IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee,

v.

MONICA ARROYO
Senior Airman (E-4),
United States Air Force,
Appellant.

USCA Ct. Dkt. No.: 24-0212/AF
Crim. App. Dkt. No.: 40321

Amicus Curiae Brief of Victim, L.P, in Support of Appellee

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Issue Presented by Amicus Curiae

I.

DID THE AIR FORCE COURT INAPPROPRIATELY FIND PLAIN ERROR IN THE VICTIM IMPACT STATEMENT WHILE RELYING ON R.C.M. 1001 BECAUSE THE STATEMENT COMPLIED WITH ARTICLE 6b's TEXT AND INTENT?

Interest of Amicus Curiae

Amicus curiae, L.P., is the victim of Appellant/Offender's crime. L.P. was the named victim in Appellant's general court-martial, and L.P. gave a victim impact statement that is addressed in the Brief on Behalf of the Appellant. Moreover, as a victim in the military justice system, L.P. is afforded rights under Article 6b, U.C.M.J. L.P. filed a brief as *amicus curiae* before the Air Force Court of Criminal Appeals (A.F.C.C.A) and files this brief in support of Appellee under Rule 26(b)(3).

Facts

On 19 June 2021, Appellant was charged with one charge, two specifications of sexual assault under Article 120, UCMJ: first, that she had penetrated L.P.'s vulva with her fingers, and second, that she had contacted L.P.'s vulva with her mouth. JA at 27.[1] On 7 March 2022, Appellant signed, alongside her counsel, a plea agreement that included a mandatory bad conduct discharge. JA at 190-194. The plea agreement included the following language:

> I understand that, as consideration for my offer for plea agreement, the GCMCA will direct trial counsel to withdraw and dismiss the Charge and its Specifications, after the military judge accepts my plea of guilty . . . Upon announcement of the sentence, trial counsel will motion to dismiss with prejudice the charge and its specifications.

On March 9, 2022, a general court-martial was conducted, and Appellant pled guilty in accordance with the plea agreement. When reviewing the plea agreement, the military judge asked the Government and Defense their position on whether the bad conduct discharge was "a permissible term." JA at 70. Defense Counsel stated "[o]ur client has agreed to this condition in order to get the benefit of the deal and we are not aware of any express condition that would prevent you from adjudging it, sir." JA at 70.

[1] At some point before the charges were withdrawn and dismissed, a pen and ink change was made to Specification 2; these facts reflect the final version. *See* JA at 27.

On appeal to the CCA, Appellant argued that the bad conduct discharge was inappropriately severe. *See* JA at 22. The CCA, in addressing sentence appropriateness, did not deem the bad conduct discharge to be inappropriately severe. *See* JA at 23. The CCA came to this decision after it considered several factors. *See* JA at 22-23. First, the CCA considered the lack of any extenuating circumstances presented by Appellant. JA at 22. Second, the CCA considered the impact the offense had on L.P. *Id*. And third, the CCA considered the Appellant had bargained for the bad conduct discharge with assistance of her counsel to receive "the benefit of [a] bargain." *Id*. The CCA pointed out that the bargain "reduced Appellant's criminal exposure . . . [and] ensured Appellant would not be exposed to additional significant collateral consequences that were possible under the dismissed specifications." *Id*. The CCA considered that the military judge had explicitly "discussed, in detail, the requirement in the plea agreement to adjudge a bad-conduct discharge," and that "the military judge did not *sua sponte* reject the plea agreement as unconscionable or recommend to the convening authority any suspension or reduction of Appellant's punishment." *Id*.

Additionally, on Appeal to the CCA Appellant sought relief because she alleged L.P.'s characterization of the effects of Appellant's abuse in L.P.'s victim impact statement were "improper;" and that L.P.'s relaying the effects of Appellant's abuse on her military career—to include an expedited transfer—was

also "improper." Citing to R.C.M. 1001(c), the CCA found that the military judge committed plain error for allowing L.P.'s statement to discuss two of the matters in her unsworn statement: (I) L.P.'s discussion of her expedited transfer to Kadena Air Base and (II) her two-week quarantine on arrival on Okinawa. *See* JA at 15. The CCA found that Appellant was not prejudiced by the error, stating "we are confident that the military judge sentenced Appellant only for the crime of which she was convicted, and that the errors did not substantially influence the sentence."

