IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 17-0551/AF
Airman First Class (E-3) THOMAS E. BARKER, USAF *Appellant.*	)	Crim. App. No. 39086

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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Appellant.	)	

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

ISSUES PRESENTED

I.

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

II.

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 Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This

Honorable Court has jurisdiction to review this issue under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted except for Appellant's characterization of the facts surrounding the admission and use of the disputed evidence at trial. (*See* App. Br. at 2.)

STATEMENT OF FACTS

On 16 May 2016, Appellant was convicted, pursuant to his pleas, of one specification of wrongful possession of child pornography and one specification of wrongful viewing of child pornography, in violation of Article 134, UCMJ. (JA at 39.) As part of a pretrial agreement entered into by Appellant, he agreed to plead guilty to the above specifications in exchange for the dismissal of a specification of wrongful distribution of child pornography and for no confinement to be approved in excess of four years. (JA at 140-45.)

During his providence inquiry, Appellant admitted to intentionally seeking out, downloading, and viewing images and videos of child pornography. (JA at 16, 23.) He further admitted that he downloaded images and videos of young boys and girls engaged in sexual acts or poses for their shock value. (JA at 28.) As part of his pretrial agreement, Appellant also agreed to a stipulation of fact detailing his offenses. (JA at 65-89.) Paragraph 11 of the stipulation describes one of the

videos possessed and viewed by Appellant and names the girl in the video as KF. (JA at 68.) It states that the video viewed by Appellant "corresponds to the National Center for Missing and Exploited Children (NCMEC) series 'Vicky,' and is one video among many that her father created over a two-year period when KF was 10-11 years old. The Accused viewed this video on at least one occasion during the charged timeframe." (Id.)

As part of its sentencing case, the United States moved to admit Prosecution Exhibits 8, 9, and 10. (JA at 40-41.) Prosecution Exhibit 8 contained three separate victim impact statements written by KF, who is referenced in the stipulation of fact as being the subject of the "Vicky" child pornography series. (JA at 40, 68.) The third victim impact statement, dated 31 January 2013 states:

> I am making this supplement to my prior Victim Impact Statement to make clear that each additional time that another person downloads and sees the computer images that are now known as the "Vicky series" it does me immeasurable additional harm. I am hurt every time I hear about another criminal case that involves my images.

(JA at 120.) Prosecution Exhibit 9 contained a victim impact statement written by KF's mother, and Prosecution Exhibit 10 represented a statement written by KF's stepfather. (JA at 41.)

Defense counsel objected to the introduction of these three exhibits. (JA at 41.) Specifically, defense counsel objected under three grounds: (1) that the

victim statements constituted a discovery violation by the United States; (2) that they were not proper to be admitted under R.C.M. 1001A; [1] and (3) that the statements failed the balancing test under Mil. R. Evid. 403.

Defense counsel first objected that the United States had committed a discovery violation with the victim statements, arguing that the defense had not received any notice of statements that would be introduced. (JA at 41.) The defense further argued, "I think it's a basic discovery violation for a couple of reasons. One, is I don't know who the individuals even are in these statements. Two, I don't have any contact information for these individuals." (Id.) The defense explained that, due to the lack of contact information, they could not effectively rebut the statements. (JA at 41-42.) In response, the United States argued that defense counsel had previously been provided the statements and that trial counsel had notified the defense counsel the week before of the intention to introduce them as evidence. (JA at 44.) Based upon the privacy interests of victims in this type of case, the United States maintained that it would not be appropriate to provide the victims' contact information to the defense. (Id.) As such, the United States had provided the contact information for the Federal Bureau of Investigation (FBI), from which the Government had obtained the statements. (Id.) Defense counsel then rebutted that the rules on discovery do not

[1] The record of trial references R.C.M. 1001(A); however, from the context, it is clear that counsel and the military judge were referring to R.C.M. 1001A.

allow the Government to require the defense to contact the FBI to try to get contact information. (JA at 45.)

After the military judge's ruling on the evidence, which will be outlined in detail below, the defense requested the ability to provide a further proffer of information concerning this issue of discovery. (JA at 48.) Defense counsel proffered that after sending a discovery request to the prosecution and receiving the victim impact statements, he asked for the victims' contact information. (Id.) He was told that he could contact the FBI to try and get that information. (Id.) Trial counsel responded to defense counsel's proffer that the victim impact statements had been provided to the defense over a month previously and that trial counsel had notified the defense of the intent to admit the exhibits during sentencing. (JA at 49.) Trial counsel stated that the victim's contact information was not even made available to the prosecution and that the statements came already redacted from the FBI so that the victim would not be repeatedly contacted about cases. (Id.) Defense counsel then argued once again that providing a victim statement with neither identifying nor contact information did not fulfill the Government's discovery obligations. (Id.) The military judge noted these additional arguments, but did not amend his prior ruling. (Id.)

The defense's second objection was that the victim impact statements failed to meet requirements under R.C.M. 1001A. In that regard, the defense argued that

the victims would not be considered as "crime victims" for purposes of that Rule, because they did not suffer direct physical, emotional, or pecuniary harm resulting from Appellant's offenses of viewing and possession. (JA at 42-43.) Also, defense argued that the victim impact statements were written before Appellant's crime, that the victims were not even notified about the proceeding or given the opportunity to be present, and that it did not make sense to allow a victim impact statement be used in perpetuity. (Id.) Defense counsel further submitted Appellate Exhibit IV for the military judge to consider, which appeared to be some kind of guidance on victim impact statements under 18 U.S.C. § 3771(a). (JA at 43.) Counsel maintained that R.C.M. 1001A had been based off this statute and that the guidance memorandum required that victim impact statements not be re-used, but instead obtained anew for each defendant sentenced. (Id.) The defense also contended that the victim statements had all been sworn to, yet the defense did not have the opportunity to speak to the victims. (JA at 43-44.)

