

1 October 2026

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee,

v.

GIORGIO A. SZABO,
Lieutenant Colonel (O-5),
United States Air Force,
Appellant.

USCA Dkt. No. 26-0224/AF

Crim. App. Dkt. No. ACM 40690

BRIEF ON BEHALF OF APPELLANT

LUKE D. WILSON, Lt Col, USAF
U.S.C.A.A.F. Bar No. 35115
Air Force Appellate Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
luke.wilson.14@us.af.mil

Counsel for Appellant

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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE OVERRULED THE DEFENSE’S OBJECTION AND ALLOWED THE COMPLAINANT TO RECITE MULTIPLE ALLEGATIONS OF UNCHARGED MISCONDUCT DURING HER R.C.M. 1001(c) UNSWORN STATEMENT.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Relevant Authorities

RCM 1001(c)(2)(A)¹ states,

For purposes of this subsection, a crime victim is an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty or the individual’s lawful representative or designee appointed by the military judge under these rules.

Additionally, RCM 1001(c)(2)(B) states,

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.

¹ All references in this brief to the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

RCM 1001(c)(3) states, “The content of statements made under paragraphs (4) and (5) [sworn and unsworn victim statements] may only include victim impact and matters in mitigation.”

Statement of the Case

Between 30 April 2024 and 3 May 2024, Appellant was tried and sentenced by a panel of officer members sitting as a general court-martial at Joint Base Andrews Naval Air Facility Washington, Maryland. JA at 33. Consistent with his pleas, Appellant was found guilty of one charge and two specifications of disobeying an order in violation of Article 92, Uniform Code of Military Justice (UCMJ); one charge and one specification of wrongful use of a controlled substance and one specification of wrongful possession of a controlled substance in violation of Article 112(a), UCMJ; one charge and one specification of fraternization in violation of Article 134, UCMJ; and one charge and one specification of damaging nonmilitary property in violation of Article 109. *Id.* The members sentenced Appellant to be reprimanded, confined for four months, and dismissed from the service. Ja at 515.

The Convening Authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action – *United States v. Lieutenant Colonel Giorgio A. Szabo*, dated 29 May 2024. In accordance with Appellant’s request, the Convening Authority deferred Appellant’s automatic forfeitures starting fourteen days from the date the sentence was adjudged until the date

the military judge signed the EOJ. *Id.* Commencing the day the military judge signed the EOJ, the automatic forfeitures were waived for a period of four months, release from confinement, or expiration of term of service, whichever was soonest. *Id.* The total pay and allowances were directed to be paid to the ex-spouse of Appellant for the benefit of his dependent. *Id.*

The AFCCA denied relief and affirmed the findings and sentence on April 23, 2026. JA at 1-18.

Statement of Facts

Prior to Appellant's court-martial, he deployed five times and logged an additional 1,184.8 combat air hours. JA at 54. Appellant's position as a pilot saw him "directly support the Vice President, First Lady, Cabinet Secretaries, and senior U.S. government and military leaders." JA at 44. During this time he also became a divorced father of a young son. JA 377-81.

After Appellant's marriage ended he, a commissioned officer, met AC, an enlisted member, at the base gym. JA at 234, 327, 377. He learned she was an active-duty flight attendant and soon became aware of her enlisted status. JA at 235. Shortly after meeting, Appellant and AC began a romantic relationship. *Id.*

From the outset, Appellant knew that, as a commissioned officer, engaging in a romantic relationship with an enlisted member of the Air Force was prohibited. *Id.* Appellant and AC served in different squadrons, and Appellant held no

administrative or operational authority over AC. *Id.* The relationship was intermittent, continuing from 2018 until it ended in November 2021. *Id.*

After their relationship ended, AC interviewed with the Air Force Office of Special Investigations. JA at 48. In that interview, she detailed the nature of her relationship with Appellant and disclosed her knowledge of his use of controlled substances. *Id.*

Appellant's commander subsequently issued a no-contact order directing him not to communicate with AC. JA at 45. Appellant, however, failed to adhere to the order and contacted AC on over a hundred occasions. JA at 46. Consequently, a Military Protective Order was issued on 12 September 2024, which Appellant violated multiple times. JA at 47.