Summary of Argument

Crime victims have enumerated statutory rights that shall be accorded to them throughout the pendency of the military justice process. The Sentencing Phase of the court-martial must afford victims their statutory rights and any abrogation of those rights should be for explicit cause upon an assertion by the convicted offender that the sentencing phase was fundamentally unfair. *See Betterman v. Montana*, 578 U.S. 437, 448 (2016) ("After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair.") Appellant in this case has not proffered any basis that her sentence hearing was fundamentally unfair. However, the sentencing phase and this appellate review has been fundamentally unfair to L.P. who only seeks acknowledgement of her statutory rights in the military justice system. A.F.C.C.A. failed to account for L.P.'s statutory rights

during the sentencing phase and the A.F.C.C.A. opinion, insofar as it found L.P.'s statement improper, should be set aside for its failure to properly account for L.P.'s unequivocal rights during sentencing – rights receiving no mention in the pendency of this appeal.

Argument

I. A.F.C.C.A. properly considered the benefit of Appellant's plea agreement in assessing sentence severity.

L.P. agrees with the analysis in the Brief on Behalf of the United States that the A.F.C.C.A. properly considered the benefit of Appellant's plea agreement in assessing sentence severity. To Appellee's analysis, L.P. adds that forbidding CCAs from considering the benefit an Appellant received in a plea agreement as a factor in assessing the appropriateness of a sentence bargained for as part of that plea agreement would have a chilling effect on future plea negotiations for victims like her.

A. Challenging a bargained for agreements prevents others from seeking such agreements.

L.P. supported this agreement because a bad conduct discharge was a bargained-for-sentence. Knowing an accused can later challenge that agreement—receiving both the benefit of the agreement by having specifications dismissed with prejudice and receiving the benefit of challenging aspects most beneficial to the

Government and the named victim—removes a major incentive to negotiate a plea agreement and would prevent her and others from supporting such agreements.

If CCAs cannot acknowledge the benefit received by convicted offenders when serious charges are withdrawn, appellants will have an incentive to negotiate for a guilty plea that includes significant punishment, in exchange for the withdrawal of serious charges, only to seek the removal of the punishment later.[2] This creates the possibility—as it would in this case—of an "unjust windfall" for future appellants. *Cf. United States v. Acevedo*, 46 M.J. 830, 834 (C.G. Ct. Crim. App. 1997) (stating that to remove a dishonorable discharge that was part of "bargains to which [the] parties freely and voluntarily agreed" would have been an "unjust windfall" for appellants). The Supreme Court has stated the finality of guilty pleas should be respected by courts, because guilty pleas are indispensable in the modern criminal justice system's operation. *See United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004). When "'courts disturb the parties' allocation of risk in an agreement, they threaten to damage the parties' ability to ascertain their

[2] It is worth noting that in analyzing the benefit received by the plea as part of its sentence severity analysis, the A.F.C.C.A. was not doing anything out of the ordinary for a CCA. *See, e.g.*, *United States v. Valdez*, 2024 CCA LEXIS 393, at *14 (N-M Ct. Crim. App. Sep. 26, 2024) (noting Appellant's "benefit of his bargain—to include . . . withdrawal and conditional dismissal of other serious charges" when analyzing sentence severity); *United States v. Dioguardi*, 2023 CCA LEXIS 455, at *6 (N-M Ct. Crim. App. Oct. 30, 2023) (noting, in the context of accessing sentence severity, that "withdrawal and dismissal of [Appellant's] other charged offenses" was a benefit he received) *United States v. Villagomez-Garcia*, 2021 CCA LEXIS 642, at *4 (N-M Ct. Crim. App. Nov. 29, 2021) (noting Appellant's "benefit of the bargain" including withdrawn and dismissed charges in analyzing sentence severity). See also *United States v. Lawton*, 2024 U.S. Dist. LEXIS 197880, at *11-*12 (W.D. Pa. Oct. 31, 2024) (noting a more serious charge not pursued as a result of a plea agreement when analyzing sentence severity) for an example of the same type of analysis in a federal district court.

legal rights when they sit down at the bargaining table.'" *See Portis v. United States*, 33 F.4th 331, 335 (6th Cir. 2022).

Disrupting bargained-for plea agreements injures victims like L.P. because crime victims, in addition to the Government and an accused, also benefit from a plea agreement. Congress has granted victims an independent role in the proceeding, including the right to be informed of any "plea agreement, separation-in-lieu-of-trial agreement, or non-prosecution agreement relating to the offense." Article 6b(a)(8). R.C.M. 705(3)(B) captures this accordingly:

> *Victim consultation*. Prior to the convening authority or special trial counsel, as applicable, accepting a plea agreement, the convening authority or special trial counsel shall make the convening authority's or special trial counsel's best efforts to provide the victim an opportunity to submit views concerning the plea agreement terms and conditions in accordance with regulations prescribed by the Secretary concerned. The convening authority or special trial counsel, as applicable, shall consider any such views provided prior to accepting a plea agreement. For purposes of this rule, a "victim" is an individual who is alleged to have suffered direct physical, emotional, or pecuniary harm as a result of the matters set forth in a charge or specification under consideration and is named in one of the specifications under consideration.