Regarding R.C.M. 1001A, the United States argued that KF, her mother, and her stepfather did suffer direct harm by being re-victimized by Appellant downloading and viewing KF's images. (JA at 44.) Trial counsel also argued that these victim impact statements were not being re-used in multiple courts-martial, and if they prosecuted another child pornography offender, they would submit a new request to the FBI for statements. (R. at 45.) Trial counsel stated that

although the victim impact statements contained verbiage indicating that they were sworn statements, the prosecution agreed to treating the statements as unsworn. (Id.) Lastly, trial counsel argued that under Article 6b, UCMJ, KF, along with her mother and stepfather, were victims entitled to be reasonably heard at sentencing. (Id.)

Defense counsel provided rebuttal argument that R.C.M. 1001A(a) requires trial counsel to ensure a victim is aware of the right to be heard, while in this case, none of the victims had been contacted before their statements were used. (Id.) Trial counsel then explained that, based upon the nature of these type of cases, victims provide impact statements to the FBI to maintain on file for future prosecutions. (JA at 46.)

The defense's third objection came under Mil. R. Evid. 403. Defense counsel argued that the statements were "more prejudicial than probative," because the letters discussed people creating and distributing child pornography videos, which Appellant was not convicted of. (JA at 46.) The Government countered that the victim statements were prejudicial for Appellant, "but they're not unduly prejudicial." (Id.) Trial counsel continued that the statements were probative, because they showed "the exact harm that this child victim suffered and continues to suffer as a result of Airman Barker's actions and those -- those like him." (Id.)

After hearing counsel's arguments on both sides, the military judge issued his ruling. As pertaining to Prosecution Exhibit 8, consisting of three statements written by KF, the military judge found that KF would qualify as a "crime victim" under R.C.M. 1001A, as victims of child pornography cases are re-victimized by the downloading and viewing of their images and videos. (JA at 46-47.) The military judge also found that R.C.M. 1001A does allow submission of unsworn statements by "crime victims." (JA at 47.) The military judge explained that the way the rule is drafted provides "enough leeway with regards to the form of the victim impact statements, and the unsworn statements, that I am going to allow Prosecution Exhibit 8 for identification as a victim -- an unsworn victim impact statement of V.F. [sic], the alleged victim in many of these videos." (Id.) As pertaining to the objection under Mil. R. Evid. 403, the military judge conducted a balancing test where he concluded that the probative value was not substantially outweighed by danger of unfair prejudice, because "it is a victim impact statement which is related to the videos that the accused is known to have and has pled guilty to possessing." (Id.) Regarding the objection due to a discovery violation, the military judge stated that he had no evidence other than proffers of counsel and, therefore, had insufficient evidence to find that the Government had committed a discovery violation. (Id.)

Based upon the above rationale, the military judge admitted Prosecution Exhibit 8, the three victim impact statements from KF, as evidence. (Id.) However, the military judge did not admit the statements from KF's mother and stepfather, ruling that they did not fit under the definition of "crime victim" in R.C.M. 1001A. (JA at 48.)

During the course of the Government's sentencing argument, which takes up approximately four pages in the record of trial, trial counsel briefly alluded to the statements written by KF:

> I would like to introduce you to KF. 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 KF. 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." Your Honor, Airman Barker is that stranger. And seven years confinement gives KF some justice, but there are dozens and dozens of other children involved here as well.

(JA at 63-64.) No other references were made to KF or her victim impact statements during counsels' sentencing arguments. Trial counsel argued for a punishment of reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for seven years, and a dishonorable discharge. (JA at 62.)

After deliberations, the military judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 30 months, and to a bad-conduct discharge. (JA at 72.)

On appeal at AFCCA, Appellant raised the issue of whether the military judge erred in admitting Prosecution Exhibit 8. In their published opinion, AFCCA stated it will "address for the first time whether a victim impact statement written before an accused wrongfully possesses or views child pornography is admissible as an exercise of a victim's right to be reasonably heard at a sentencing hearing." United States v. Barker, 76 M.J. 748, 751 (A.F. Ct. Crim. App. 2017). In its opinion, AFCCA first determined that a minor depicted within an image of child pornography does constitute a "crime victim" under R.C.M. 1001A. Id. at 753. AFCCA then held that:

> In continuing crime cases, such as possession and viewing of child pornography, there is no requirement that a victim prepare a separate statement for each individual case. Moreover, the fact that a victim impact statement was authored before an accused's criminal acts does not necessarily make the statement irrelevant to the accused's offenses. However, there must be some evidence establishing a foundational nexus between the victim impact described in the statement and the subsequent offenses committed by the accused. The evidence must establish that the accused's offenses impacted the victim at some point in the manner described in the statement, whether or not the victim continues to be impacted to the same degree, or even it [sic] all, by the time of trial. The fact that the victim may be suffering a lesser impact at the time of trial does not

> necessarily make the statement stale, but it may be a matter in mitigation.