Contemporaneously, the criminal investigation into the allegations of substance use proceeded. On 26 August 2022, investigators executed a search of Appellant's residence, where they discovered both cocaine and anabolic steroids. JA at 48, 175. On the same day, a urinalysis was conducted on Appellant. *Id.* The samples tested positive for the cocaine metabolite. *Id.*

In a signed stipulation of fact, Appellant admitted to his fraternization with AC, his use of cocaine and possession of steroids, and to damaging property at AC's residence. JA 44-53. The damaged property included two broken wine glasses, a

bottle of wine, and a mudroom door that Appellant punched during an argument. JA at 51.

During the sentencing phase of the trial, Defense counsel timely objected to AC's proposed unsworn victim impact statement that detailed uncharged misconduct and its resulting impact. JA at 353. Specifically—and separately from the mudroom door, bottle and glasses that formed Appellant's Article 109 charge and specification—AC's unsworn statement alleged that:

- Appellant “broke into [AC's] home without [her] permission” on multiple occasions and “trashed her house and destroyed a lot of [her] property”;
- Following the alleged break-ins referenced above, she had “substantial emotional distress and lingering fear for [her] safety”;
- Appellant broke AC's kitchen cabinet;
- Appellant “threw glassware into [AC's] backyard”;
- Appellant “took [his] anger out on [AC's] personal vehicle and on a rental vehicle”;
- Appellant dented the top of AC's car, broke her steering wheel, and “slashed [her] tire with a steak knife”;
- He “punched and cracked the windshield of [AC's] rental vehicle”;
- His actions “led to an increase in [AC's] insurance premiums”;
- These instances left AC “feeling vulnerable and on edge” where she “lived in perpetual worry that [Appellant was] going to overreact as [he] had in the past and do something more to [AC]”;
- Appellant caused “irreparable damage to [AC's] reputation.”

JA at 42-43; 364-67.² AC then concluded her unsworn by asking the panel of members “to at least try to prevent this man from destroying another woman’s life in the future.” *Id.* AC delivered both an oral and written unsworn statement to the members. JA at 363-66.

Following the Defense’s objection, the military judge granted the Defense a fifteen-minute recess. JA 355. After the break, the trial defense counsel told the judge, “I think we’re in agreement on all but one paragraph.” JA at 357. The Defense then discussed their objection to paragraph five of the unsworn statement, which consisted only of AC’s allegations of Appellant damaging AC’s personal and rental vehicles, with a result of AC’s insurance premiums increasing. JA at 357-62.

The military judge overruled the Defense’s objection based on the unpublished AFCCA case of *United States v. Goldsmith*, No. ACM 40148, 2023 CCA LEXIS 8, *19-22 (A.F. Ct. Crim. App. Jan. 11, 2023), which endorsed contents of a victim’s unsworn statement that fell within a “continuing course of conduct,” a construction that this Court subsequently rejected in *United States v. Campos*, 85 M.J.

² Undersigned counsel notes that pages 4-5 of the Supplement to Petition for Grant of Review referenced AC’s allegations that Appellant manipulated her into breast augmentation, working as a stripper, shooting nude content, and manipulation “into doing multiple things that [AC] was uncomfortable with.” *See* Supplement to Petition for Grant of Review at 4-5. These allegations appeared only in Appellate Exhibit CXXVIII (*see* JA at 40), not in Court Exhibit A (*see* JA at 42), which was admitted into evidence and published to the members. *See* JA at 40-43. Because those allegations were not before the members, they are not at issue in this case.

310, 316 (C.A.A.F. 2025). The military trial judge stated, “I am going to overrule your objection, Defense Counsel. I do find under the applicable rights of allocation [sic] of a victim in an unsworn statement, that this reasonably falls within the scope of both destruction of property specification or continuing course of conduct and/or the fraternization specification.” JA at 362. As a result of the military judge’s ruling, AC provided the above-referenced unsworn victim impact statement to the panel members. JA at 364-66.

