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, *Airman Barker.*	**REPLY TO GOVERNMENT ANSWER** 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

Pursuant to Rule 19(a)(7)(B) of this Court's Rules of Practice and Procedure, Airman First Class Thomas E. Barker, the Appellant, hereby replies to the government's brief concerning the granted issues, filed December 8, 2017.

I.

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

R.C.M. 1001A was enacted to give crime victims an opportunity to be reasonably heard during a sentencing hearing. R.C.M. 1001A(b)(4)(B) defines the right to be reasonably heard as including the

right for a victim to make an unsworn statement during sentencing in a non-capital case. A crime victim must assert a desire to participate, directly or through counsel, in order to present a sworn or unsworn statement during a sentencing hearing. R.C.M. 1001A(e)(2) empowers a victim and a victim's counsel, but these rights do not extend to a trial counsel to submit victim impact statements on their own volition.

There was no evidence that someone came forward expressing a desire to exercise her right under R.C.M. 1001A to submit an unsworn statement during Airman Barker's sentencing hearing. In fact, the government conceded during Airman Barker's courts-martial that K.F. did not want to be contacted regarding Airman Barker's courts-martial. JA 16-17. Nevertheless, the government still attempted to introduce a victim impact statement purporting to be from K.F. at Airman Barker's sentencing hearing. The letter was written at least three years before Airman Barker's courts-martial. There was no evidence to show the affiant still felt the same way as when she wrote the statement. In her letter, the affiant mentioned being represented by an attorney, yet there was no evidence the government ever contacted this attorney. The Defense was never given any information whereby to contact the affiant

or her legal representative to ascertain the authenticity of this letter. Appellee cites to *United States v. McDonald*, 55 M.J. 173 (C.A.A.F. 2001), in support of its argument that the Confrontation Clause does not apply during a sentencing hearing. Gov't Ans. at 14. However, it held Procedural Due Process requires that the evidence introduced in sentencing meet minimum standards of reliability. *McDonald,* 55 M.J. at 177. *McDonald* differs from Airman Barker's case because in *McDonald* there was no evidence to suggest the victim's father's testimony was unreliable or his identity questioned. *Id.* at 177. The reliability and authenticity of the letters in Prosecution Exhibit 8 for Airman Barker's case are being questioned. Airman Barker's trial Defense counsel questions the identity of the author and the accuracy of the letters in Prosecution Exhibit 8. JA at 41-42. Appellee cites *United States v. Lubich*, 72 M.J. 170 (C.A.A.F. 2013) in its position that proffers alone can establish the proper authentication of evidence. Gov't Ans. at 28. However, in *Lubich,* there was an NCIS cyber forensic examiner testifying while the government moved to introduce the exhibit, consisting of computer generated data the witness had personally analyzed, which is wholly different than the unfounded

proffers delivered by the government to admit a written letter during Airman Barker's sentencing hearing. *Id.* at 171-173. The admission of evidence during a sentencing hearing hinges on its accuracy and reliability, whether it be a Prosecution Exhibit or a Defense Exhibit after the rules are relaxed. *United States v. Boone*, 49 M.J. 187, 198 n.14 (C.A.A.F. 1998)(quoting David A. Schlueter, *Military Criminal Justice: Practice and Procedure* § 16-4(B) at 721 (4th ed. 1996)). The proffers by trial counsel alone during Airman Barker's sentencing hearing did not meet the minimum standards of reliability, and therefore, Prosecution Exhibit 8 should not have been admitted into evidence.

As discussed in Airman Barker's Brief, the government did not have to attempt to introduce victim unsworn statements under R.C.M.1001A using only verbal proffers as the foundation for their introduction. The government had other avenues they could have used to get these statements into evidence, which included simply putting a paragraph in the stipulation of facts or getting an affidavit from the victim's legal representative.

Appellee cites many cases which highlight how the Federal court

system handles sentencing hearings. Gov't Ans. at 17-20. As discussed in Airman Barker's Brief, the Federal criminal sentencing process differs in many ways from military courts-martial sentencing hearings. Evidentiary standards also differ in a courts-martial sentencing hearing 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 courts-martial members in the sentencing process. *Wingart,* 27 M.J. at 136.

R.C.M. 1001A(e) provides that a designee may be appointed under R.C.M. 801(a)(6) in the event a victim is under eighteen years of age, incompetent, incapacitated or deceased and such designee may provide the unsworn statement on behalf of the victim. R.C.M. 1001A(e)(2) permits the victim's counsel to deliver a victim's unsworn statement

upon a showing of good cause.

The appointment of a designee would have ensured a fair process for Airman Barker. The questions arising from this record of trial on whether the letter's affiant was the person depicted in the child pornography, whether that person wanted to participate in Airman Barker's sentencing hearing, if the affiant still felt the same way today as she did when she wrote the letter, and if the affiant is even still alive, would have been answered.

Airman Barker's trial Defense counsel objected to Prosecution Exhibits 8, 9, and 10 for a myriad of reasons. JA at 41. The Defense counsel's initial objection was that there was a discovery violation, however, he discusses the rest of his objections in some length. The discussion of Defense counsel's objections with the military judge and trial counsel cover over 8 pages of the trial transcript. JA at 41-49. Defense counsel states he didn't know who the individuals are in the statements, (JA at 41) he didn't have contact information for the authors, (JA at 41) and as a result, does not know who the author is. JA at 42. Defense counsel gave an analogy that character letters submitted by an accused as evidence in mitigation require identifying

information to ensure the reliability of the letters submitted as evidence. JA at 42. Defense counsel also lodged objections that these letters were not proper to be admitted under R.C.M. 1001A because there was no evidence the affiant knew about Airman Barker's courts-martial, the affiant wanted to participate in Airman Barker's courts-martial, or if the affiant still felt the same way she did when she wrote the letter three years earlier. JA at 42. It is very clear from the record that Defense counsel was not only objecting to the government's discovery violation, but also objecting for lack of foundation, authentication, and the letters were overly prejudicial. JA at 41-49. The objections stated by Defense counsel meet the threshold set in *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2008).