Id. at 754-55. AFCCA also directed that when conducting the balancing test under Mil. R. Evid. 403 in these type of cases, military judges should consider, "the length of time since the statement was authored and the degree of lessened victim impact (if any) by the time of trial." Id. at 755.

AFCCA ultimately held that the military judge had erred in admitting two of the three statements written by KF, as there was no information contained within them that linked them to KF or the "Vicky" series. Id. at 755-56. However, the statement dated 31 January 2013 did reference the "Vicky" series, tying it to paragraph 11 of the stipulation of fact, where Appellant admitted to viewing a video of KF from the "Vicky" series. Id. The Court also found sufficient evidence to show that KF intended her January 2013 statement be used for sentencing purposes. Id. at 756. Although AFCCA concluded that the military judge erred in admitting the other two statements, it did not find that Appellant had been prejudiced in any way. Id. at 757.

SUMMARY OF THE ARGUMENT

AFCCA correctly held that R.C.M. 1001A allows for the introduction of victim impact statements in child pornography cases, even in cases where the accused has been only charged with possessing or viewing images of child pornography containing the victim. Extensive federal case law has established that

children appearing in images of child pornography are directly harmed and re-victimized by those who download and view their images. Therefore, these victims would be considered "crime victims" under R.C.M. 1001A(b)(1). Furthermore, R.C.M. 1001A contains no prohibition, under these circumstances, against using a victim impact statement that has been written before the offenses have been committed by the accused.

As R.C.M. 1001A contemplates the admission of the type of victim impact statements admitted in this case, AFCCA correctly affirmed the introduction of the January 2013 victim impact statement written by KF. Additionally, the January 2013 statement was sufficiently authenticated, because, on its face, the statement was written by the subject of the "Vicky" series. Within his stipulation of fact, Appellant admitted to viewing a video from this series containing images of KF. Appellant never objected to the authentication of the victim witness statement, thus bringing this error under a plain error analysis.

Finally, regardless of whether or not the January 2013 victim impact statement was admitted in error, Appellant was not prejudiced in the sentence he received. Appellant stood convicted of serious crimes, and there is no indication that the military judge was unduly influenced by this victim impact evidence.

ARGUMENT

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR IN DETERMINING THAT THE FOUNDATION HAD BEEN LAID FOR THE ADMISSION OF THE JANUARY 2013 VICTIM IMPACT STATEMENT.

Standard of Review

A military judge's admission of evidence, including sentencing evidence, is reviewed for an abuse of discretion. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009). "Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error." United States v. Eslinger, 70 M.J. 193, 197-98 (C.A.A.F. 2011) (citations omitted).

Law and Analysis

As outlined above, AFCCA held that the military judge did not abuse his discretion in admitting the January 2013 victim impact statement under R.C.M. 1001A. [2] In determining whether AFCCA erred, the two major questions to be answered are whether R.C.M. 1001A contemplates the admission of victim impact statements written prior to an accused's possession or viewing of child

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[2] The Air Force Court debated whether the United States offered the victim impact statements under R.C.M. 1001(b)(4) or 1001A. Barker, 76 M.J. at 754. It ultimately concluded that although the United States did not specify which Rule it was relying upon, it must have offered them under R.C.M. 1001A, as it failed to attempt to lay foundation for hearsay evidence. Id.

pornography and, if so, whether KF's January 2013 statement met the foundational requirements in this case.

A) R.C.M. 1001A permits the introduction of victim impact statements in cases of possessing or viewing child pornography, even if the statement was written prior to the charged offenses.

Pursuant to R.C.M. 1001(b)(4), the government may offer evidence "as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." This includes evidence of any psychological or medical impact on any person who was a victim of an offense committed by an accused. R.C.M. 1001(b)(4). The Sixth Amendment's Confrontation Clause does not apply to presentencing in a non-capital case. United States v. McDonald, 55 M.J. 173, 174 (C.A.A.F. 2001). However, the Due Process Clause is applicable in the sense that it requires that evidence admitted during sentencing must meet the "minimum standards of reliability" and comport to procedural due process requirements. Id. at 176-77.

On 26 December 2013, the President signed the Fiscal Year 2014 National Defense Authorization Act (hereinafter "FY2014 NDAA"). National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-33 (2013). By signing the FY2014 NDAA, the President immediately put into force Article 6b, UCMJ. Id. Among the rights afforded to victims by Article 6b, UCMJ, is the right to be

reasonably heard at a sentencing hearing. Article 6b(a)(4)(B), UCMJ. Article 6b mirrors 18 U.S.C. § 3771, the Crime Victims' Rights Act (hereinafter "CVRA").[3]

On 17 June 2015, the President, based on direction contained in the FY2014 NDAA, signed Executive Order 13696, promulgating R.C.M. 1001A as a mechanism for ensuring victims are afforded the rights listed in Article 6b, UCMJ. National Defense Authorization Act for Fiscal year 2014, Pub. L. No. 113-33, §1701(b)(2)(A) (2013). R.C.M. 1001A reiterates the mandate in Article 6b, UCMJ, that a victim has the right to be reasonably heard at sentencing. R.C.M. 1001A(a). 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. *See also* R.C.M. 1001A(e).

