IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

v.

Colonel (O-6)
PRITCHARD, CHARLES L.
Military Judge
United States Army,
Respondent

Lieutenant Colonel (O-5)
DIAL, ANDREW J.
United States Army,
Real Party in Interest

REAL PARTY IN INTEREST'S REPLY TO GOVERNMENT BRIEF ON SPECIFIED ISSUE

Docket No. ARMY MISC 20220001

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

COME NOW, undersigned counsel, on behalf of the real party in interest (RPI), Lieutenant Colonel (LTC) Andrew J. Dial, and reply to the government's brief on the specified issue ordered on 23 February 2022.

A. Clause Three of Article 134, Uniform Code of Military Justice (UCMJ), demonstrates the flaw in non-unanimous verdicts.

The amicus identifies a significant, and fatal, flaw, in the government's rationale for non-unanimous verdicts. Servicemembers charged under Clause Three of Article 134, UCMJ, and civilians charged with the exact same offenses are indeed subject to very different schemes of proof for the very same crime which illustrate the lack of any rational basis for the current disparity in treatment.

The government wishes to escape the trap by asserting "the specified issue goes beyond the facts of this case and was not at issue before the military judge when he issued his ruling," (Govt. Br. on Specified Issue, pg. 3) and asking this court to "limit its holding…to the narrow facts of the RPI's case." (Govt. Br. on Specified Issue, pg. 3). But the amicus brief did what amicus briefs are supposed to do, bring to light the flaws, foibles, strengths, or the unintended consequences of, in this case, a statutory scheme. The government's real complaint is the amicus brief identified a fatal flaw in non-unanimous verdicts: They lead to disparate results when a servcemember is charged with an assimilated crime.

Indeed, the military judge identified the same flaw. He too cited to Clause Three of Article 134 in discussing the similarities and differences between courts-martial and trials. (Military Judge's Ruling, pg. 8). The military judge conducted an extensive analysis of the procedural and substantive differences between servicemembers and civilians who are charged with criminal offenses.

The military judge's review of the relevant circumstances to determine if the two groups are similarly situated was thoughtful and appropriate. Similarly, this court's consideration of the amicus' briefs will assist this court in conducting its equal protection analysis. Although Clause Three is not implicated in this case, exposing the impact Clause Three has on any notion that nonunanimous verdicts are constitutional—which is at issue—is helpful.

Military justice is ever evolving. In the beginning, military justice was narrowly confined to offenses with a military nexus, such as desertion or disobeying orders. Servicemembers were tried by civilian courts for non-military related misconduct. This includes the offense of rape, unless it occurred within the unique circumstances of military operations during a time of war. 5 Journals of the Continental Cong., 1774-1789, at 795 (1776). The first substantive revision of military justice occurred with the Articles of War in 1806, which continued to criminalize only military specific offenses. 9th Cong., 2 Stat. 367-68 (1806). In 1916, the Articles of War were amended and Congress added Article 58, which for the first time allowed servicemembers to be court-martialed for non-military, common law offenses:

> In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offense may have been committed.

Manual for Courts-Martial, United States, App. I (1917) (containing the Articles of War, as amended).

There has been a continual expansion of crimes covered by the UCMJ, culminating in the all-encompassing nature of Clause Three of Article 134, UCMJ.

What once was two different systems making servicemembers charged with crimes dissimilar to civilians charged with crimes has vanished. "[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." *Obergefell v. Hodges*, 576 U.S. 644, 674 (2015).

During hearings discussing the expansion of court-martial subject-matter jurisdiction in 1916, Brigadier General (BG) Enoch Crowder, The Army Judge Advocate General, testified that when those subject to military law are in the United States, they should have the same protections as civilians for non-military specific offenses. *Revision of the Articles of War: Hearing Before the S. Subcomm. On Military Affairs*, 64th Cong. 88-89 (1916). Another revision to the Articles of War occurred in 1919 due to concerns that the military justice system had excessive punishments without sufficient safeguards and military members' Constitutional rights lacked adequate protections. *See Establishment of Military Justice-Proposed Amendment of The Articles of War: Hearing Before the S. Subcomm. On Military Affairs*, 66th Cong. 1134 (1919). The right to a requirement of a unanimous guilty verdict must be afforded to servicemembers in light of the new insight articulated in *Ramos* and the similarity between a

servicemember charged with a crime under the UCMJ and their civilian counterpart.

B. Servicemembers charged with serious crimes under the UCMJ are similarly situated to civilians charged with serious crimes.

Amicus offers a convincing hypothetical: A servicemember is charged for mail fraud in civilian court and is thereby afforded the benefit of an impartial jury, via a requirement of a unanimous guilty verdict. In a military court, another servicemember is court-martialed under Clause Three of Article 134 for the very same charge of mail fraud but denied an impartial unanimous jury. (Amicus Br. at pg. 9). The government wants to wish away this hypothetical, claiming it is "not relevant", but the hypothetical and the government's inability to rebut it are very telling.

Beside asking this court not to "look behind that curtain," the government argues that the jurisdictional element of Clause Three of Article 134 renders servicemembers charged under that provision dissimilar to a civilian charged with the same offense. But that notion was rejected in *United States v. Rice*: "[O]ur… decision in *Leaonard*, 64 M.J. at 385, and the Supreme Court's recent decisions in *Rehaif* and *Luna Torres* make clear that there is a distinction between substantive elements and jurisdictional elements." *United States v. Rice*, 80 M.J. 36, 43 (C.A.A.F. 2020). Jurisdictional elements should not be considered when conducting a double jeopardy analysis under Article 134. *Id*. This Court should

apply the same analysis to determine whether, "in cases brought under Clause Three of Article 134, UCMJ, a servicemember is indeed similarly situated to a civilian accused of the same crime because there is no relevant distinction which distinguishes either their status or the conduct at issue." (Amicus Br. at pg. 7).

C. Convictions of servicemembers without a unanimous verdict for offenses under Clause Three of Article 134, UCMJ, implicates the due process clause of the Fifth Amendment.

Amicus offers this Court a telling example highlighting nonunanimous verdicts lack of rational basis. "[T]he Due Process Clause of the Fifth Amendment applies to a servicemember at a court-martial." *United States v. Graf*, 35 M.J. 450, 450 (CAAF 1992) *citing Middendorf v. Henry*, 425 U.S. 25, 41 (1976). In *Ramos* the Supreme Court found that "[t]he Sixth Amendment requires unanimity." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1390 (2020). This fundamental right was "incorporated against the States by way of the Fourteenth Amendment" by way of due process incorporation. *Id*. at 1391. The Court could have found that the right was incorporated under the Privileges or Immunities Clause of the Fourteenth Amendment, which was suggested by Justice Thomas. *Id*. at 1423 (Thomas concurring). However, the Court incorporated the right as a requirement under due process, implicating the Fifth Amendment Due Process Clause. In order to afford similarly situated people different due process rights, there must be a reason.

There is none in the present case, which is demonstrated by the Air Force amicus brief.

Conclusion

For the reasons outlined in the amicus' brief, the military judge's ruling and the RPI's brief in opposition the ruling of the military judge should be affirmed.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to the Army Court and Government Appellate Division on 8 March 2022.

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