So, while not a party to a court-martial, victims have a role in plea agreement negotiation and thus a stake in the finality of such agreements. Forbidding CCA's from considering an appellant's benefit in sentence severity analysis makes victims' support of plea agreements predicated only on hope it will meet

affirmance on appeal, since significant punishments bargained as part of the process receive no more deference than those adjudged after a trial.

B. An Unjust Windfall for L.P.'s Offender Violates Article 6b(a)(9).

The R.C.M.s include only some implementing language of Article 6b that meaningfully implement the provision of rights. L.P. continues to enjoy the statutory right to be treated with fairness and with respect for her privacy and dignity for the duration of the military justice proceedings of her offender – this includes during plea negotiations and through the entirety of her offender's appeal. Article 6b(a)(9), U.C.M.J. The right to be treated with fairness is a statutorily accorded due process right imparted to victims not accounted for in R.C.M. 705, laying the foundation where crime victims must wait years for finality – even when their offenders plead guilty. The Rule was amended to facially comply with victim notification of and conference requiring consideration of a victim's view as guaranteed under Article 6b(a)(5),(8); but then the Rule undercuts victims' statutory rights when declaring waiver of appellate rights an impermissible term in pretrial agreements. R.C.M. 705(c)(1)(B).

Additionally, the omission of victims' rights in the R.C.M.s addressing appeals engenders this unfair scenario where an offender can do just what the Appellant is doing in this case – negotiate and later challenge the provision of the bargain the offender most opposes. Tellingly, the word "victim" does not appear a

single time in R.C.M.s 1201 through 1210, which address appeals. In this case, Appellant agreed to a sentence and then – because R.C.M. 705 prevents waiver of appellate rights – used the victim's own words relaying the abuse to seek relief from her own agreed to sentence.[3]

Congress passed the Justice for All Act in 2004 codifying the Crime Victims' Rights Act (C.V.R.A.). It provided federal crime victims the following rights:

> (1) The right to be reasonably protected from the accused.
> (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
> (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> (5) The reasonable right to confer with the attorney for the Government in the case.
> (6) The right to full and timely restitution as provided in law.
> (7) The right to proceedings free from unreasonable delay.
> (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

[3] When the Military Justice Review Group issued Part I of its recommendations to amend the UCMJ as to plea agreements it said, "[t]he convening authority would be responsible for entering into an agreement that reflects the interests of the government in general and the disciplinary interests of the unit in particular." REP. OF THE MIL. REV. GRP. PART I: UCMJ RECOMMENDATIONS 33 (2015), available at https://ogc.osd.mil/Portals/99/report_part1.pdf. Despite the report's issuance almost two years after the provision of victims' rights under Article 6b, there is no mention of a victim's right to fairness vis-à-vis plea agreements.

18 U.S.C. § 3771 (2018). Federal courts have repeatedly found that the C.V.R.A.'s right to be reasonably heard is a broad—nearly unfettered—right. *See Kenna v. United States Dist. Court*, 435 F.3d 1011, 1016-17 (9th Cir. 2006) ("[v]ictims now have an indefeasible right to speak, similar to that of the defendant").

Although these rights were applicable to federal crime victims, victims of crimes committed by service members were left without comparable rights for another decade. It was not until after the 2014 National Defense Authorization Act (NDAA) added Article 6b to the UCMJ affording victims of UCMJ offenses statutory rights that victims in the military justice were unequivocally afforded the rights in the C.V.R.A. *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, § 1701 (26 Dec. 2013) ("Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice")(hereinafter "FY14 NDAA"). The FY14 NDAA inserted Article 6b into the U.C.M.J. under Section 1701 of that Act. The title of that section was "Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice," indicating Congress intended to confer rights under the C.V.R.A. through Article 6b, U.C.M.J..

These new rights for victims in the military justice system mirrored the C.V.R.A., including Article 6b(a)(9), the right to be treated with fairness and respect. This identical right allows analysis of and jurisprudence addressing the

C.V.R.A. to provide persuasive and pointed guidance as to the meaning and applicability of rights afforded in Article 6b, UCMJ. *See In re HK*, 2021 CCA LEXIS 535, at *8 (A.F. Ct. Crim. App. Sep. 13, 2021) ("Petitioner's theory is not without basis, in light of both the textual similarities between the C.V.R.A. and Article 6b, UCMJ, and the fact the act creating Article 6b, UCMJ, titled that provision as 'Extension of Crime Victims' Rights to Victims of Offenses Under the Uniform Code of Military Justice.'").