Appellant propounds two main arguments against KF's victim witness statement falling under R.C.M. 1001A: first, that Appellant would not be considered as a crime victim as defined in R.C.M. 1001A(b)(1), and second, that the Rule requires the statement to be written specifically for the hearing in which it is used.

[3] For example, 18 U.S.C. § 3771(a)(4) provide victims the right to be reasonably heard at any public proceeding in district court involving sentencing. Equally, Article 6b(a)(4)(B), UCMJ, also provides victims the right to be reasonably heard at a sentencing hearing.

1. A child appearing within a child pornography image would be considered a "crime victim" under R.C.M. 1001A in a case where an accused possesses or views that image.

Appellant argues that KF would not be considered a "crime victim" under R.C.M. 1001A, as Appellant merely possessed and viewed the child pornography instead of creating it. (App. Br. at 9.) Within R.C.M. 1001A(b)(1), "crime victim" is defined as "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." In holding that children depicted in child pornography do suffer harm each time someone downloads and views their images, AFCCA cited to the Supreme Court case, United States v. Paroline, 134 S. Ct. 1710, 1716-17 (2014), which explained the continuing harm caused to children portrayed in child pornography "is exacerbated by [its] circulation." (quoting New York v. Ferber, 458 U.S. 747, 759 (1982)). Appellant attempts to distinguish Paroline from this case by stating that it only concerned the issue of civil restitution. While Appellant is correct that the central issue in Paroline was how to determine the amount of restitution someone possessing child pornography must pay a victim who appears in the possessed images, that does not change the Supreme Court's acknowledgement that the children appearing in such images are directly harmed by those who download and view those same images. This type of victimization constitutes precisely what is envisioned by R.C.M. 1001A.

In addition to the Supreme Court, a majority of federal circuit courts have also held that children appearing in child pornography suffer direct harm and are victims of those who possess and view images of child pornography. *See* United States v. Sherman, 268 F.3d 539, 547-48 (7th Cir. 2001); United States v. Tillmon, 195 F.3d 640, 644 (11th Cir. 1999); United States v. Goff, 501 F.3d 250, 259 (11th Cir. 2007); United States v. Norris, 159 F.3d 926, 929 (5th Cir. 1998); United States v. Hibbler, 159 F.3d 233, 237 (6th Cir. 1998); United States v. Boos, 127 F.3d 1207, 1211 (9th Cir. 1997); United States v. Ketcham, 80 F.3d 789, 793 (3rd Cir. 1996); United States v. Rugh, 968 F.2d 750, 755 (8th Cir. 1992); United States v. Toler, 901 F.2d 399, 403 (4th Cir. 1990). Both the Air Force and Coast Guard Courts have previously come to the same conclusion in published opinions. *See* United States v. Anderson, 60 M.J. 548, 555-56 (A.F. Ct. Crim. App. 2004); United States v. Marchand, 56 M.J. 630, 632 (C.G. Ct. Crim. App. 2001).

AFCCA correctly held that children appearing in child pornography are continually re-victimized by those who download and view their images, as the Supreme Court and a majority of federal circuits have all agreed to the harm such victims experience.

2. R.C.M. 1001A does not require child pornography victims to write a new victim impact statement for each case involving their images.

Appellant further contends that the victim witness statement in this case was written years ago and that it would violate Appellant's due process rights to

introduce a victim witness statement not obtained solely for Appellant's court-martial or without previously speaking to the victim. (App. Br. at 12.) Appellant, however, cites no case law for these propositions; neither does he cite any part of R.C.M. 1001A which would exclude the use of victim impact statements like this.

As discussed above, R.C.M. 1001A has its origins in Article 6b, UCMJ, which in turn arose from the CVRA. Some Federal circuit courts have weighed in on this issue when interpreting the CVRA. In United States v. Gray, 641 Fed. Appx. 462, 468 (6th Cir. 2016), the appellant challenged the relevance of victim witness statements that were not written specifically for his case. That Court declared that the appellant cited "no law or case that indicates that a victim of child pornography is required to write a new statement every time someone is sentenced for possessing or receiving his or her image." Id. The Court continued that, as the statements came from victims identified in the images he viewed, the victims had a statutory right under the CVRA to be heard at sentencing. Id. The Court further explained that the authors of the statements were considered under the CVRA as victims harmed by the appellant's viewing and possessing of their images.

In United States v. Clark, 335 Fed. Appx. 181, 183 (3rd Cir. 2009), the appellant also challenged statements from victims depicted in images he viewed, including three statements from the "Vicky" series. That Court also stated that, "[t]he law does not require that a victim of child pornography write a new

statement every time someone is sentenced for possessing or distributing a pornographic image of him or her." Id. Apparently in that case, as in this one, the identity of the victim was redacted. The Court wrote that nothing required the victim's identity to be revealed to the appellant and that redacting their names was consistent with the CVRA, which requires victims to be treated with privacy and respect. Id. at 184.[4]

Just as with the CVRA, R.C.M. 1001A contains no requirement that the victim be present at the proceeding where the statement is used or that a new statement be obtained for each child pornography conviction. As explained in this case by AFCCA, the only requirement is that there be evidence of a nexus between the victim impact and Appellant's offenses. Barker, 76 M.J. at 754.

