IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Juan I. CAMPOS Sergeant (E-5) U.S. Marine Corps, Appellant	**APPELLANT'S REPLY** Crim. App. Dkt. No. 202200246 USCA Dkt. No. 24-0138/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

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Reply

I.

Uncharged misconduct is not financial, social, psychological or medical impact that directly relates to or arises from the convicted offenses.

In arguing that the notion of "continuous course of conduct" applicable to evidence in aggravation should apply to unsworn victim impact statements,[1] the Government ignores the plain language of each rule:

R.C.M. 1001(b)(4) Evidence in aggravation	R.C.M. 1001(c)(2)(B) Victim impact
"The trial counsel may present ***evidence as to any aggravating circumstances*** *directly related to or resulting from the offenses of which the accused has been found guilty*. **Evidence in aggravation includes, but is not limited to,** evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused . . . ."	"**For purposes of this subsection, victim impact includes** any financial, social, psychological or medical ***impact on the crime victim*** *directly relating to or arising from the offense of which the accused has been found guilty*."

Whereas R.C.M. 1001(b)(4) is broadened by the language "but is not limited to," R.C.M. 1001(c) only uses the word "includes" and then specifically lists what can be considered as victim impact. This distinction is both palpable and purposeful,

[1] Gov. Answer at 15.

especially when considering the canon of expression *unius est exclusio alterius*, otherwise known as the inclusion of one is the exclusion of others.[2] The plain language of RCM 1001(b)(4) allows for trial counsel to present evidence as to any aggravating *circumstances*. The term "circumstances" broadens the aperture for what a trial counsel may introduce as *evidence* in a court-martial, which must still pass a balancing test under M.R.E. 403.[3] On the other hand, R.C.M 1001(c)(2)(B) concerns the *impact* on the crime victim, and its use of that term is couched by a specific list of what can be included as "impact" to a crime victim: financial, social, psychological or medical.

Here, Appellant's alleged uncharged misconduct does not comprise anything on that list. Thus, the military judge allowed the Victim to include "victim impact" not just for its intended purpose of explaining how Appellant's convicted crimes affected her financially, socially, psychologically, or medically, but also to lodge a number of new allegations to tell the military judge "what kind of person [Appellant] is."[4] This far exceeds the scope of what is defined or even contemplated by R.C.M. 1001(c)(2)(B).

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[2] *United States v. Mooney*, 77 M.J. 252, 257 (C.A.A.F. 2018)
[3] *See United States v. Stephens*, 67 M.J. 233, 236 (C.A.A.F. 2009).
[4] J.A. at 518-19.

In fact, what the military judge allowed the victim to do in this case is to introduce the sort of uncharged allegations contemplated for certain evidence of aggravating circumstances under R.C.M. 1001(b)(4), and to do so in a way that circumvented the military rules of evidence and other procedural protections. As the Government notes in its Answer,[5] the Court of Military Appeals (C.M.A.) held in *United States v. Mullens* that uncharged misconduct may be admissible as evidence of aggravating circumstances where it is part of a "continuing course of conduct" that involves "the same or similar crimes, the same victim and the same situs" as the conduct for which the accused was convicted.[6] In *United States v. Nourse*, this concept was applied to the theft of additional property from the same sheriff's office.[7]

But the Government is mistaken in its use of these cases to endorse the military judge's consideration of uncharged misconduct in an unsworn victim impact statement as a "continuing course of conduct." The military judge and the lower court supported this action by erroneously extending the analysis used in *Mullens* and *Nourse*, which both dealt specifically with *evidence in aggravation*.

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[5] Gov. Answer at 15
[6] *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990).
[7] *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001)

But such an extension runs afoul of the plain language of each respective rule, which this Court has found makes the two categories of sentencing material "distinct."[8] In essence, the military judge in this case allowed precisely what this Court has found "improper[]" in similar contexts, where "the trial counsel appropriated the victims' rights under R.C.M. 1001[(c)] in order to admit *the Government's evidence* in aggravation."[9] That is error.

II.

To adopt the Government's position would frustrate the military justice process during sentencing.

The Rules for Courts-Martial are very specific in the rights they afford to crime victims during sentencing:

> Crime victims have the right to be reasonably heard. After presentation by the trial counsel, a crime victim of an offense of which the accused has been found guilty has the right to be reasonably heard at the presentencing proceeding related to that offense. A crime victim who makes an unsworn statement under R.C.M. 1001(c)(5) is not considered a witness for purposes of Article 42(b). If the crime victim exercises the right to be reasonably heard, the crime victim shall be called by the court-martial. The exercise of the right is independent of whether the crime victim testified during findings or is called to testify by the Government or defense under this rule.[10]

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[8] *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019).
[9] *Id.* at 342 (internal quotations marks and citation omitted).
[10] R.C.M. 1001(c)(1).