During a Congressional session addressing the specific C.V.R.A. right to be treated with fairness, co-sponsor of the act, Arizona Senator Jon Kyl, explained the word choice:

> [F]airness includes the notion of due process. Too often victims of crime experience a secondary victimization at the hands of the criminal justice system. This provision is intended to direct government agencies and employees, whether they are in executive or judicial branches, to treat victims of crime with the respect they deserve and to afford them due process.

150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004). The Appellant in this case agreed to a sentence, and the Appellate process has now afforded the convicted offender the opportunity to back out of the agreement because her victim said too much when exercising her statutory right – a right that is and remains L.P.'s indefeasible right – to speak. This is unfair.

In conclusion, the CCA was not improper when it considered the bad conduct discharge was adjudged as part of a negotiated plea agreement that

included withdrawal and dismissal of more serious offenses than those to which the Appellant pled guilty. It acted exactly as the Supreme Court would expect by honoring the finality of a bargained-for agreement that had a significant benefit for Appellant. *Cf. United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004) (stating that the finality of plea agreements should generally be honored). Forbidding CCA's from considering an appellant's benefit in sentence severity analysis makes it harder for victims to support plea agreements, since significant punishments bargained as part of the process would be invalidated and undercut by the CCA.

II. The A.F.C.C.A. inappropriately found plain error in the victim impact statement while relying on R.C.M. 1001 because the statement complied with both the statute's text and intent.

Although the A.F.C.C.A. relied on R.C.M. 1001 to interpret whether the victim impact statement complied with the rule, L.P.'s victim impact statement is consistent with Article 6b; thus no error occurred. While generally relying on the presidentially promulgated rules gives consistent guidance, here, the rule does not fully implement the governing statute. A history of the statute's implementation shows a gap in certain victim impact statements, and this statement, in particular, falls in that gap. In applying the rules, appellate courts must look to the law as well as the promulgated rules. The C.A.A.F., with appropriately vested authority, can rely on the a statute plain language text and congressional intent as the governing law instead of the inconsistent R.C.M. Doing so affords the Accused

full due process rights, complies with the law and congressional direction affording victims allocution, and gives the intended parity with civilian jurisdictions that have similar statutory language.

> Our Court has observed that there are "hierarchical sources of rights" in the military justice system, including the Constitution, federal statutes, Executive Orders, Department of Defense Directives, service directives, and federal common law. Normal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and ***provide greater rights for the individual***.

United States v. Czeschin, 56 M.J. 346, 348 (C.A.A.F. 2002) (internal quotations and citations omitted) (emphasis added). L.P.'s victim impact statement remains consistent with her rights accorded in Article 6b; and R.C.M. 1001's limitation of those rights should not overcome her superior right in statute.

A. R.C.M. 1001 is inconsistent with Article 6b.

R.C.M. 1001 is inconsistent with Article 6b, U.C.M.J., as applied to victim impact statements because it violates the legislative intent and fundamental principles of victim protection enshrined in Article 6b. Article 6b, UCMJ, provides victims with certain rights within the military justice system. Specifically, Article 6b(a)(4)(B) provides victims with "the right to be reasonably heard at a sentencing hearing relating to the offense." This "right to be heard" has no caveats or limiting language but does outline specific hearings where that right may be exercised. The statutory provision was created to ensure victims a meaningful voice in the military

justice process. This statute ultimately aligned with legislative intent to enact victim-centric reform within the military justice system. *See United States v. Hamilton*, 77 M.J. 579, 582-83 (A.F. Ct. Crim. App. 2017) (discussing background of Article 6b).

Following the enactment of Article 6b, R.C.M. 1001 was amended to outline procedures for the victim impact statement being introduced, both as evidence in aggravation by the prosecution or as a sworn or unsworn statement by a victim. *See Id.* R.C.M. 1001(c)(2)(B) broadly defines victim impact as including "any financial, social, psychological, or medical impact on the crime victim relating to or arising from the offense of which accused has been found guilty." In contrast, R.C.M. 1001(b)(4) narrowly tailors allowable victim impact, when presented as evidence in aggravation by the prosecution, as impact that "directly and immediately resulted from the accused's offense." Further examination of the R.C.M. 1001 shows that the rule states a "victim's statement should not exceed what is permitted under R.C.M. 1001(c)(3)." R.C.M. 1001(c)(3) states that the contents of either a sworn or unsworn victim impact statement "may only include victim impact and matters in mitigation, except that in a noncapital case, the victim may recommend a specific sentence."