On appeal, the AFCCA initially found that the Defense affirmatively waived any objection to any portion of the R.C.M. 1001(c) unsworn statement other than paragraph 5. JA at 8. Regarding paragraph 5, the AFCCA acknowledged that the military trial judge’s overruling of the Defense’s objection was erroneous “*in part* because of a continuing course of conduct with the” destruction of property offense was error. JA at 8. (emphasis in original). However, the AFCCA went on to hold,

Nevertheless, applying the deferential abuse of discretion standard of review, we find the military judge did not err in finding the challenged portion of the unsworn statement was permissible because it fell “within the scope” of the fraternization offense.

JA at 9. The AFCCA reasoned that because the uncharged misconduct described by AC in her unsworn occurred during the course of the fraternization, it directly related to or arose from the fraternization offense as is required by R.C.M. 1001(c)(2)(B). *Id.* The AFCCA further held that even if this reasoning amounted to an abuse of discretion, “Appellant’s material rights were not substantially prejudiced.” *Id.*

Summary of the Argument

The military judge abused her discretion by permitting AC to use her RCM 1001(c) unsworn statement to present multiple instances of uncharged misconduct to the panel of members. RCM 1001(c) limits victim impact to harm directly relating to or arising from the offenses of which an accused was convicted; it does not permit a victim to use an unsworn statement to introduce allegations of unrelated misconduct or bad character.

The military trial judge's "continuing course of conduct" rationale for admission of the uncharged misconduct was erroneous under *United States v. Campos*, 85 M.J. 310. Nor could the allegations of uncharged misconduct be presented to the members as being directly related to the fraternization offense. That theory of admission is erroneous in that it substitutes a "but-for" causation theory of admission for RCM 1001(c)'s requirement that the asserted impact directly relate to or arise from the convicted offense.

The error extended beyond the paragraph specifically challenged at trial. Although the AFCCA treated Appellant's remaining objections as waived, the governing law concerning the admission of uncharged misconduct in a victim's unsworn statement was unsettled at the time of trial and was subsequently resolved in Appellant's favor by *Campos*. See 85 M.J. 310.

Under this Court’s waiver jurisprudence, when a point of law was unsettled at the time of trial, but was later definitely resolved in Appellant’s favor, the situation amounts to an “exceptional circumstance” warranting the treatment of the remaining errors as forfeited, rather than waived. They are, therefore, reviewed for plain error.

Finally, the errors were prejudicial. AC’s unsworn statement placed vivid allegations of break-ins, extensive property destruction, and other violent conduct before the members—conduct substantially more serious than Appellant’s convictions—and portrayed Appellant as an uncontrolled and continuing danger to others. Against Appellant’s substantial sentencing case, those allegations were material and prejudicial. Their improper admission substantially influenced the adjudged sentence, and this Court should set aside Appellant’s dismissal.

Argument

THE MILITARY JUDGE ABUSED HER DISCRETION WHEN SHE OVERRULED THE DEFENSE’S OBJECTION AND ALLOWED THE COMPLAINANT TO RECITE MULTIPLE ALLEGATIONS OF UNCHARGED MISCONDUCT DURING HER R.C.M. 1001(c) UNSWORN STATEMENT.

Standard of Review

This Court reviews the military judge’s ruling on the admissibility of a victim’s unsworn statement for an abuse of discretion. *United States v. Cunningham*, 83 M.J. 367, 371 (C.A.A.F. 2023) (citing *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022)). “A military judge abuses his discretion when he admits evidence

based on an erroneous view of the law.” *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (citing *United States v. Barker*, 77 M.J. 377, 383 (C.A.A.F. 2018)). Additionally, forfeited issues are reviewed for plain error. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)).

Law and Analysis

The right of a victim to make an unsworn statement during sentencing is not a license to introduce unbounded allegations of uncharged misconduct. The scope of such statements is strictly controlled by the RCM 1001(c)(3) and is unequivocal: a victim’s unsworn statement “may only include victim impact and matters in mitigation.” RCM 1001(c)(3). “Victim impact,” in turn, only includes impact on the “victim directly relating to or arising from the offense of which the accused has been found guilty.” RCM 1001(c)(2)(B). The rule does not permit the introduction of aggravating evidence or character attacks disguised as victim impact. *United States v. Edwards*, 82 M.J. 239, 245 (C.A.A.F. 2022). In the instant case, the military trial judge abused her discretion when she overruled the trial defense counsel’s objection to AC’s unsworn statement under RCM 1001(c). This error substantially influenced Appellant’s sentence.

