IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee,*	)	**APPELLANT'S BRIEF IN SUPPORT OF THE GRANTED ISSUES**
v.	)	
	)	USCA Dkt. No. 18-0135/AF
Senior Airman (E-4) **DARION A. HAMILTON,** USAF, *Appellant.*	)	Crim. App. Dkt. No. ACM 39085
	)	Filed: June 6, 2018

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

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WHETHER THE MILITARY JUDGE ERRED IN ADMITTING PROSECUTION EXHIBITS 4, 5, AND 6.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (CCA) reviewed this case pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

Senior Airman (SrA) Hamilton was tried at a general court-martial by a military judge on April 25, 2016. JA 18. In accordance with his pleas, SrA Hamilton was convicted of one charge and two specifications of wrongfully possessing and distributing child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). JA 18. SrA Hamilton was sentenced to two years of confinement, reduction to E-1, total forfeiture of all pay and allowances, and a bad-

conduct discharge. JA 18. On June 3, 2016, the convening authority approved the sentence as adjudged and, with the exception of the punitive discharge, ordered it executed. JA 18.

The CCA affirmed the findings and sentence in a published opinion en banc on December 20, 2017. JA 1, 13. It found that unsworn victim impact statements offered pursuant to Rule for Courts-Martial (R.C.M.) 1001A are not evidence, thereby rendering the Military Rules of Evidence (Mil. R. Evid.) inapplicable to such statements. JA 9. In conclusion, the CCA held that the military judge did not abuse his discretion in admitting prosecution exhibits 4, 5, and 6. JA 9.

SrA Hamilton petitioned this Court for review on February 16, 2018, and this Court granted review on April 23, 2018.

Statement of Facts

During the government's presentencing case, Detective Kevin Papineau of the Elk Grove, California, Police Department, identified three images found on SrA Hamilton's computer as belonging to the "Blue Pillow" child pornography series. JA 56-57. Detective Papineau assisted in the 2009 investigation that identified the victim, "B", depicted in the "Blue Pillow" child pornography series. JA 57-59.

Through Detective Papineau, the government introduced Prosecution Exhibit 4, which consisted of two victim impact statements purportedly written in 2011 by "B" and "B's" mother. JA 58-59, 89-91. "B" was 14 years old when she purportedly wrote her victim impact statement. JA 59.

Defense counsel objected to Prosecution Exhibit 4 on the basis of hearsay and improper sentencing evidence. JA 59-60. In response, trial counsel asserted that it "[was] proper *aggravation* evidence under rule 1001, subparagraph (b)(4)" and that "under the new NDAA updates . . . rule 1001A allows victims to provide a statement, including through a third party during sentencing proceedings." JA 59 (emphasis added).

Defense counsel then added that the statements were improper because they were written "before Senior Airman Hamilton's offense dates"; the defense also objected to the "entire line of questioning." JA 60. The military judge sustained defense counsel's objection on the hearsay basis, but overruled his objection to the testimony in general. JA 61-62. The military judge did so without establishing on the record whether he was ruling under R.C.M. 1001(a) or 1001A. JA 61-62.

Neither "B" nor "B's" mother's statement was signed or notarized. JA 89-91. Nor were their statements accompanied by a notarized affidavit. JA 89-91. Moreover, both victim-impact statements were prepared before SrA Hamilton committed his offenses. JA 59. The government did not offer any showing that "B" or "B's" mother personally requested that their victim-impact statements be considered in SrA Hamilton's court-martial, or that Detective Papineau was their appointed designee. The military judge simply relied on Detective Papineau's hearsay testimony that "B" wanted her and her mother's statements introduced in cases involving her images. JA 62.

The government then sought to offer Prosecution Exhibit 5—a video recording of a speech given by "B" in August of 2015, at a Crimes Against Children Conference in Dallas, Texas. JA 62. Defense counsel objected that the video was improper under R.C.M. 1001A. JA 64. Trial counsel retorted that because "B" discussed aspects of the case and what the process was like for her, the video should be "considered under a victim's unsworn statement under rule 1001(a)." JA 65. The military judge overruled the objection and admitted Prosecution Exhibit 5 as aggravation evidence, finding that "[u]nder 1001(a)(4) in terms of

what evidence may be considered in aggravation, it does allow fairly broad discretion with regard to what actually constitutes evidence in aggravation." JA 65.