Neither would it be reasonable from a practical perspective in these type of cases to require a new statement or attendance at the court-martial for each child pornography conviction. Child pornography is a pervasive "serious national problem," where images are "traded with ease on the Internet." Paroline, 134 S. Ct. at 1716-17. If that was the standard, child pornography victims would likely have to spend all their time attending courts-martial and writing impact statements. This would severely hamper victims' rights and the Government's obligation to

[4] Article 6b(a)(8), UCMJ, also affords "[t]he right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter."

ensure victims' views are presented to the Court. *See* United States v. Horsfall, 552 F.3d 1275, 1282 (11th Cir. 2008) ("In addition, the victim' viewpoints were generally pertinent to the sentencing process, as the government was obligated by statute to ensure that these views were presented at sentencing."). *Cf.* Article 6b, UCMJ (granting victims the right to be reasonably heard at a sentencing hearing relating to the offense). Furthermore, the use of victim impact statements could not violate an accused's due process rights, as Appellant argues, because R.C.M. 1001A specifically permits the prosecution or the defense to rebut "any statements of facts therein."

For all of the above reasons, AFCCA correctly held that R.C.M. 1001A does not prohibit the use of victim impact statements from victims of child pornography, such as was done this case.

B) AFCCA did not err in holding that the United States laid sufficient foundation for the January 2013 statement.

In this case, the United States both laid a proper foundation for admission under R.C.M. 1001A and provided sufficient authentication for the January 2013 statement. While any objection that the statement was improperly admitted under R.C.M. 1001A was preserved by Appellant's trial objection, any issues related to authentication were forfeited absent plain error, because trial defense counsel failed to object on these specific grounds.

1. The January 2013 victim impact statement is admissible under R.C.M. 1001A.

As described above, federal courts have consistently held that children depicted in images of child pornography are directly harmed by those who download and view their images. In this case, KF's own statement from January 2013 confirms that she has continued to be directly harmed by those who possessed and viewed her images. She states, "[m]y knowledge that this defendant was among those who have downloaded, looked at, and enjoyed the pictures of me at my most vulnerable has caused me more and real psychological and emotional hurt and harm." (JA at 120.) She also confirms that she is notified by her attorney of cases concerning her images. (Id.)

Additionally, there was a nexus between the victim impact described in KF's statement and Appellant's crimes. The stipulation of fact set forth that images of KF, the subject of the "Vicky" series, were found on Appellant's computer and that Appellant had viewed them. This established the link showing that KF was directly harmed by Appellant's actions. Nothing within R.C.M. 1001A requires the victim to write a new statement for each conviction. The text of KF's January 2013 statement makes it clear that it was written to be used in litigation, so the United States owed her an obligation under R.C.M. 1001A and Article 6b, UCMJ, to present her victim impact statement in sentencing.

Appellant briefly argues that the probative value from KF's statements were substantially outweighed by their prejudicial impact. (App. Br. at 10.) However, this Court has explained that military judges enjoy wide discretion in applying Mil. R. Evid. 403 when they articulate their balancing test analysis on the record. United States v. Collier, 67 M.J. 347, 353 (C.A.A.F. 2009) (quoting United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000)). The military judge in this case performed a balancing test on the record, finding that the probative value of a victim impact statement written by a victim depicted in a video viewed by Appellant was not substantially outweighed by any danger of unfair prejudice. (JA at 47.)

KF constituted a "crime victim" under R.C.M. 1001A(b)(1), and her statement comported with all of that Rule's requirements. For these reasons, AFCCA correctly held that the military judge did not abuse his discretion in admitting the January 2013 statement.

2. The United States presented sufficient basis for authentication of the January 2013 statement.

As Appellant failed to object to the admission of KF's statements for lack of authentication, this Court should review this issue for plain error. Regardless of the standard used, however, the United States presented sufficient evidence to authenticate the victim impact statement, dated January 2013.

a. As Appellant did not preserve an authentication objection at trial, this issue should be reviewed for plain error.[5]

Mil. R. Evid. 103 requires a timely objection on the record to preserve an error at trial. An appellate court may, however, still take notice of plain error, even absent an objection at trial, where the appellant demonstrates that error was committed, that the error was plain, and that it materially prejudiced the appellant's rights. United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000) (citing United States v. Powell, 49 M.J. 460, 463-65 (C.A.A.F. 1998)).

Mil. R. Evid. 103 also requires that counsel state their specific grounds for objections, "unless it was apparent from the context." This requirement allows the parties at trial to appreciate the substance of the objection and gives the military judge opportunity to fully consider it. United States v. Brandell, 35 M.J. 369, 372 (C.M.A. 1992) (citing United States v. Fontenot, 29 M.J. 244, 246 (C.M.A. 1989)). Notwithstanding this, Mil. R. Evid. 103 "should be applied in a practical rather than a formulaic manner." United States v. Reynoso, 66 M.J. 208, 210 (C.A.A.F. 2008). This Court has held that it "does not require the moving party to present every argument in support of an objection;" neither does it require a party to refer

[5] The United States made this same argument during initial appellate review; however, AFCCA found that trial counsel's objections were sufficient to preserve the authentication issue. Barker, 76 M.J. at 751 n.5. While the United States does not argue that AFCCA's ultimate resolution of the case was wrong, it does continue to contend that this Court should review the authentication issue under a plain error standard.

to a rule by its exact citation. United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2008). But this Court does require "sufficient argument to make known to the military judge the basis of his objection and, where necessary to support an informed ruling, the theory behind the objection." Id. (citing United States v. Banker, 60 M.J. 216 (C.A.A.F. 2004); Brandell, 35 M.J. at 372).