A. The introduction of uncharged misconduct via the victim’s unsworn statement was error.

The military trial judge erred in allowing the admission of multiple instances of uncharged misconduct in AC's unsworn statement. Whether the theory of admission was based on a continuing "course of conduct," or based on the instances being directly related to Appellant's fraternization offense, their admission was erroneous. Additionally, while the military trial judge only specifically analyzed the uncharged misconduct appearing in paragraph five of AC's unsworn statement, the uncharged misconduct appearing in the other parts of AC's unsworn statement were plain error.

1. Paragraph five of the unsworn statement: The military trial judge erred when she found that AC's unsworn statement "reasonably [fell] within the scope of both destruction of property specification or continuing course of conduct and/or the fraternization specification."

As the AFCCA recognized, the military trial judge's use of a "continuous course of conduct" theory to allow AC to use paragraph five of her RCM 1001(c) unsworn statement to present multiple instances of uncharged misconduct against Appellant was an abuse of discretion. JA at 8.; *United States v. Campos*, 85 M.J. at 316. But the military trial judge's other basis for admissibility—upheld by the AFCCA—that the multiple instances of uncharged misconduct described in paragraph five of AC's unsworn statement somehow were proper impact of Appellant's fraternization offense, was also error. JA at 9; 362.

Paragraph five of AC's unsworn statement states,

On other occasions during our relationship, you took your anger out on my personal vehicle and on a rental vehicle I was using after you damaged my personal vehicle. You left dents on the top of my car with your

fists, broke my steering wheel by repeatedly punching it, slashed my tire with a steak knife. You also punched and cracked the windshield of the rental vehicle that was loaned out to me. The repairs for this damage led to an increase in my insurance premium.

JA at 42; 365.

A “crime victim” is “an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty.” RCM 1001(c)(2)(A). RCM 1001(c)(2)(B) defines victim impact as “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.” In *Campos*, this Court held that “victim impact” consists of two elements: the content of the statement must relate to (1) the offenses of which the accused has been found guilty, and (2) the impacts arising from *those specific offenses*. *Id.* Both elements are required. *Id.*

Allegations of uncharged misconduct fail this test on both elements. By definition, they do not concern the offenses for which the accused was convicted. Instead, they introduce new, unproven allegations that serve only to portray the accused as a person of bad character. This Court in *Campos* explicitly stated that “nothing in R.C.M. 1001(c) . . . authorizes a victim’s unsworn statement to be used to provide information about the accused’s bad character.” *Campos*, 85 M.J. at 315.

Further, while the military trial judge did not explain her rationale behind how these instances of uncharged misconduct arose from Appellant’s fraternization

offense beyond a conclusory statement that “I do find under the applicable rights of allocation [*sic*] of a victim in an unsworn statement, that this reasonably falls within the scope of . . . the fraternization specification,” the AFCCA opined because the fraternization involved an “illicit romantic relationship” between Appellant and AC, and at times that relationship was unhealthy and troubled, then the impact AC felt from instances during that poor relationship (regardless of whether those instances were charged) was proper R.C.M. 1001(c) victim impact. *See* JA at 9.

Such a holding is clearly erroneous. Under the AFCCA’s theory, the impact from anything that happened during the relationship would be proper R.C.M. 1001(c) victim impact as long as it can be tied to the relationship in some way. The theory amounts to a “but-for” theory of causation; but-for the fraternization, the litany of uncharged misconduct and all the resulting impacts would not have occurred. However, “but-for” theories of causation are generally not used to affix legal liability. *See Palsgraf v. Long Island R. Co.*, 248 N.Y. 339 (1928) (holding that the proximate cause of the plaintiff’s injuries was the passenger’s exploding fireworks, not the railroad guard’s actions of pushing the passenger onto the train even though but-for the guard’s action the fireworks would not have become dislodged and exploded).