When viewed in conjunction with one another, Article 6b and R.C.M. 1001 are at odds when applied to certain aspects of victim impact. In this case, where

content of L.P.'s victim impact statement was at issue, Article 6b would not limit the content as much as R.C.M. 1001 did. While R.C.M. 1001 could be viewed simply as implementing appropriate guidance, any implementing guidance that restricts a granted *right* by Congress and signed by the President restricts the right itself. This narrow standard has led to inconsistent application.[4] More specifically, the narrow standard created an issue for L.P.'s statement on appeal without clear guidance what R.C.M. 1001's limitations mean.

Where the plain language of Article 6b prescribes no such limitations on the right to be reasonably heard, R.C.M. 1001, as promulgated, enacts rigid and ambiguous procedural requirements on a victim's right to be heard.[5] These procedural constraints fail to align with Article 6b and serve only to produce a chilling effect on victims in practice. Accordingly, the text of R.C.M. 1001 has inappropriately limited victim impact evidence.[6]

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[4] DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON VICTIM IMPACT STATEMENTS AT COURTS-MARTIAL PRESENTENCING PROCEEDINGS 19 (2023) ("The Committee notes, however, that the standard in victim impact cases—that the impact must directly relate to or arise from the crime for which the accused was convicted—is not clear and appears to be applied differently by different military judges.").

[5] Article 6b(a)(4)(B)), UCMJ. Article 6b(a)(4)(B) incorporates—verbatim—the same right to victim allocution at sentencing contained in the Crime Victim' Rights Act (C.V.R.A.), 18 U.S.C. § 3771 (2018). Federal courts have interpreted the C.V.R.A.'s "reasonable right to be heard" as giving crime victims "an indefeasible right" to allocution at sentencing. *See Kenna v. United States Dist. Court*, 435 F.3d 1011, 1016-17 (9th Cir. 2006).

[6] See DEF. ADVISORY COMM. ON INVESTIGATION, PROSECUTION, AND DEF. OF SEXUAL ASSAULT IN THE ARMED FORCES REPORT ON VICTIM IMPACT STATEMENTS AT COURTS-MARTIAL PRESENTENCING PROCEEDINGS 18 (2023) ("[T]he data, coupled with the records of trial, indicate that it is the standards in R.C.M. 1001(c) . . . that inappropriately limit victim impact statements.")

In addition to Article 6b's plain language, the legislative intent behind Article 6b makes clear Congress sought to ensure victims are treated with fairness, dignity, and respect throughout the military justice process and victims have a meaningful opportunity to participate in said process. More specifically – Article 6b confers substantive *rights* onto victims. Yet R.C.M. 1001, with its procedural hurdles, undercuts a victim's Article 6b rights by prioritizing judicial efficiency over victims' rights. In practice, R.C.M. 1001 serves as the mechanism by which a victim's voice is ultimately diluted and is inconsistent with the plain language of Article 6b.

B. C.A.A.F. should hold that Article 6b provides the sole framework appropriate for analyzing victim impact statements.

The C.A.A.F. could invalidate R.C.M. 1001 or simply rely on Article 6b to determine whether L.P.'s statement complies with legal guidance. First, the C.A.A.F. possesses the authority to invalidate R.C.M. 1001 as applied to L.P.'s victim impact statement as it conflicts with the unambiguous statutory language of Article 6b. The C.A.A.F.'s ability to do so is grounded in its jurisdiction and duty to ensure that military justice rules are not inconsistent, illegal, or in any manner undermine statutorily prescribed rights or due process. Article 36, U.C.M.J. Further, Article 67, UCMJ, empowers the C.A.A.F., as the highest military appellate court, with its subject matter jurisdiction to review decisions of service appellate courts to ensure the miliary justice system maintains compliance with the

Constitution and other applicable statutory provisions as prescribed by Congress. *See generally United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998) (stating "where the President unambiguously gives an accused greater rights than those conveyed by higher sources, this Court should abide by that decision unless it clearly contradicts the express language of the Code.").

