IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,* *v.* Airman First Class (E-3) **THOMAS E. BARKER,** United States Air Force, *Appellant.*	**APPELLANT'S BRIEF IN SUPPORT OF THE GRANTED ISSUES** USCA Dkt. No. 17-0551/AF Crim App. No. ACM 39086

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

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WHETHER THE COURT OF CRIMINAL APPEALS IMPROPERLY CONDUCTED A REVIEW OF THE PREJUDICE RESULTING FROM THE MILITARY JUDGE'S ERRONEOUS ADMISSION OF EVIDENCE IN AGGRAVATION.

Statement of Statutory Jurisdiction

The lower court had jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1). The jurisdiction of this Court is invoked under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On 16 May 2016, Appellant was tried by a military judge alone sitting as a general court-martial at McConnell Air Force Base, Kansas. In accordance with his pleas, Appellant was found guilty of one charge and one specification each of wrongful possession and viewing of

child pornography, in violation of Article 134, UCMJ. JA 39. [1] Appellant was sentenced to a bad conduct discharge, reduction to the grade of E-1, forfeiture of all pay and allowances and confinement for 30 months. JA 64.

During trial, the military judge admitted a prosecution exhibit which purported to be three victim impact statements, over the objection of defense counsel. JA 47. Trial counsel used the victim impact statements to argue for an increased period of confinement. He specifically argued about the sexual abuse the victim suffered at the hands of her father and the impact of her images being "traded" or distributed over the internet and the impact that other men watching those images years ago had on her. JA 57-58. The Appellant was not charged with or convicted of distribution of child pornography.

On June 13, 2016, the convening authority approved the adjudged sentence. JA 18-20.

On July 7, 2017, the Air Force Court of Criminal Appeals (CCA) published its decision in this case, *United States v. Barker*, 76 M.J. 748

[1] One specification of wrongful distribution of child pornography was withdrawn and dismissed following arraignment.

(A.F. Ct. Crim. App. 2017). JA 1-12. The CCA found that the military judge abused his discretion by admitting two of the victim impact statements over the defense's objection, but held that the wrongful admission of these statements did not substantially influence the sentence adjudged and affirmed Appellant's conviction and sentence. JA 1-12.

Appellant petitioned this Court for review on August 17, 2017, and this Court granted review on October 12, 2017.

Statement of Facts

During sentencing, trial counsel offered Prosecution Exhibit 8, which was described as three victim impact statements. JA 40. The exhibit was allegedly obtained by the Federal Bureau of Investigation (FBI). JA 41. Trial counsel never contacted the affiant(s). *Id.* [2]

Defense counsel objected to the exhibit on the grounds that the statement represented a discovery violation and that the exhibit was improper under Rules for Court-Martial (R.C.M.) 1001A. JA 41-43, 45-46, 48. Specifically, defense counsel articulated: the government failed

[2] The affiant requested not to be contacted regarding her right to submit a post-trial impact statement. JA 16-17.

to provide contact information for the affiant(s), the defense had no opportunity to interview the affiant(s) (JA 42), the affiant(s) did not meet the definition of "crime victim" (JA 42), the statements were drafted prior to Appellant committing the offenses charged and were not obtained in preparation for Appellant's trial. (JA 41-43). Defense counsel also pointed out there was no evidence to prove who drafted the letters in Prosecution Exhibit 8. JA 42. Defense counsel argued the prejudicial nature of the statements outweighed any probative value. JA 46.

There is no information contained within the stipulation of fact that relates to these statements, nor is there any information indicating the statements were obtained by the FBI, or transmitted from the FBI to trial counsel. Pros. Ex. 1, JA 65-89. None of the alleged victim(s) appeared personally or by counsel at the court-martial. The statements are dated December 2011, January 2013, and September 23, 2013. The statements do not contain the affiant(s) name. JA 114-120. According to trial counsel the statements were received already redacted and the affiant(s) did not want to be contacted. JA 49. No evidence was submitted authenticating whether Prosecution Exhibit was, in fact,

obtained by the FBI, how the exhibit was obtained or how it was transmitted to government counsel. There was no evidence submitted regarding whether the statements had been altered. There was no evidence the affiant(s) was aware of Appellant's conduct or trial. The rules for sentencing relating to hearsay, foundation, and authentication were not relaxed during the government's sentencing case. JA 8. Trial counsel attempted to lay the foundation for authentication of these letters by giving proffers. JA 40-47.