In Datz, a defense counsel objected to the testimony from an investigator about the appellant's head nods during questioning. 61 M.J. at 40. Defense counsel specifically cited Mil. R. Evid. 401 and 403 as the basis of his objection, but his argument addressed the issue of adoptive admissions without specifically citing the pertinent rule. Id. at 41. In that case, this Court found that defense counsel, through his argument, had informed the parties of the substance of his objection. Id. at 42.

This Court came to the opposite conclusion in Reynoso. In that case, the defense counsel objected to an exhibit, a compilation of housing allowance rates, only stating "foundation" as the grounds. 66 M.J. at 209. Defense counsel then conducted voir dire of the witness through which the Government had sought to admit the exhibit, focusing on the fact that the witness could not tell whether the figures he relied on were accurate. Id. at 209-10. On appeal, the appellant argued that a proper foundation had not been laid under Mil. R. Evid. 1006 for admission of a summary of voluminous materials and that the exhibit constituted hearsay. Id.

at 210. This Court held that the appellant had forfeited these objections because the defense counsel's objection was not sufficient to make the military judge aware of those issues. Id. "Given the numerous bases on which a foundational objection might be lodged, some further indication of defense counsel's specific concern was necessary." Id. In doing so, this Court distinguished the case from Datz, where the "subsequent discussion clearly established the grounds on which the subsequent challenge on appeal was based." Id.

In this case, defense counsel did not sufficiently preserve an objection for authentication. Defense counsel provided three specific grounds for his objection to the victim impact statements: that the government committed a discovery violation by not providing names and contact information for the letters' authors, that the statements were not proper under R.C.M. 1001A, and that the evidence failed the balancing test under Mil. R. Evid. 403. When taken out of context, one could argue that certain statements made by defense counsel, such as, "I don't know who the individuals even are in these statements," or, "I don't have any contact information for these individuals," could sufficiently preserve an authentication objection; however, when taken in the context of the entire argument, it becomes clear that those statements referred solely to the discovery violation instead of to an authentication objection.

Not only did defense counsel never state that he was making an authentication objection, but also at no point did he argue the substance of an authentication objection. When making the statements quoted above about not having contact information and not knowing who had written the statements, counsel was arguing the presence of a discovery violation by the Government. Essentially, defense counsel argued that he would be unable to contact the authors of the statements and interview them, because he did not know who they were and did not have contact information for them. (JA at 41-42.) This can also be shown by the fact that the Government's response was that they had provided the contact information for the FBI, from which they had obtained the statements, to the defense, so the defense could have called the FBI to try to discover the authors' contact information. (JA at 44.) Even after the military judge's ruling, defense counsel continued to argue that, although he could not have provided a motion due to the pretrial agreement, he believed that the United States had a discovery obligation to provide contact information for the statement authors so that he could contact them. (JA at 48.)

At no point did defense counsel ever assert an objection as to the authentication of the documents; neither did he ever argue that the victim impact statements were anything other than what the United States purported them to be. Most tellingly, trial counsel did not respond to an authentication objection, and the

military judge did not rule on authentication. The military judge's ruling covers the exact objections raised by Appellant: a discovery violation, R.C.M. 1001A, and Mil. R. Evid. 403. (JA at 46-48.)

This case falls much closer to Reynoso than to Datz. Here, Appellant's defense counsel never informed the parties of an objection as to authentication, and subsequent discussion also failed to clearly establish that ground. Therefore, the military judge was not sufficiently made aware of any authentication issues. Furthermore, there would have been no reason for the military judge to question the authentication of these statements sua sponte. Certainly, the military judge could have believed that defense counsel intentionally failed to object to the authentication of these statements, as the defense never questioned the nature of the statements or where they originated. Perhaps defense counsel had contacted the FBI, confirmed the origin of the victim impact statements, and believed that it would not be worthwhile to make an authentication objection. In AFCCA's opinion, the Court mentions that the prosecution had offered an affidavit from a retired police officer who had investigated the underlying "Vicky" series case, which the Court notes could have been useful in authenticating the victim impact statements. Barker, 76 M.J. at 755 n.9. Defense counsel, presumably, would have seen that affidavit. Perhaps defense counsel believed that the stipulation of fact found in Prosecution Exhibit 1 sufficiently authenticated the statements. This

Court has no obligation to read the basis for an objection into the record, where no such objection was made. Because Appellant did not raise an authentication objection at trial, this Court should review this issue under a plain error standard.

b. Regardless of the standard of review, AFCCA correctly held that the January 2013 victim impact statement was sufficiently authenticated.

Mil. R. Evid. 901 requires the proponent of an item of evidence to produce sufficient evidence to support a finding that the item is what the proponent claims it to be. This can be done through various means, examples of which are listed in Mil. R. Evid. 901(b). Authentication is a component of relevancy. United States v. Lubich, 72 M.J. 170, 174 (C.A.A.F. 2013). This Court has explained that:

> Generally speaking, the proponent of a proffered item of evidence needs only to make a prima facie showing that the item is what the proponent claims it to be…Once the proponent has made the requisite showing, the trial court should admit the item, assuming it meets the other prerequisites to admissibility, such as relevance and compliance with the rule against hearsay, in spite of any issues the opponent has raised about flaws in the authentication. Such flaws go to the weight of the evidence instead of its admissibility.