It may be the case that, but for the fraternization, there would not have been a relationship between Appellant and AC; and but-for that relationship there would not

have been an argument between them; and but-for that argument Appellant would not have become upset; and but-for Appellant becoming upset he would not have allegedly damaged AC's car; and but-for the damage to AC's car she would not have made a claim with her insurance; and but-for that insurance claim AC's insurance rates would not have increased. But that does not mean that AC's increased insurance rates are directly related to or arising from the fraternization.

Whether under a theory of "course of conduct," or under a theory of directly relating to or arising from the fraternization, the military judge abused her discretion when she allowed the admission of the uncharged misconduct of paragraph five of AC's unsworn statement.

2. The admission of the uncharged misconduct in the rest of the unsworn was forfeited, not waived, error.

The law was unsettled at the time of Appellant's trial. It was then definitively settled in Appellant's favor subsequent to trial, but before completion of his appellate review. Under these circumstances, the other instances of uncharged misconduct in AC's unsworn statement are considered forfeited, rather than waived, and are, therefore, reviewed for plain error.

i. Admission of additional instances of uncharged misconduct was erroneous.

The military trial judge's erroneous allowance of the presentation of Appellant's alleged uncharged misconduct to the members was not limited to paragraph

five of AC's unsworn statement, however. In other areas of the unsworn, AC detailed:

- Appellant had the inability to control his anger (JA at 42, paragraph three; 364);
- Appellant "broke into [AC's] home without [her] permission" on multiple occasions and "trashed [her] house and destroyed a lot of [her] property." (JA at 42, paragraph three; 364);
- Following the alleged break-ins referenced above, she had "substantial emotional distress and lingering fear for [her] safety." (JA at 42, paragraph three; 364);
- Appellant broke AC's kitchen cabinet. (JA at 42, paragraph three; 364);
- Appellant "threw glassware into [AC's] backyard." (JA at 42, paragraph three; 364);
- Appellant's "inability to control [himself] or [his] rage . . . left [AC] feeling vulnerable and on edge." (JA at 42, paragraph six; 365);
- AC felt extremely humiliated, and Appellant caused "irreparable damage to [AC's] reputation." (JA at 43, paragraph 9; 365).

JA at 42-43; 364-66. For the same reasons the admission of the uncharged misconduct detailed in paragraph 5 of the unsworn statement was erroneous, the uncharged misconduct detailed in the rest of the unsworn statement was erroneous as well.

Here, the disconnect between Appellant's actual convictions and AC's unsworn statement is stark. Appellant was convicted of fraternization, cocaine use, steroid possession, violating lawful orders, and a single, limited specification of damaging non-military property. JA 19-32; 284. AC, however, was not the victim of the

drug offenses, and her unsworn statement barely touched upon the fraternization or the specific property damage of which Appellant was convicted. Instead, she provided an account of completely separate, uncharged allegations. JA 42-43; 364-366.

AC told the members that Appellant “broke into [her] house on two separate occasions,” “trashed [her] house, and destroyed a lot of [her] property.” JA at 364. This included allegations that he “broke [her] kitchen cabinets” and “threw kitchen glassware to [her] backyard.” *Id.*

These are not “impacts” arising from the convicted offenses. They are descriptions of entirely different, and potentially far more serious, uncharged crimes, such as breaking and entering or burglary. The harms AC described were impacts arising from this uncharged conduct. Her “substantial emotional distress” and fear for her safety stemmed from the alleged uncharged break-ins. *Id.* None of this was related to or arising from offenses of which Appellant was convicted. Allowing the members to hear it was a clear violation of R.C.M. 1001(c) and an abuse of discretion.

ii. There was no waiver of these additional instances of uncharged misconduct: The AFCCA’s incomplete waiver analysis was erroneous because it did not consider the “exceptional circumstance” created by *United States v. Campos*, 85 M.J. 310 (C.A.A.F. 2025), which excused the trial defense counsel’s earlier alleged waiver.