Rather than invalidate an R.C.M., the C.A.A.F. can set the precedent that Article 6b's statutory framework should be the sole guidance by which victim impact statements are analyzed. As "[t]he entire system of military justice is a creature of statute, enacted by Congress pursuant to the express constitutional grant of power to make rules for the Government and Regulation of the land and naval Forces," the C.A.A.F. is entrusted with ensuring the military justice system maintains compliance with the Constitution and other applicable statutory provisions as enacted by Congress. *See U.S. v. Rodriguez*, 67 M.J. 110, 114-16 (2009) (internal citations omitted). Flowing from both statute and the relevant caselaw, the C.A.A.F.'s mandate has been interpreted, at least in part, as possessing the responsibility to ensure Congressional laws satisfy the requirements of the Due Process Clause when legislating military affairs. *See generally Weiss v. United States*, 510 U.S. 163 (1994) (affirming that the appropriate test to apply to determine whether a court-martial procedure violates due process is to ask whether

the factors militating in favor of overturning that procedure are so extraordinarily weighty as to overcome the balance struck by Congress).

This court has previously recognized the military justice system must comply with source authority provisions which, as applied, mandate that any R.C.M.s inconsistent with statutory provisions of the U.C.M.J. are void. *See generally United States v. Lopez*, 35 M.J. 35, 39 (C.M.A 1992) (stating that "[t]he military, like the Federal and state systems, has hierarchical sources of rights . . ." and "[n]ormal rules of statutory construction provide that the highest source authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual . . . ."); *cf. generally United States v. Lopez de Victoria*, 66 M.J. 67 (C.A.A.F. 2008) (wherein the C.A.A.F. invalidated the lower court's reversal based on its interpretation of Article 43, U.C.M.J., affirming the principle that R.C.M.s cannot supersede statutory or constitutional rights).

If an R.C.M., in practice, is inconsistent or infringes upon an accused's constitutional rights, the C.A.A.F. possesses the authority to invalidate the rule. *See Davis supra.* The same is true of the C.A.A.F.'s authority to intervene to ensure R.C.M.s comply with the U.C.M.J. and provision of statutory rights to victims. The C.A.A.F.'s role as a guardian of military justice empowers it to invalidate the application of an R.C.M. when it conflicts with statutory or constitutional

mandates. This oversight ensures that the military justice system operates within its lawful boundaries and upholds the rights of those in the system. Simultaneously, doing so ensures L.P. and other victims receive their statutorily-granted right with R.C.M. 1001 as supplementary guidance. This approach can ensure the military justice system complies with the primacy of the statutory provisions enshrined in Article 6b and further serves to protect and preserve a victim's right to be reasonably heard within the military justice system.

C. Applying language similar to Article 6b's, federal courts rely on the Crime Victims' Rights Act to gran broad rights to victims at sentencing.

Under the C.V.R.A., victims of crimes have "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4). Congress later gave the military fundamentally the same language under Article 6b. Article 6b(a)(4)(B). Article 6b similarly says that a victim in a military court has "the right to be reasonably heard at any of the following: [. . .] a sentencing hearing relating to the offense [. . .]." The difference between the two has nothing to do with the content. Both include "the right to be reasonably heard." The types of proceedings listed and the format of the lists are the only differences. Because both have identical language without limitations on the content, application of the C.V.R.A. and the congressional intent both guide the application of Article 6b.

The application of the C.V.R.A. in federal courts is consistent with the text of Article 6b and differs from the limiting application of R.C.M. 1001.

Furthermore, the drafters of R.C.M. 1001's predecessor R.C.M. 1001A (2015 M.C.M.) proclaim it is to align with the C.V.R.A and Fed. R. Crim Pro. Rule 32(i)(4). RCM 1001A was added to the 2015 M.C.M. to effectuate a victim's right to be heard at sentencing codified in Article 6b(a)(4)(B), the accompanying explanation states:

> *2015 Amendment*: RCM 1001A was added to implement Article 6b(a)(4)(B), UCMJ, as created by Section 1701 of the National Defense Authorization Act for Fiscal Year 2014, P.L. 113–66, 26 December 2013, concerning the right of a victim to be reasonably heard at a sentencing hearing relating to the offense. ***It is consistent with the principles of law and federal practice prescribed in 18 U.S.C. 3771(a)(4) and Federal Rule of Criminal Procedure 32(i)(4)(B)***, which requires the court to 'address any victim of the crime who is present at sentencing' and 'permit the victim to be reasonably heard.' See 10 U.S.C. 836(a).

Federal Register: Manual for Courts-Martial; Publication of Supplementary Materials, 80 Fed. Reg. 130, 39087 (Jul. 8, 2015)(emphasis added).

Congressional intent of the C.V.R.A. clearly shows they did not want to impede the form in which victims chose to be heard, saying: "[t]he Committee does not intend that the right to be heard be limited to 'written' statements, because the victim may wish to communicate in other appropriate ways." 150 Cong. Rec. S10911 (daily ed. Oct. 9, 2004) Federal law furthers this sentiment.