The military judge overruled the defense objections and admitted the exhibit. JA 47. In his ruling, the military judge acknowledged that the legislative history indicated that the defense was correct about the intent of the rule requiring a statement to be drafted specifically for the trial where it will be used. JA 47.

During sentencing argument, trial counsel argued for increased confinement because of the statements, stating:

> I would like to introduce you to K.F. She was approximately 10 to 11 when that video was taken, and that hand on her head is her father's hand. I'm holding what's been marked as Prosecution Exhibit 8, it's been admitted into evidence as Prosecution Exhibit 8; it's a victim impact statement from K.F. She said 'They are trading around my trauma like treats at a party and it feels like I'm being raped all over again by

> every one of them. It sickens me to the core, terrifies me and makes me want to cry. So many nights I've cried myself to sleep thinking of a stranger somewhere staring at their computer with images of a naked me on the screen.'

JA 57-58.

Appellant was sentenced to a bad conduct discharge, reduction to the grade of E-1, forfeiture of all pay and allowances, and confinement for 30 months. JA 64.

Argument

I.

THE COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD FOUNDATION HAD BEEN LAID TO ADMIT EVIDENCE IN AGGRAVATION.

Standard of Review

A military judge's decision to admit or exclude evidence is reviewed for an abuse of discretion. *United States v. Olson*, 74 M.J. 132, 134 (C.A.A.F. 2015). An appellate court reviews a military judge's findings of fact for clear error, but his/her conclusions of law are reviewed de novo. *United States v. Ellerbrock*, 70 M.J. 314, 317 (C.A.A.F. 2011).

Law & Analysis

A. The letters in Prosecution Exhibit 8 were inadmissible because they did not meet the requirements of R.C.M. 1001A.

The statements in Prosecution Exhibit 8 do not meet the threshold requirements for unsworn victim impact statements under R.C.M. 1001A.

R.C.M. 1001A permits a crime victim of an offense of which an accused has been found guilty to be reasonably heard at a sentencing hearing relating to that offense. It defines a crime victim as an individual who has suffered direct physical, emotional, or pecuniary harm as result of the commission of an offense of which the accused was found guilty. R.C.M. 1001A(b)(1). The Rule allows a crime victim to make an unsworn statement at a sentencing hearing. R.C.M. 1001A(c). The unsworn statement may be made by the victim or designee and may be oral, written, or both. R.C.M. 1001A(e). A victim wishing to present an unsworn statement shall provide a copy to the trial counsel, defense counsel, and military judge. R.C.M. 1001A(e)(1). The defense is allowed to rebut any statements of facts within a victim's unsworn statement admitted into evidence under R.C.M. 1001A.

R.C.M. 1001A and Article 6b, UCMJ are derived from 18 U.S.C. § 3771(a), also known as the Crime Victims' Rights Act. The articulated rights under both statutes are similar, but are not identical. This mirrors the fact that the evidentiary standards differ in a sentencing hearing in a court-martial as opposed to a Federal district court sentencing hearing. The Manual for Courts-Martial imposes limitations on admissible evidence in sentencing proceedings that are greater than those that apply to sentencing in Federal district courts. *United States v. Wingart,* 27 M.J. 128 (C.M.A. 1988). The limitations are not irrational or arbitrary because of the absence in courts-martial of a presentence report prepared by a probation officer, the availability of extensive information in an accused servicemember's personnel records, and the participation of lay court-martial members in the sentencing process. *Wingart,* 27 M.J. at 136.

The CCA cited *Paroline v. United States*, 134 S. Ct. 1710 (2014), in its reasoning for upholding the military judge's ruling on one of the statements, stating that child pornography offenses are continuing crimes. *Paroline* is not relevant to Appellant's case, as *Paroline* dealt

with the issue of civil restitution. As such, *Paroline* has no precedential value to Appellant's case.