Id. (quoting 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 901.02[3], at 901-13 to 901-14 (Joseph M. McLaughlin ed., 2d ed. 2003) (footnotes omitted)).

"When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." Robbins 52 M.J. at 457. "As a result, 'plain

error before a military judge sitting alone is rare indeed.'" Id. (quoting United States v. Raya, 45 M.J. 251, 253 (C.A.A.F. 1996)). Under a plain error analysis, Appellant bears the burden of showing there was error, the error was plain, clear, or obvious, and the error material prejudiced Appellant's substantial rights. United States v. Gomez, 76 M.J. 76, 79 (C.A.A.F. 2017). Failure by the Appellant to prove any of the three prongs is fatal. United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006). Discussion of the prejudice prong in this case will be discussed in more detail within the United States' analysis of Issue II.

In this case, AFCCA held that both the December 2011 and the 23 September 2013 statement "lacked any evidence that would have permitted the military judge to determine that they were authentic," as they contained no identifying information within them. Barker, 76 M.J. at 756. However, the Court held that the January 2013 statement was sufficiently authenticated, because, while heavily redacted, it still states, "I am making this supplement to my prior Victim Impact Statement to make clear that each additional time that another person downloads and sees the computer images that are now part of the '*Vicky series*' it does me immeasurable additional harm." (JA at 120) (emphasis added). AFCCA found that this, combined with the stipulation of fact, where Appellant admitted to viewing a video from the "Vicky" series, provided a sufficient link between the

January 2013 statement and the video Appellant admitted to viewing. Barker, 76 M.J. at 755.

Beyond the name of the series contained within the January 2013 statement, it is clear from the text that it was written by a victim of child pornography whose images have been spread throughout the internet. (JA at 120.) It is also evident that this statement was written in anticipation of being used in criminal litigation, as it discusses KF being kept up to date with ongoing cases and states, "[m]y knowledge that *this defendant* was among those who have downloaded, looked at, and enjoyed the pictures of me at my most vulnerable has caused me more and real psychological and emotional hurt and harm." (Id) (emphasis added). One of the examples contained within Mil. R. Evid. 901 on how to satisfy the authentication requirement for an item is with the distinctive characteristics of the item itself. "The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," may satisfy the requirement. Mil. R. Evid. 901(b)(4). In Lubich, this Court found that data recovered from a computer was sufficiently authenticated under this rule, among several other reasons, because the computer data contained numerous references to the appellant's personal computer information. 72 M.J. at 175. Similarly, in this case, the January 2013 victim impact statement contains sufficient information,

when combined with the stipulation of fact, for AFCCA to have held that it had been properly authenticated.[6]

AFCCA found that this statement had been authenticated using an abuse of discretion standard. As defense counsel did not provide a sufficient objection to preserve the issue of authentication, this Court should review the admission of this evidence for plain error. The United States made a prima facie showing, which was not objected to by the defense. As this Court has noted, any other flaws go toward weight rather than the admissibility of the evidence.

For all the reasons presented above, the military judge did not err, whether plain or otherwise, in admitting the January 2013 statement, and AFCCA also did not err in finding that the foundation requirements had been met.

[6] Alternatively, a persuasive argument could be made that there is no authentication requirement for a written victim impact statement introduced under R.C.M. 1001A. Based upon the plain language of the Rule, it appears that hearsay does not apply, given that written statements are permitted. It follows that the rules of evidence would also be more lenient with regard to any authentication requirement. Although the rules of evidence do not apply in federal sentencing proceedings as they do in the military, R.C.M. 1001A was meant to be consistent with "the principles of law and federal practice." Drafters' Analysis, Manual for Courts-Martial, United States A21-73 (2016 ed.). Under the federal system, the rules of evidence do not apply in sentencing. Fed. R. Evid. 1101(d)(3). The only standard used in federal sentencing is whether there is "sufficient indicia of reliability," as required by the Due Process Clause of the Fifth Amendment. United States v. Hansel, 524 F.3d 841, 847 (8th Cir. 2008) (citation omitted).

II.

THE AIR FORCE COURT OF CRIMINAL APPEALS DID NOT ERR IN CONDUCTING ITS PREJUDICE ANALYSIS; EVEN IF THIS COURT FINDS THAT NO VICTIM IMPACT STATEMENTS SHOULD HAVE BEEN ADMITTED AS EVIDENCE, APPELLANT WAS NOT PREJUDICED.

Standard of Review

"Whether a lower court utilized the appropriate standard to test for prejudice is a question of law reviewed de novo." United States v. Dockery, 76 M.J. 91, 98 (C.A.A.F. 2017) (citing United States v. Evans, 75 M.J. 302, 304 (C.A.A.F. 2016)).

Law and Analysis

Whether or not AFCCA correctly held that the January 2013 statement was properly admitted as evidence, Appellant was not prejudiced by the admission of the victim impact statements. The question of prejudice from an error during the sentencing portion of trial is whether the error substantially influenced the adjudged sentence." Eslinger, 70 M.J. at 200-02. This Court uses a four-prong analysis when evaluating prejudice: (1) the strength of the Government case; (2) the defense theory; (3) the materiality of the evidence; and (4) the quality of the evidence. United States v. Latorre, 53 M.J. 179, 182 (C.A.A.F. 2000).

A) AFCCA did not err in conducting its prejudice analysis after holding that the military judge erred in admitting two of the three victim impact statements.