Appellant argued to the AFCCA that the military judge abused her discretion by permitting AC to refer to Appellant’s uncharged misconduct in her unsworn statement. JA at 8. With no analysis as to how the law dictated the result, the AFCCA

found that Appellant waived his objection to all the portions of the victim’s unsworn statement other than the fifth paragraph. *Id.* However, had the AFCCA performed an analysis of this Court’s jurisprudence concerning waiver, rather than just “agree[ing] with the Government that Appellant waived his objection,” *id.*, it would have been apparent that waiver did not apply to Appellant’s situation.

a. When the law was unsettled at the time of trial, but “subsequent case law opened the door” and “definitively resolved” a question of law in appellant’s favor by the time of the appellant’s appeal before appellate review, then this Court reviews under forfeiture not waiver.

Recently, in *United States v. Ford*, this Court discussed the current state of the law regarding waiver and reiterated the general rule that it is expected that counsel “object when the law is unsettled and a certain interpretation is favorable to their client.” __ M.J. __, 2026 CAAF LEXIS 570, at *9 (C.A.A.F. July 1, 2026). But, this Court went to explain an exception to this general rule; specifically, “this Court has applied forfeiture as opposed to waiver in a limited number of previous cases involving *exceptional circumstances* when a convicted servicemember had seemingly waived an issue in the context of an unsettled point of law at the time of trial.” *Id.* (emphasis added).

Although this Court did not expand upon what exactly constituted “exceptional circumstances,” it did point to two cases as examples of such exceptional circumstances. *Id.* One circumstance occurred in *United States v. Oliver*, 76 M.J. 271

(C.A.A.F. 2017), and a second that occurred in *United States v. Sweeney*, 70 M.J. 296 (C.A.A.F. 2011). *Id.*

In *Oliver*, this Court “appl[ied] forfeiture, rather than waiver, where a lesser included offense issue ‘was definitively resolved’ in the appellant’s favor by the time of the appellant’s appeal before this Court.” *Ford*, 2026 CAAF LEXIS 570 at *10 (citing *Oliver*, 76 M.J. at 274). In *Sweeney*, this Court “appl[ied] forfeiture, rather than waiver, despite the appellant’s failure to object on Confrontation Clause grounds where ‘subsequent case law opened the door for a colorable assertion of the right to confrontation where it was not previously available.’” *Id.* (citing *Sweeney*, 70 M.J. at 304).

Taking *Oliver* and *Sweeney* together, an “exceptional circumstance” that pierces concerns of waiver occurs when the law was unsettled at the time of trial, but then became settled in the appellant’s favor before review by this Court.

This reading aligns with Supreme Court precedent. *See Henderson v. United States*, 568 U.S. 266 (2013). *Henderson* involved “a substantive legal question that was unsettled at the time the trial court acted,” but “[b]efore the case was final and at the time of direct appellate review, . . . the question had become settled in the defendant’s favor.” *Id.* at 269. The Supreme Court held, in that circumstance, that the trial judge’s act was reviewable under the plain error standard. *Id.* Importantly, the Court held the error was reviewable under a plain error standard even though the

trial judge specifically drew the defense counsel's attention to the act that would later be found to be error and asked if the defense counsel opposed the trial judge's action, to which the defense counsel stated, "no." *Id.*

Specifically, the *Henderson* trial court had sentenced the appellant to an "above-Guidelines prison term" to "try to help" the appellant by making his sentence qualify him for a drug rehabilitation program. *Id.* The Supreme Court noted, "Henderson's counsel did not object. Indeed, the judge asked counsel if there was 'any reason why that sentence as stated should not be imposed.' And counsel replied, 'Procedurally, no.'" *Id.* However, after the *Henderson* sentencing proceeding was held, but before the *Henderson* appeal was heard, the Supreme Court decided a different case in which they held that it was "error for a court to 'impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation.'" *Id.* at 270 (citing *Tapia v. United States*, 564, U.S. 319, 335 (2011)). The Court of Appeals recognized the trial error in *Henderson* but found that it could not correct *Henderson's* error because at the time of the appellant's sentencing proceeding "the law in that Circuit was unsettled," and therefore the error was not plain at the time it was committed. *Id.*