Appellant was found guilty of wrongful possession and viewing of child pornography, but was not found guilty of or even charged with producing or distributing child pornography. Appellant's crime began when he downloaded the child pornography and ended when he possessed the child pornography. Appellant's crime is different than the person(s) responsible for creating child pornography. Appellant's conduct was not a continuation of the original offense; the creator of the child pornography has not subsequently been charged with a crime in perpetuity relating to Appellant's actions. It is fundamentally unfair that a victim impact statement discussing the creation of child pornography and the trauma of child sexual abuse was used as evidence in aggravation against Appellant during his court-martial.

As drafted, the statements do not talk about any direct harm the affiant(s) suffered because of Appellant's crimes, as required under R.C.M. 1001A. The statements are broadly drafted to encompass all of the suffering the affiant(s) has experienced throughout her life, the affiant(s) seeking civil restitution, and the distribution of child

pornography. JA 114-120. Even page seven of Prosecution Exhibit 8, the lone statement the CCA found to be admissible within the exhibit, talks about the affiant(s) father sexually abusing her and the distribution of her recorded child sexual abuse across the internet. JA 120.

We do not even know if the statement's affiant(s) is a victim depicted in the videos and images of child pornography introduced into evidence at Appellant's court-martial. There is no evidence the statement's affiant(s) wished to have the statement considered during Appellant's sentencing hearing. The government concedes the lone child victim identified in the child pornography evidence presented at trial did not want to be contacted regarding Appellant's court-martial. JA 16-17.

The statement on page seven of Prosecution Exhibit 8 was not proper as evidence under R.C.M. 1001A. Any probative value to the statements in Prosecution Exhibit 8 are substantially outweighed by the prejudicial impact of statements because the harm the suffered by the statement's affiant(s) was never shown to be directly related to, or resulting from, the offenses of which the Appellant was found guilty.

B. The victim impact statements were inadmissible because the government did not lay proper foundation.

Sentencing evidence is subject to the requirements of Mil. R. Evid. 403. *United States v. Hursey*, 55 M.J. 34, 36 (C.A.A.F. 2001) (citing *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995)).

Authentication is a precondition to the admission of an item of evidence. The requirement of authentication is satisfied when the party offering the evidence "produce[s] evidence sufficient to support a finding that the item is what the proponent claims it is." Mil. R. Evid 901(a).

During sentencing, the government offered what appeared to be three separate statements as a single Prosecution Exhibit. JA 40. The CCA found that only page seven of Prosecution Exhibit 8 met the foundational requirements to be properly admitted. *Barker*, 76 M.J. 748 at (A.F. Ct. Crim. App. 2017). JA 1-12. Page seven of Prosecution Exhibit 8 discusses the impact the affiant(s) suffered from enduring child sexual abuse and having multiple individuals view that abuse. A significant portion of the statement also discusses the distribution of images. Pros. Ex. 8 at 7, JA 120. Appellant was not charged with nor convicted of distribution of child pornography. JA 39. Uncharged

misconduct is not admissible at sentencing unless is constitutes "aggravating circumstances" within the meaning of R.C.M. 1001(b)(4). *Wingart*, 27 M.J. at 136 (C.M.A. 1988). Here, any reference to the impact of distribution was inadmissible and unfairly prejudicial.

The letter from the affiant(s) lacked the foundational requirements necessary to be admitted as evidence in aggravation under R.C.M. 1001A. There was no evidence the statement's affiant(s) is a victim depicted in the child pornography introduced into evidence at Appellant's court-martial. There is also no way of knowing whether the statements had been altered.

C. The victim impact statements were inadmissible because they lacked reliability.

Even if the statements were to be found properly authenticated, this does not mean they would be considered reliable. The statements admitted into evidence appear to have been written many years ago and do not offer any insight into whether the affiant(s) still feel the same way as when the letters were written. It would violate Appellant's due process rights to introduce the same victim impact statements during Appellant's sentencing hearing that were used during the child

pornography creator's sentencing hearing several years prior. Procedural due process requires that the evidence introduced in sentencing meet minimum standards of reliability. *United States v. McDonald*, 55 M.J. 173, 177 (C.A.A.F. 2001).