Next, the government sought to introduce Prosecution Exhibit 6, which consisted of a victim impact statement accompanied by a Washington State Sheriff's Deputy's affidavit. JA 65-66, 93-95. The victim impact statement was purportedly written by "J" from the "Marineland" child pornography series and was dated May 30, 2014. JA 93, 95. Defense counsel objected that it was not a proper victim-impact statement. JA 66. Nevertheless, the military judge admitted Prosecution Exhibit 6 because it "[fell] within what is permitted under 1001 . . . ." JA 67. The military judge failed to establish on the record whether he was admitting it under Rule for Courts-Martial (R.C.M.) 1001(a) or 1001A. JA 67.

The military judge failed to conduct a Mil. R. Evid. 403 balancing test for Prosecution Exhibits 4, 5, and 6. JA 64-65, 67.

Argument

I.

VICTIM IMPACT STATEMENTS ADMITTED PURSUANT TO R.C.M. 1001A SHOULD BE CONSIDERED EVIDENCE AND SUBJECT TO THE MILITARY RULES OF EVIDENCE.

Standard of Review

Interpreting R.C.M. 1001A is a question of law, which this Court reviews de novo. *United States v. Barker*, __ M.J. __, No. 17-0551/AF, 2018 CAAF LEXIS 295, at *10 (C.A.A.F. 21 May 2018) (citing *United States v. Leahr*, 73 M.J. 364, 369 (C.A.A.F. 2014)).

Law

"[T]he Due Process Clause of the United States Constitution 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). "A soldier has a right to a fair trial conducted in accordance with his statutory rights under the [UCMJ]." *United States v. Adens*, 56 M.J. 724, 734 (C.A.A.F. 2002) (citing *United States v. Rowe*, 11 M.J. 11, 13 (C.M.A. 1981), *overruled on other grounds by United States v. Kunckle*, 23 M.J. 213, 219 (C.M.A. 1987)).

The Mil. R. Evid. apply at sentencing, "thus providing procedural safeguards to ensure the reliability of evidence admitted during sentencing." *United States v. Saferite*, 59 M.J. 270, 273 (C.A.A.F. 2004) (quoting *McDonald*, 55 M.J. at 176). Mil. R. Evid. 1101(a) states that "[e]xcept as otherwise provided in this Manual, these rules apply generally to all courts-martial . . . ." Moreover, Mil R. Evid. 1101(d) lists proceedings excepted from the application of the rules, and sentencing is not among one of the exceptions.

Sentencing evidence, like all other evidence, is subject to the balancing test of Mil. R. Evid. 403. *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). Mil. R. Evid. 403 provides that "[t]he military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Discussing the application of Mil. R. Evid. 403, this Court's predecessor stated: "[e]motional displays by aggrieved family members, though understandable, can quickly exceed the limits of propriety and equate to the bloody shirt being waved." *United States v. Fontenot*, 29 M.J. 244,

252 (C.M.A. 1989) (citing *United States v. Pearson*, 17 M.J. 149, 153 (C.M.A. 1984)).

Argument

In order to protect an accused's due process rights, the rules of evidence must be applied to unsworn victim impact statements presented under R.C.M. 1001A. Without rules of evidence, there will be no safeguards to ensure victim impact statements, at a minimum, are reliable or what they purport to be. Unchecked, unsworn victim impact statements would become unfettered, leaving an accused without the ability to challenge its contents or challenge its authenticity.

In holding that unsworn victim impact statements are not evidence, the CCA opined that its "holding . . . is not to suggest that unsworn victim statements are unfettered or that the right to be reasonably heard is indefeasible . . . ." JA 9. To support its claim that their ruling will not permit unsworn victim statements to become unfettered, the CCA cited to the *Manual for Court-Martial* (2016 ed.) pt. II, Discussion, which states that "[a] victim's unsworn statement should not exceed what is permitted under R.C.M. 1001A(c) . . . ." JA 9. The problem with that reasoning, however, is that the only constraints

within R.C.M. 1001A(c) is that "[t]he content of statements . . . may include victim impact or matters in mitigation." R.C.M. 1001A does not contain any guidance regarding the standards of reliability such statement must comport with. Without the rules of evidence, a military judge would not be required to conduct a Mil. R. Evid. 403 balancing test or any other assessments of reliability or authenticity for unsworn victim-impact statements presented under R.C.M. 1001A. This result would leave an accused with no meaningful way to verify or challenge the facts contained within a victim impact statement.

