear that the doctors who treated Z.C. knew exactly what to do and made appropriate diagnoses all while the police interrogated SrA Cunningham:

> While Appellant was speaking to investigators, ZC was airlifted to the pediatric specialty center….an eye exam revealed that ZC had extensive bilateral retinal hemorrhages, *which is indicative of an abusive or non-accidental head injury*….this scan showed bilateral subdural hemorrhages and severe hypoxic-ischemic injury—meaning injury to the brain caused by a lack of oxygen and blood flow….ZC died on 12 March 2020, nine days after arriving at the hospital, "[d]espite medical therapy."

Id. at 009 (emphasis added). The Government cannot produce evidence that SrA Cunningham's statements actually contributed to Z.C. receiving subpar medical care, which then resulted in his death. In fact, the evidence proves the opposite: "[d]espite medical therapy," Z.C. died nine days after arriving at the hospital. *Id.*

This Court should take the Government's medical impact argument for what it was always intended to be: The investigators' ruse to effectuate SrA Cunningham's confession. The investigators never needed to tell the doctors "what happened, so [they] [could] help" Z.C. receive medical care. JA at 007. Medical impact was always an interrogation tactic designed to coerce a confession.

ARGUMENT ON SEEING THE MEDIA AND THE WORLD IS WATCHING

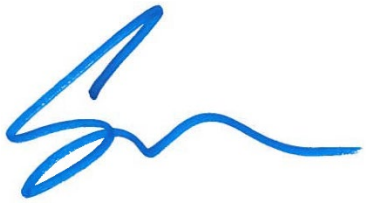
The Government confusingly claimed that "Appellant cites no precedent from any court holding that the same arguments made here are improper." Answer at 46. But it then contradictorily said, "Appellant *broadly cites a myriad* of state and federal cases" to argue that "mentioning the media to a military judge during sentencing argument is plain error." Answer at 50 (emphasis added).

The Government's confusion on the caselaw boils down to a simple practicality. Because it is plain and obvious error for a prosecutor to argue facts not in evidence to pressure a judge into adopting a sentence recommendation,

prosecutors do not do it. As such, there is little appellate case law directly on point discussing what is an otherwise obvious principle.

However, the principles of not commenting on matters not in evidence and allowing community pressures to influence a judicial determination have existed since time immemorial. Moses, the ancient lawgiver, told the Israelites, "You must not follow the crowd in doing wrong. When you are called to testify in a dispute, *do not be swayed by the crowd to twist justice*." Exodus 23:2 (NLT) (emphasis added); *see also Van Orden v. Perry*, 545 U.S. 677, 740 (2005) (O'Connor, J., dissenting) ("[T]he frieze of our own Courtroom providing a good example, where the figure of Moses stands among history's great lawgivers."). A quote by this Court provides a modern juxtaposition showing the ubiquity of the principle: "Typically, trial counsel is…prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence." *United States v. Tyler*, 81 M.J. 108, 111 (C.A.A.F. 2021) (citations and quotations omitted). Trial Counsel's invocation of the media was irrelevant, a matter not in evidence, and an attempt to twist justice for a higher sentence.

WHEREFORE, SrA Cunningham respectfully requests this Court reverse the Air Force Court's decision by finding error and prejudice for the Government's improper argument, remand the case back to the Air Force Court, and direct that the Air Force Court order a new sentencing rehearing.



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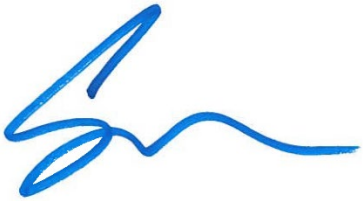
CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on February 23, 2023, and that a copy was also electronically served on the Government Trial and Appellate Division on the same date.



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CERTIFICATE OF COMPLIANCE

This supplement complies with the type-volume limitation of Rule 24(c)(2) of no more than 7,000 words because it contains 6,951 words.

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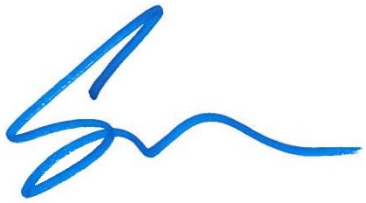

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