> Prosecutors and defendants already have the right to speak at sentencing, *see* Fed. R. Crim. P. 32(i)(4)(A); our interpretation puts crime victims on the same footing. Our interpretation also serves to effectuate other statutory aims: (1) To ensure that the district court doesn't discount the impact of the crime on the victims; (2) to force the defendant to confront the human cost of his crime; and (3) to allow the victim 'to regain a sense of dignity and respect rather than feeling powerless and ashamed.'

United States v. Ritchie, 435 F.3d 1011, 1016 (9th Cir. 2006) (internal citations omitted).

In addition to congressional intent, the application of the C.V.R.A. reflects this broad right to victim allocution without infringing on any due process rights of the accused. When it comes to a victim's right to be heard at a sentencing hearing, "[b]efore imposing a sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard." Fed. R. Crim. P. 32(i)(4)(B).. A sentencing judge is allowed to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *Nichols v. United States*, 511 U.S. 738, 747 (1994) (internal citations omitted). In fact, there is no limit to the information "concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." 18 U.S.C. § 3661 (2018).

Unlike a military court, the Federal Rules of Criminal Procedure also require a presentence report prior to a sentencing hearing, which must contain "information that assesses any financial, social, psychological, and medical impact on any victim." Fed. R. Crim. P. 32(d)(2)(B). Not only can victims address the court at sentencing either verbally or through a written impact statement, but the presentencing report also includes impact the Defendant's actions had on the victim, seemingly without limitation within the rules.

Examples of victim impact statements at sentencing in the Federal district courts (some even before the C.V.R.A. was enacted) include: (1) Victim of sexual assault talked about how the offenses impacted his finances. He lost his job due to mental health problems stemming from the offenses such as "anger, anxiety, fear, guilt, sleep loss, nightmares, chronic fatigue, depression, forgetfulness, and difficulty concentrating." *United States v. Sepulveda*, 64 F.4th 700, 713 (5th Cir. 2023). (2) The grandmother of a minor victim said that he would probably be in counseling for the rest of his life. *United States v. Hooks*, No. 22-11939, 2023 U.S. App. LEXIS 16206, at *11 (11th Cir. June 27, 2023). (3) Victim was invited to testify at sentencing about the appropriate punishment the Defendant should receive. *Doe 2 v. AP*, 331 F.3d 417, 419 (4th Cir. 2003). (4) Victim's parents shared that victim "had hid from them and from friends because she felt humiliated and that she had been called names and written about on school walls . . . that she

had been threatened and had been followed to frighten her into silence . . . . [she] had cried for months and had continuing nightmares, and . . . [she] was receiving psychological counseling for post traumatic stress disorder." *United States v. Guy*, 282 F.3d 991, 992 (8th Cir. 2002).

At the federal level, victim impact statements are emotional and tearful testimony and even from victims whose names are not on the indictment. In a case of a doctor who abused many women over decades, the sentencing judge read— and the sentencing report contained— multiple victim impact statements from women who were not named victims. *United States v. Hadden*, 2024 U.S. App. LEXIS 25564, at *19 (2d Cir. Oct. 10, 2024) ("And there is no doubt that the district court had broad discretion to consider the extensive harm that Hadden caused over many years to numerous uncharged victims, in the context of the sentencing factors listed in 18 U.S.C. § 3553(a).").

Consideration of victim impact statements that go beyond the onerous restrictions of the Presidential rules does not make the statements so unduly prejudicial against the defendant that it violates the Due Process Clause, especially when the defendant presents mitigation witnesses. *See United States v. Rodriguez*, 581 F.3d 775, 795-797 (8th Cir. 2009). Victim impact statements at the federal level are allowed to recommend a sentence. For example, a victim and fiancé urged imposition of the maximum sentence during their victim impact statements.

Clement v. McCaughtry, No. 92-4154, 1993 U.S. App. LEXIS 32655 (7th Cir. Dec. 9, 1993).