Although AFCCA held that the military judge erred in admitting the statements dated December 2011 and September 2013, it found that Appellant had not been prejudiced by their admission. Although their prejudice analysis was short, it was also highly persuasive. Essentially, AFCCA reasoned that the military judge admitted all three statements under the proffer that they were all authored by the same victim. After AFCCA found that two of those letters had been admitted in error, it still found that the January 2013 statement had been properly admitted. AFCCA concluded that the removal of two additional statements allegedly written by the same person could not have prejudiced Appellant.

KF's January 2013 statement discusses how she is hurt every time she hears about someone downloading her images and videos, that she has to speak with her therapist each time a notification comes about a new case, and that the knowledge of others looking at her images has caused her psychological and emotional harm. (JA at 120.) The other statements, while they may provide some additional details concerning the effects of her psychological harm, do not add any appreciable information to the January 2013 statement. The general tenor of the two excluded statements remains the same, that the victim has suffered immeasurable harm and continues to suffer harm through people like Appellant downloading and viewing

images of her being abused. The fact that AFCCA did not expressly review each of the prongs from the four-prong prejudice test does not mean that their review was deficient. Under the circumstances, there is no reason to believe that two additional statements written by the same person and that essentially say the same thing as the properly admitted statement would have any substantial influence on the sentence adjudged by the military judge. For these reasons, AFCCA correctly determined that Appellant was not prejudiced by the military judge improperly admitting the December 2011 and September 2013 statements.

B) Even if this Court finds that the January 2013 victim impact statement should not have been admitted, Appellant was not prejudiced.

Even if this Court finds that the January 2013 statement was also admitted in error, Appellant has not been prejudiced in any way.

First the Government's sentencing case was already strong. Appellant admitted to intentionally seeking out and downloading, over the course of almost one year, videos and images of children between the ages of 2 and 16 years old engaging in sexually explicit conduct. (JA at 71.) In all, Appellant possessed and viewed 155 videos and 12 images of children engaged in said conduct. (JA at 70.) In searching for these videos and images, Appellant used specific search terms commonly used to search for child pornography. (Id.) Several of these videos are

described in detail within the stipulation of fact. (JA at 67-69.) Appellant stated that he viewed these videos for "shock value." (JA at 28.)

On the other hand, the defense evidence consisted only of some photographs, a few character letters from family and coworkers, and an unsworn statement. (JA at 121-39.) The defense's best argument was that Appellant was not the one who had assaulted these children and created the videos and that the child pornography was only a minute portion of Appellant's massive collection of adult pornography. (JA at 65-68.)

Regarding the materiality and quality of the evidence, it has already been discussed above how all three victim impact statements essentially said the same thing. The military judge did not need these statements to be able to consider the natural consequences for children who have been victims of child pornography: that victims will continue to feel re-victimized as people download and view their images. These common sense assumptions have been affirmed by case law, as also described above. This Court can "presume that the judge took the information for what it was worth and nothing more." Latorre, 53 M.J. at 182. Additionally, according to the stipulation of fact, only one of Appellant's downloaded videos contained images of KF, constituting a small portion of Appellant's entire collection of child pornography.

Finally, the military judge's ultimate sentence decision shows that he was not influenced by KF's statements or by the Government's sentencing argument that only briefly references KF. The United States argued for a sentence including a dishonorable discharge and confinement for seven years. (JA at 62.) The defense argued that the confinement be "for a term of months instead of years." (JA at 68.) The military judge sentenced Appellant to only 30 months of confinement and a bad-conduct discharge, much closer to the defense's recommendation than to the Government's. (JA at 72.) This sentence, which was completely appropriate based upon Appellant's offenses, fell well below the confinement cap of four years which Appellant himself had bargained for prior to his court-martial and even further below the maximum possible punishment of a dishonorable discharge and confinement for 20 years. (JA at 144.) *See* United States v. Saferite, 59 M.J. 270, 275 (C.A.A.F. 2004) (where this Court compared the imposed sentence to the maximum sentence in determining whether the military judge was substantially influenced by evidence).

In Gomez, the military judge allowed one of Appellant's victims to testify as aggravation evidence in a case with members, that the trial process had caused her stress, which caused preeclampsia in her pregnancy, which caused her child to be born prematurely. 76 M.J. at 79. The Court found this to be error (without specifying whether it constituted plain error or not), because the victim had

provided an expert medical diagnosis without proper foundation or medical expertise. Id. Notwithstanding, this Court also found that this evidence had not substantially influenced the members' sentencing decision.

The information contained in the three victim impact statements was far less prejudicial than the premature birth in Gomez, especially as this case was heard by a military judge alone. "The prejudicial impact of erroneously admitted evidence in a bench trial is presumed to be substantially less than it might have been in a jury trial." United States v. Cacy, 43 M.J. 214, 218 (C.A.A.F. 1995) (quoting United States v. Cardenas, 9 F.3d 1139, 1156 (5th Cir. 1993)). Appellant suffered no prejudice, as his sentence was not substantially influenced by the introduction of the victim impact statements. Therefore, Appellant's claim should be denied.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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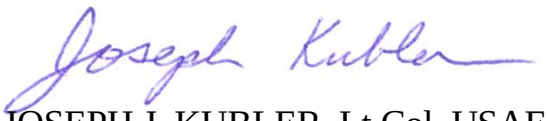

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 December 2017.

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