Moreover, nothing in Article 6b or R.C.M. 1001A suggests that the victim's right to be heard is beyond the scope of the procedural and evidentiary rules of presentencing. While R.C.M. 1001A is silent as to whether the rules of evidence apply, Mil. R. Evid. 1101(a) plainly states: "except as otherwise provided in this Manual, these [Military Rules of Evidence] apply generally to all courts-martial." Mil. R. Evid. 1101(d) does not exempt the application of the rules of evidence from sentencing, and Mil. R. Evid. 1101(a) plainly states the rules of evidence apply.

R.C.M. 1001A implemented the victim's right to be reasonably heard as part of the presentencing procedure—a procedure subject to the rules of evidence. *McDonald*, 55 M.J at 176. Unsworn victim impact statements are presented to the court-martial for use, consideration, and determination of an appropriate sentence. Because victim impact statements have the potential to significantly increase an accused's sentence, safeguards must be applied to ensure due process and an appropriate sentence.

This Court's predecessor understood the potential impact of victim statements when it stated in *Fontenot*: "[e]motional displays by aggrieved family members, though understandable, can quickly exceed the limits of propriety and equate to the bloody shirt being waved." 29 M.J. at 252 (citing *Pearson*, 17 M.J. at 153).

WHEREFORE, Senior Airman Hamilton respectfully requests this Honorable Court reverse the CCA's holding that unsworn victim-impact statements admitted pursuant to R.C.M. 1001A are evidence subject to the Mil. R. Evid.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION IN ADMITTING PROSECUTION EXHIBITS 4, 5, AND 6.

Standard of Review

"A military judge's decision to admit sentencing evidence or exclude evidence is reviewed for abuse of discretion." *United States v. Olson*, 74 M.J. 132, 134 (citing *United States v. Jasper*, 72 M.J. 276, 279 (C.A.A.F. 2013)).

Law

The NDAA for Fiscal Year 2014 modified R.C.M. 1001(a) by adding R.C.M. 1001A, establishing a general sequence of presentencing matters. R.C.M. 1001(a)(1)(A). The prosecution begins by admitting service and personal data, evidence of prior convictions, evidence of aggravation, and rehabilitative potential evidence. *Id.* The government admits aggravation evidence, to include victim impact statements, under R.C.M. 1001(b)(4). *Barker*, 2018 CAAF LEXIS 295, at *9. The prosecution's sentencing case is followed by the victim's right to be reasonably heard pursuant to R.C.M. 1001A. "If the victim exercises the right to be reasonably heard, the victim shall be called by the court-martial." R.C.M. 1001(a)(1)(B).

"R.C.M. 1001A is itself part of the presentencing procedure and is temporarily located between the trial and defense counsel's respective presentencing cases." *Barker*, 2018 CAAF LEXIS 295, at *2. "It belongs to the victim, and is separate and distinct from the *government's* right to offer victim impact statements in *aggravation*, under R.C.M. 1001(b)(4)." *Id*.

"R.C.M. 1001A(b)(4)(B) effectuates the right to be heard at presentencing, and thus provides that, in noncapital cases, the victim has the right to be reasonably heard through a sworn or unsworn statement." *Barker*, 2018 CAAF LEXIS 295, at *9. The victim may use an unsworn statement that can be oral, written, or both, and the victim may not "be cross-examined by the trial counsel or defense counsel upon it or examined upon it by the court-martial." R.C.M. 1001A(e). The contents of the statements may include "victim impact or matters in mitigation." R.C.M. 1001A(c).

Provision is also made for the appointment by the military judge of a representative to assume the Article 6b, UCMJ, rights of a victim who is under the age of eighteen, or "incompetent, incapacitated, or deceased." Article 6b(c), UCMJ; *Barker*, 2018 CAAF LEXIS 295, at *9.

"The introduction of statements under [R.C.M. 1001A] is prohibited without, at a minimum either the presence or request of the victim, R.C.M. 1001A(a), the special victim's counsel, *id*., or the victim's representative, R.C.M. 1001A(d)—(e)." *Id*., at *10.