The Supreme Court began its analysis by noting that a "rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been

specifically urged would be out of harmony with . . . the rules of fundamental justice.” *Id.* (citing *United States v. Olano*, 507 U.S. 724, 732 (1993)). The Court then noted that precedent dictated that when a trial court’s decision was “plainly correct at the time when the judge made the decision,” but then became error because of a later-decided case, the trial court’s decision is reviewed for plain error. *Id.* at 273-74. The Court then noted that “trial court decisions that were plainly *incorrect* at the time when the judge made the decision” were also reviewed for plain error. *Id.* (emphasis added). The Court then rhetorically questioned, if decisions that were plainly *correct* when made are reviewed for plain error, and decisions that were plainly *incorrect* are reviewed for plain error, then should not “cases in the middle—ie, where the law at the time of the trial judge’s decision was neither clearly correct nor incorrect, but unsettled” at the time of trial, though plain at the time of review be reviewed for plain error as well? *Id.* at 274. The Court answered the question in the affirmative, holding, “we conclude that whether a legal question was settled or unsettled at the time of trial, ‘it is enough that an error be ‘plain’ at the time of appellate consideration’” in order to satisfy the plain error analysis of *United States v. Olano*, 507 U.S. 725 (1993). *Id.* at 279.

Henderson is on-point with the instant case. In both cases, the trial decision that was later found to be error was made in a sentencing context, not a Constitutional context like *Oliver* and *Sweeney*. Like the defense in *Henderson*, the defense’s

attention in this case was on the trial decision that would later be found to be error; in *Henderson* the defense’s attention was drawn to the lengthening of the appellant’s sentence to engage in rehabilitation, while in the instant case the defense’s attention was on whether uncharged misconduct was admissible as “course of conduct” evidence in a victim’s unsworn. In both cases, although the defense’s attention was drawn to the decision that would later be found to be error, neither defense counsel objected to the decision. Just like *Henderson*, after Appellant’s trial, the law regarding that trial decision was definitively settled in Appellant’s favor. And now, just like the trial decision in *Henderson*, the trial decision in the instant case should be reviewed for plain error.

b. The law was unsettled at the time of Appellant’s trial.

Application of *Ford*’s exceptional circumstance principle is warranted here because, despite the Defense’s apparent waiver to most of the uncharged content in AC’s unsworn statement, the question of whether it was proper for a victim to discuss an accused’s alleged uncharged misconduct in an RCM 1001(c) unsworn statement as “course of conduct” evidence was still an unsettled area of the law at the time of Appellant’s trial. The only authority the military trial judge relied on for the propriety of the “course of conduct” theory for the admission of uncharged misconduct in an RCM 1001(c) unsworn statement was the unpublished AFCCA opinion of *Goldsmith*. Tr. 1339-41 (citing *Goldsmith*, 2023 CCA LEXIS 8). *Goldsmith*, in

turn, relied on *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)), and *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001). *Goldsmith*, 2023 CCA LEXIS 8, at *19. However, neither *Mullens* nor *Nourse* involved a victim's unsworn statement. See *Mullens*, 29 M.J. at 400; *Nourse*, 55 M.J. at 232. Indeed, no case at the time discussed a "course of conduct" theory of admission of uncharged misconduct in an RCM 1001(c) unsworn statement. Thus, the law with regard to the area was unsettled at the time the military trial judge made her ruling and the Defense made its objection.

c. The law was then definitively settled in Appellant's favor.

Around ten months after Appellant's court martial, this Court definitively settled the question of whether uncharged misconduct was allowed to be presented in a victim's RCM 1001(c) unsworn statement against an accused as a "course of conduct;" that decision was in Appellant's favor as the answer was a definitive "no." See *Campos*, 85 M.J. at 316. In *Campos* this Court held that the military judge abused his discretion in admitting "allegations of additional misconduct in the unsworn victim impact statement." *Id.* at 312.

Identical to the theory of admissibility in the instant case, the military trial judge in *Campos* specifically admitted the uncharged misconduct under a theory of "continuous course of conduct regarding similar crimes" that the appellant was charged with. *Id.* at 313. Thus, the very rationale the military trial judge used to

admit portions of AC's uncharged misconduct-laden unsworn statement was considered and rejected by this Court.

d. Because the law was unsettled at the time of trial but then became settled in the appellant's favor, waiver does not apply to this situation.