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

Appellee cites to *United States v. Saferite*, 59 M.J. 270, 275 (C.A.A.F. 2004), in discussing the prejudice to Airman Barker as a result of the erroneous admission of evidence in aggravation. Gov't Ans.

at 36. *Saferite* differs from Airman Barker's case, as it deals with the prejudice resulting from the government introducing evidence of a character witness' bias during a sentencing hearing, specifically the Appellant's spouse. *Saferite,* 59 M.J. at 271. The government's evidence in aggravation introduced in *Saferite* did not humanize the accused's crimes, nor did it highlight harm done to a child from sexual abuse. Appellee further claims that C.A.A.F's prejudice analysis in *Saferite* is on point in looking at the how the military judge's err prejudiced Airman Barker. Gov't Ans. at 36. However, the prejudice analysis used in *Saferite* is not on point to Airman Barker's sentencing hearing because the Appellant in *Saferite* was tried by a panel of officer members. *Id.* at 271.

Appellee next cites to *United States v. Gomez*, 76 M.J. 76 (C.A.A.F. 2017), which differs from Airman Barker's case because the accused's Defense counsel did not object to this testimony or cross-examine the victim. Gov't Ans. at 36-37. As a result, the Court used the plain error standard to determine any prejudice. *Gomez,* 76 M.J. at 80. The trial transcript in *Gomez* also reflected that there were additional victims that provided compelling testimony about the serious impact the

Appellant's crimes had on them. *Id.* at 80. There was no victim testimony during Airman Barker's sentencing hearing. The only additional evidence admitted during the government's sentencing case were Letters of Counseling and Reprimand for failing to pass the Air Force fitness test and enlisted performance reports, none of which were aggravating at all. JA at 92-113. Prosecution Exhibit 8 humanized Airman Barker's crimes and gave trial counsel ammunition he otherwise would not have had access to when delivering his sentencing argument. The overbreadth of the letters in Prosecution Exhibit 8 extrapolate on crimes beyond what Airman Barker was convicted of and even discuss the sexual abuse the affiant suffered at the hands of her father. JA at 114-120. An error is less likely to be harmless when it provides new ammunition at a courts-martial. *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007). The referencing of distribution of the victim's child sexual abuse put uncharged misconduct and/or the criminality of others in the purview of the military judge to consider during his sentencing deliberations. The prejudice to these statements in Prosecution Exhibit 8 substantially outweigh whatever probative value they have. 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.

Appellee cites to *United States v. Cacy*, 43 M.J. 214 (C.A.A.F. 1995) in support of its position any prejudice to Airman Barker was diminished by the fact that he was sentenced by a military judge alone. Gov't Ans. at 37. However, *Cacy* differs from Airman Barker's case in that this court held the Appellant opened the door to the expert testimony and thus the military judge allowing this testimony was not obvious error. *Cacy*, 43 M.J. at 218. Military judges are given a presumption that they will correctly follow the law, until they are found to have incorrectly followed the law. This presumption is not absolute and cannot make an error harmless *sua sponte*. *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.

In the event this Court concludes this should be viewed under the plain error standard, the military judge's err rises to this level. The military judge took the proffers of trial counsel as the sole basis for the foundation in admitting evidence in aggravation during Airman

Barker's sentencing hearing. There is nothing in the record that trial counsel provided Airman Barker's Defense counsel with proper contact information to the F.B.I. There is no identifying information on the face of the letters in Prosecution Exhibit 8. JA at 113-120. Airman Barker's Defense counsel states there was no way of knowing who wrote these letters and where these letters actually came from. JA at 41-42. The admission of Prosecution Exhibit 8 humanized Airman Barker's crimes and gave information to the military judge that was not relevant to the offenses Airman Barker was found guilty of. The statements talk about the distribution of child pornography and the ongoing trauma of being a child sexual assault victim, neither of which are offenses in which Airman Barker was convicted of.

The erroneous admission of material evidence alone can be sufficient to prejudice the substantial rights of an accused. *United States v. Bowen*, 76 M.J. 83 (C.A.A.F. 2017). This Court held in *United States v. Reyes*, 63 M.J. 265 (C.A.A.F. 2006) that a military judge's err in admitting documentary evidence during a sentencing hearing was enough to establish prejudice to the Appellant under the plain error standard. *Reyes,* 63 M.J. at 267.

WHEREFORE, this Court should set aside the sentence.

Respectfully Submitted,

MARK J. SCHWARTZ, Captain, USAF
U.S.C.A.A.F. Bar No. 35679
Appellate Defense Counsel
Air Force Airman Barker Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Office: (240) 612-4770
mark.j.schwartz7.mil@mail.mil

Counsel for Airman Barker

CERTIFICATE OF FILING AND SERVICE

I certify I electronically filed a copy of the foregoing with the Clerk of Court on December 18, 2017 and that a copy was served via electronic mail on the Air Force Appellate Government Division on December 18, 2017.

Respectfully Submitted,

MARK J. SCHWARTZ, Captain, USAF
U.S.C.A.A.F. Bar No. 35679
Appellate Defense Counsel
Air Force Airman Barker Defense Division
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
Office: (240) 612-4770
mark.j.schwartz7.mil@mail.mil