Trial counsel had multiple avenues to lay the proper foundation for these statements. Trial counsel could have called the victim to testify in person. Trial counsel could have called the victim to testify telephonically. Trial could have included a paragraph in the stipulation of facts. Trial counsel could have obtained an affidavit from the victim or victim's legal representative. The government did none of these things. At trial the government proffered the letters were received from the FBI and did not introduce anything to corroborate this proffer. Recitations by counsel do not qualify as an "offer of proof," to satisfy the evidentiary requirements to introduce an exhibit in a court-martial, *United States v. Thompson,* 11 C.M.A. 252 (C.M.A. 1960).

The CCA conceded the purported victim impact statements lacked foundation in its opinion, stating:

> "None of the unsworn statements are self-authenticating and the Prosecution offered no evidence, other than the redacted statements themselves (with their redacted titles), to

> establish that the statements are relevant to Appellant's court-martial, to authenticate them as letters written by one of his victims, or to indicate that the victims desired to exercise their right to be reasonably heard at Appellant's sentencing hearing through the statements."

JA 9.

The affiant(s) states on page seven of Prosecution Exhibit 8 that she has an attorney to keep her up to date on any case involving computer images of her abuse on the internet. JA 120. However, the government never contacted that attorney. The government conceded that the victim they mentioned during sentencing proceedings, K.F., did not want to be contacted regarding Appellant's court-martial. J.A. 16-17. There was no evidence the affiant(s) even knew about Appellant's court-martial.

Page seven of Prosecution Exhibit 8 is dated January 13, 2013, which would have been over 3 years before Appellant's court-martial. There was no evidence to show the affiant(s) still felt the same way as when she wrote the statement 3 years prior and that she wanted to participate in Appellant's sentencing hearing. The defense was never given any contact information to contact the affiant(s) or her representative and as a result had no opportunity to rebut any

information in Prosecution Exhibit 8 during trial.

The military judge erroneously applied the law when admitting Prosecution Exhibit 8 into evidence and the CCA erred when it held that page seven of Prosecution 8 was properly admitted into evidence. Setting a precedent which allows the government to admit evidence in aggravation without laying the proper foundation will create a fundamentally unfair sentencing proceeding for all future courts-martial.

WHEREFORE, this Court should find the Air Force Court of Criminal Appeals erred when it held proper foundation had been laid to admit evidence in aggravation. In light of this, this Court should set aside the sentence.

II.

THE COURT OF CRIMINAL APPEALS IMPROPERLY CONDUCTED A REVIEW OF THE PREJUDICE RESULTING FROM THE MILITARY JUDGE'S ERRONEOUS ADMISSION OF EVIDENCE IN AGGRAVATION.

Standard of Review

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially

prejudices the substantial rights of the accused." *United States v. Berry*, 61 M.J. 91, 97 (C.A.A.F. 2005) (quoting Article 59(a), UCMJ, 10 U.S.C. § 859). The government must demonstrate that "the error did not have a substantial influence on the findings." *Id.* (citation omitted). When deciding whether the government has met its burden of proof, this Court should consider four factors: "(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." *Berry,* 61 M.J. at 98.

Law & Analysis

Prosecution Exhibit 8 provided a face to the government's sentencing case. The remainder of the government's sentencing evidence was documentary and digital evidence. The government compiled statements they proffered to be victim impact statements and failed to give the defense counsel any identifying information for these letters in discovery.

As a result of having no point of contact information for these letters, the defense had no way to rebut this evidence. The admission of this evidence allowed trial counsel to humanize a victim…a victim

that was not even identified to the defense.

The government never contacted the affiant(s) or her legal representative in preparation for Appellant's sentencing hearing. Nevertheless, trial counsel talked about K.F. personally during the sentencing argument stating, "I would like to introduce you to K.F…" JA 57-58. Prosecution Exhibit 8 included the discussion of distribution of child pornography and child sexual abuse—crimes Appellant was never charged with nor convicted of. JA 114-120. Trial counsel used the contents of these purported victim statements when articulating the government's sentence recommendation, arguing K.F. felt victimized by Appellant. JA 57-58. However, the SJAR states that K.F. did not want to be contacted regarding Appellant's court-martial (JA 16-17) and there is nothing to corroborate trial counsel's proffers that K.F. even wanted to participate in Appellant's court-martial.