While R.C.M. 1001(c) says victim impact includes "any financial, social, psychological, or medical impact on the crime victim relating to or arising from the offense of which the accused has been found guilty" in practice, victims are not allowed the wide latitude in their impact statements seen in federal courts or to provide similar information to what is contained in presentence reports. It is unclear why military courts limit a crime victims' right to be heard in ways the federal courts do not. By limiting victims' rights, they are not only hindering uniformed victims like L.P. from being heard, but civilian victims as well. A civilian victim of a crime will not see a benefit of the military court exercising jurisdiction over the offenses committed against them. Once they find out their rights afforded to them under the C.V.R.A. to speak for the purpose of conveying the seriousness of the impact the crime had on them, confront the accused with the "human cost" of their crime, and allow the victim to regain a sense of dignity is seriously stymied by a military court, they may have little incentive to ask for military jurisdiction over a case. These civilian victims, due to no choice of their

own, were assaulted by military members, placing them in a jurisdiction that unnecessarily limits their right to allocution, where federal courts do not.[7]

D. Reading victim impact statements fully consistent with the statute does not infringe on an Accused's due process rights.

This Court, like federal courts, can apply the underlying statute in granting a victim's right to allocution and to provide impact without infringing on an Accused's due process rights. A victim's unsworn statement allows a victim to simply state the impact of the crime during the sentencing phase of trial. Criminal sentencing hearings need not mirror trials nor implicate identical due process rights of offenders. *Williams v. New York*, 337 U.S. 241, 251(1949) ("The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure."); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) ("the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.") If Defense Counsel has concerns with victim impact evidence, they can bring appropriate rebuttal evidence, similar to the government's sentencing case after an Accused provides an unsworn statement. This leaves no

[7] Moreover, the *ex post facto* appellate review of the content of victim impact for plain error chills victim and participation in sentencing. In this case, L.P. only learned on appeal that she said too much. This after-the-fact review of victim impact statements also places victims' counsel from across the services in uncharted waters, trying to advise victim clients on how to exercise their indefeasible right to speak but within limitations that will only be learned on appeal.

additional barriers, allows an Accused full due process, particularly during the sentencing phase. This is all that Federal Rule of Criminal Procedure 32 requires.

As an example, R.C.M. 1001(c) unnecessarily restricts victim's impact statement content and evidence far more than even in federal death penalty cases. Victim allocution in death penalty cases is handled by a different statute than the C.V.R.A., the Federal Death Penalty Act (FDPA), with different statutory and judicially created requirements to be met before a victim speaks at sentencing. *See generally* 18 U.S.C. § 3593 (2018). But even in capital cases, victim sentencing statements challenged by appellants must meet a high standard before being found to have harmed the due process rights of the accused. See *United States v. Mitchell*, 502 F.3d 931, 989 (9th Cir. 2007) (stating that victim impact evidence was admissible unless "so unduly prejudicial that it renders the sentence fundamentally unfair") (citing to *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997)); see also *Payne v. Tennessee*, 501 U.S. 808, 811 (1991) ("In the event that victim impact evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Fourteenth Amendment's Due Process Clause provides a mechanism for relief.").

Importantly, this due process limitation has, as far as can be determined, not been applied outside death penalty cases by federal courts. In particular, it seems the broad victim impact statements and evidence as required by the C.V.R.A. and

implemented by Fed. R. Crim. P. 32 have not been challenged under this standard. In a military justice system where deference to Congress' due process provisions in the military context is at its apogee, the Executive's abridging a victim's right to allocution and to provide evidence at sentencing to protect non-specific claims of violations of a military accused's rights is wrong. "To succeed in a due process challenge to a statutory court-martial procedure, an appellant must demonstrate that the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress." *United States v. Anderson*, 83 M.J. 291, 298 (C.A.A.F. 2023); rev. den'd *Anderson v. United States*, 144 S. Ct. 1003 (2024)(internal quotations and citations omitted); see also *Weiss v. United States*, 510 U.S. 163, 165 (1994).

As shown, R.C.M. 1001 unnecessarily limits victim impact evidence to the court during sentencing phases of trial. However, Article 6b's plain language and the congressional intent behind the statute show fewer limitations. The application of similar language in federal courts reflect fewer limitations, granting victims the full right to allocution and to provide evidence without infringing on any due process rights of the accused. In this case, this court should apply Article 6b, to determine validity of L.P.'s victim impact statement and find L.P.'s statement consistent with the statute.

Conclusion

WHEREFORE, L.P., amicus curiae, requests this Court deny relief and invalidate the A.F.C.C.A.'s finding to engage in a sentencing severity analysis.

Respectfully submitted,

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Certificate of Compliance with Rules

I certify that this brief complies with the maximum length authorized by Rule 24(b) because it contains less than 6500 words.

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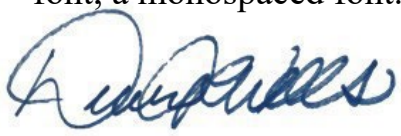

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Certificate of Filing and Service

I certify that on 2 January 2025, a copy of the foregoing was transmitted by electronic means to the following:

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