When Appellant was tried in April and May of 2024, the law was unsettled regarding whether uncharged misconduct was admissible against an accused in a victim's unsworn RCM 1001(c) unsworn statement. Less than a year later, this Court definitively decided the question in favor of Appellant. *See Campos*, 85 M.J. at 315. In light of this exceptional circumstance, analysis through the lens of forfeiture should govern those portions of AC's unsworn that were not specifically objected to, rather than strict application of waiver. Forfeited issues are reviewed for plain error. *Davis*, 79 M.J. at 331 (quoting *Campos*, 67 M.J. at 332).

B. The uncharged misconduct and the resulting impact of AC's unsworn statement substantially influenced the sentence imposed by the members.

“When a military judge has abused his discretion in rejecting objections to a victim's unsworn statement, the Court will grant relief only if the Court is persuaded that the improper portion of the victim impact statement ‘substantially influenced the adjudged sentence.’” *Campos*, 85 M.J. at 314 (citing *United States v. Hamilton*, 78 M.J. 335, 342-43 (C.A.A.F. 2019)). Four factors are considered when evaluating prejudice in victim impact statements: “(1) the strength of the Government's case;

(2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question.” *Id.* (citing *Hamilton*, 78 M.J. at 343).

When comparing the first two factors against each other, it is apparent that Appellant’s sentencing case was stronger than the Government’s. At the time of his court-martial, Appellant was a pilot who had served almost twenty-two years in the Air Force. JA at 44. In that capacity he “directly supported the Vice President, First Lady, Cabinet Secretaries, and senior U.S. government and military leaders.” *Id.* He also deployed five times and logged an additional 1,184.8 combat air hours. JA at 54. On the back end of a failed marriage, Appellant entered into a relationship with AC when he should not have. JA 45; 378-81. That relationship became “toxic” and led to several poor decisions and offenses. *Id.* However, Appellant pleaded guilty and accepted responsibility for these acts. JA at 146.

Additionally, the third and fourth factors—materiality and quality of the improper statements—factor in favor of Appellant. The materiality of the improper statements here was exceptionally high. Unlike the allegations of yelling or taking a phone in *Campos*, 85 M.J. at 317, AC’s testimony described violent, felonious conduct: breaking entering and burglarizing AC’s home, extensive property destruction, and vandalism with a weapon (“slashing my tire with a steak knife”). JA at 364-65. These are not minor acts; they paint a picture of a violent and uncontrolled individual, distinct from, and in addition to, the charged offenses. The military judge herself

confirmed their materiality when she expressly found they fell within a “continuing course of conduct.” JA at 362.

The quality of the statements was also high, as they were being delivered in front of the members by AC. The vivid and criminal allegations were powerfully prejudicial. Moreover, the military judge’s limiting instruction to the members was insufficient to cure the harm. JA at 500. An instruction cannot un-ring the bell, let alone one that paints such a wider-ranging and dark picture of an accused. Importantly, the judge’s ruling demonstrates that *she* considered the evidence material to sentencing. The instruction to the members did nothing to cure the prejudice that infected the judge’s own consideration when she erroneously admitted the statements. The error was therefore prejudicial and warrants relief.

C. Conclusion

The military judge abused her discretion when she permitted AC to deliver an unsworn statement filled with allegations of uncharged misconduct under R.C.M. 1001(c). As this Court made clear in *Campos*, such statements are strictly limited to the impacts of convicted offenses. The error was prejudicial and substantially influenced Appellant’s sentence. Appellant requests that this Honorable Court set aside the portion of his sentence requiring dismissal.

Respectfully submitted,

A handwritten signature in black ink, consisting of a large, stylized loop followed by a horizontal line and a small flourish.

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: luke.wilson.14@us.af.mil

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I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on 1 October 2026.

Respectfully submitted,

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LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: luke.wilson.14@us.af.mil

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This brief complies with the type-volume limitation of Rules 24(b)(1) of no more than 13,000 words because it contains approximately 5,959 words.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'LUKE D. WILSON', with a large, sweeping loop at the end.

LUKE D. WILSON, Lt Col, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: luke.wilson.14@us.af.mil