Prosecution Exhibit 8 and every statement therein was also available for the military judge to consider during his sentencing deliberations. "When a fact was already obvious from testimony at trial and the evidence in question would not have provided any new ammunition, an error is likely to be harmless. Conversely, when the

evidence does provide new ammunition, an error is less likely to be harmless." *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007).

The statements in Prosecution Exhibit 8 are broadly drafted to encompass all of the suffering the affiant(s) experienced throughout their lives. The statements talk about images of child sexual abuse being circulated on the internet, the distribution of child pornography, the affiant(s) seeking civil restitution, and the affiant(s) father sexually abusing her. JA 114-120. There is nothing within any of these statements that mention the Appellant and none of the statements talk of a desire to participate in Appellant's sentencing hearing. Stated another way, the harm suffered by the person(s) who wrote the statements was never shown to be directly related to, or resulting from, the offenses of which the Appellant was found guilty, as required under R.C.M. 1001A.

Any probative value to the statements in Prosecution Exhibit 8 are substantially outweighed by the prejudicial impact of statements that discuss the trauma from years prior, resulting from other crimes. Uncharged misconduct is not admissible at sentencing unless is constitutes "aggravating circumstances" within the meaning of R.C.M.

1001(b)(4). *Wingart*, 27 M.J. at 136. The reference to the impact of distribution was inadmissible and unfairly prejudicial.

The letters submitted as victim impact statements were not proper as evidence under R.C.M. 1001A. We do not even know if the affiant(s) of the statements are the original victims of the child pornography introduced into evidence at Appellant's court-martial. The government concedes the lone victim identified in the child pornography did not want to be contacted regarding Appellant's court-martial. JA 16-17.

The admission of the impact statements personalized the crimes the accused committed, but also went further than that. The statements gave information to the military judge that were not relevant to the offenses Appellant was found guilty of. The statements were purportedly from a child sexual assault victim and talk about the ongoing trauma of being a child sexual assault victim.

The military judge conceded a victim's unsworn statement must be written specifically for an accused's court-martial and the victim must communicate a desire to be heard at that hearing. JA 46-47. The affiant(s) in this case did not draft an impact statement for Appellant's

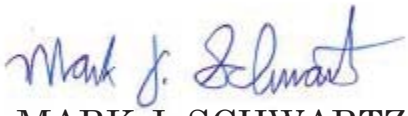
court-martial; the affiant(s) in this case did not even want to participate in Appellant's court-martial. JA 16-17. Nevertheless, the military judge admitted Prosecution Exhibit 8 into evidence and considered the statements therein as evidence in aggravation during his deliberations. It is without question that Prosecution Exhibit 8 was material evidence for Appellant's sentencing hearing. The government weaved in the contents of Prosecution Exhibit 8 into his argument. The government specifically talked about K.F., the purported affiant(s) of one the statements, discussing her father sexually abusing her and the distribution of her recorded child sexual abuse on the internet. JA 57. The government argued that sentencing Appellant to a lengthy confinement sentence would give K.F. justice. JA 58. This exhibit affected the sentencing proceedings and had a significant impact on the military judge's deliberations, ultimately to the detriment of Appellant. The erroneous admission of material evidence alone can substantially sufficient to prejudice the substantial rights of an accused. *United States v. Bowen*, 76 MJ 83 (C.A.A.F. 2017).

The presumption is that military judges will correctly follow the

law, which would normally result in no legal error, not that an acknowledged error is harmless. The presumption cannot somehow rectify the error or render it harmless. *United States v. Hukill*, 76 M.J. 219, 223 (C.A.A.F. 2017). Here, the Government cannot demonstrate that the erroneously admitted evidence did not substantially influence the military judge in his deliberations.

WHEREFORE, this Court should find the Air Force Court of Criminal Appeals improperly conducted a review of the prejudice resulting from the military judge's erroneous admission of evidence in aggravation. In light of this, this Court should set aside the sentence.

Respectfully Submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on November 8, 2017 and that a copy was served via electronic mail on the Air Force Appellate Government Division on November 8, 2017.

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