The nonbinding discussion of R.C.M. 1001(c) is equally specific with respect to what a crime victim can discuss in an unsworn victim impact statement: "A victim's statement should not exceed what is permitted under R.C.M. 1001(c)(3)."[11] The discussion then specifically provides that a crime victim "may also testify as a witness during presentencing proceedings in order to present evidence admissible under a rule other than R.C.M. 1001(c)(3)."[12]

Contrary to the Government's suggestion, Appellant's interpretation of this language is both clear and correct: *If* the goal is to introduce evidence from a victim that is not subject to the limitations of R.C.M. 1001(c)(3), then *one way* to do that would be for the victim to testify on the merits. In other words, the Government's Answer highlights the very point that Appellant is making: to admit *evidence* under a rule other than R.C.M. 1001(c)—for example, evidence of aggravating circumstances under R.C.M. 1001(b)(4)—it must be introduced through some mechanism *other than* an unsworn victim impact statement under R.C.M. 1001(c).

The purpose of unsworn victim impact statements is for crime victims to be

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[11] R.C.M. 1001(c), Discussion.
[12] *Id.*

"reasonably heard" on the *direct* impact the convicted offenses have had on them socially, financially, psychologically, or medically. While the Victim's statement in this case did include such matters, as expected in a victim impact statement, the military judge intentionally allowed her to exceed the scope of what is permitted. Woven into the Victim's impact statement were a number of other uncharged allegations against Appellant, which the military judge specifically found he could consider, both for "context" and as "a continuing course of domestic abuse," in formulating the sentence.[13]

The Government shrugs that the accused can always try to rebut any new allegations that are made in victim impact statements through their own unsworn statements.[14] But this places an undue and unwarranted burden on an accused. More importantly, operating in this manner could potentially put the accused in a position where, in order to appear appropriately contrite, they must now attempt to explain or apologize for new alleged crimes that they may or may not actually have committed (and which the victim could not even be cross-examined about). This Court should not endorse the military judge and lower court's application of

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[13] J.A. at 370.
[14] Appellee's answer at 19.

"course of conduct" to victim impact statements, which would put an accused in such an untenable position.

Nor should this Court adopt an interpretation of "victim impact" that includes the "more attenuated impact of the crime" in order to allow victims to "confront convicted perpetrators" with the "total sum of the suffering."[15] This goal is not at all what is contemplated by R.C.M. 1001(c). Had Congress and the President intended for victim impact statements to be a tool by which victims could "confront" their perpetrators with everything they have ever allegedly said or done to them, that intent would have been codified in the R.C.M. Instead, R.C.M. 1001(c) (and its nonbinding discussion) is very specific about what constitutes "victim impact" (and, by consequent exclusion, what does not). This Court need not amplify that definition by adopting the creative interpretations of its predecessor to a new and very different context, which would unfairly enhance a victim's allocution rights at the expense of an accused's procedural ones.

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[15] Brief of *Amici Curiae* at 13.

III.

Appellant's sentence was prejudiced by the error.

While the Government argues that the contested parts of the Victim's impact statement were not material to the sentence,[16] it certainly found them material enough to use in its sentencing argument, where the trial counsel castigated Appellant for previously "kicking her, for pulling her hair, for pushing her against the wall, for abusing her" and then "continued to abuse her in a cycle of violence."[17] Thus, the fact that the military judge considered the Victim's additional allegations of uncharged misconduct as "context" and "course-of-conduct" evidence, coupled with the trial counsel's argument, demonstrates how material it was to the sentence he awarded, just two months shy of the maximum confinement permitted by the plea agreement.[18]

As such, this case is distinguishable from *United States v. Harrow*, where this Court held that "when a fact was already obvious from the testimony at trial and the evidence in question would not have provided new ammunition, the

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[16] Appellee's answer at 23.
[17] J.A. at 370-74.
[18] JA at 437.

erroneous admission of the evidence is likely to be harmless."[19] That is not at all the case here, where no testimony or evidence was provided by the trial counsel to introduce the other uncharged domestic abuse allegations that the victim discussed in her victim impact statement.

Instead, the new allegations in the victim's impact statement, which the military judge specifically stated were "proper for [him] to consider," *did* provide new ammunition. The statement itself alleged a slew of new, uncharged, allegations of domestic violence, unrelated to the charges to which Appellant had pleaded guilty. Thus, the military judge's consideration of this new ammunition was far from harmless, as evidenced by the high sentence he awarded.

Conclusion

WHEREFORE, Appellant requests that this Court find prejudicial error by the military judge, reverse the lower court, and set aside the sentence.

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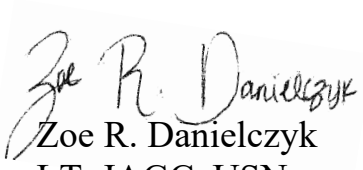
[19] *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)

Respectfully submitted.



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