Argument

A. The letters in Prosecution Exhibit 4 were inadmissible because they did not meet the requirements of R.C.M. 1001A.

The military judge abused his discretion by admitting Prosecution Exhibits 4, 5, and 6, because they were not properly offered by the government under R.C.M. 1001A.

First, the military judge erred in failing to follow the statutory order in the presentation of sentencing evidence as required by R.C.M. 1001(a). The military judge allowed the government to introduce the victim impact statements during their sentencing case-in-chief as aggravation evidence. The UCMJ is clear that victim impact statements are to be called by the court-martial and not by the government.

Not only did the military judge err in allowing the victim impact statements come in as aggravation evidence, but as this Court pointed

out in *Barker*, the military judge here ignored the fact that "the R.C.M. 1001A process belongs to the victim, not to the trial counsel." 2018 CAAF LEXIS 295, at *11; R.C.M. 1001A(a). This Court further found that "[a]ll the procedures in R.C.M. 1001A contemplate the actual participation of the victim, and the statement being offered by the victim or through her counsel." *Id.* at *12.

Here, it does not appear that the government had any interaction with "B", "B's" mother, or "J". Nor did any of the victims participate in the proceedings, and there is no indication the victims were even aware of SrA Hamilton's trial. And because the victims in this case were over the age of 18, a personal appearance or through a victim's counsel was required in accordance with R.C.M. 801(a)(6).

Lastly, the military judge improperly admitted Prosecution Exhibit 5 because it was a video and not an oral or written statement. R.C.M. 1001A(e). The rule does not provide for video format. Nor was there any showing that the video was created as a victim impact statement. Defense counsel made a timely and accurate objection that the video did not contain any "victim impact" as defined by R.C.M. 1001A(b)(2). JA 64. The military judge incorrectly overruled defense

counsel's objection, by finding that "B's" statements in the video constituted "evidence in aggravation" and "victim impact." JA 65.

B. The victim impact statements were improperly admitted 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).

The rules of evidence had not yet been relaxed when the military judge admitted the statements. The statements admitted as Prosecution Exhibits 4, 5, and 6 lack foundation and authenticity. The letters are not signed, nor do they even contain any indication of who they are from, when they were written, or that they are in fact the original letters. The testimony of Detective Papineau and the Sherriff Deputy's affidavit identify these letters as statements written by the victims and one of the victim's mothers, but there was no further

information regarding authentication or connecting the statements to Detective Papineau's testimony or the deputy's affidavit.

Moreover, the military judge himself seemed to be confused at how to properly admit and consider the unsworn victim impact statements. He failed to articulate on the record what weight he gave, not only to the unsworn victim impact statements, but also the weight he gave to the alleged sentence recommendations given in those statements.

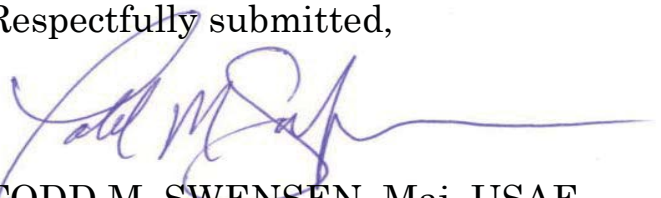
The admission of Prosecution Exhibits 4, 5, and 6, and the military judge's consideration of those exhibits in determining his sentence, materially prejudiced SrA Hamilton's substantial rights. Besides the pictures, prosecution exhibits 4, 5, and 6 were the only substantive evidence provided to the military judge. Particularly relevant, however, is that trial counsel referred to "B", "J", or statements from their victim impact statements no less than 20 times in his sentencing argument. JA 70-75, 83.

Additionally, even though not raised by defense counsel at trial, this evidence was still subject to the limitations of Mil. R. Evid. 403. The military judge failed to conduct a balancing test to determine

whether this evidence was admissible. There may be nothing that inflames the passions more than child sexual abuse. When those inflamed passions are then transferred to sentencing in a child pornography case, the impact is unfairly prejudicial. It is unfair to ask any factfinder—even a military judge—to attempt to disentangle the emotions and outrage felt when reading about someone's sexual abuse suffered as a child. Any limited relevance of portions relating to concerns about photo circulation is substantially outweighed by the danger of unfair prejudice from the inadmissible emotional thrust of the letters.

WHEREFORE, Senior Airman Hamilton respectfully requests this Honorable Court set aside his sentence and order a rehearing.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Clerk of Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on June 6, 2018.

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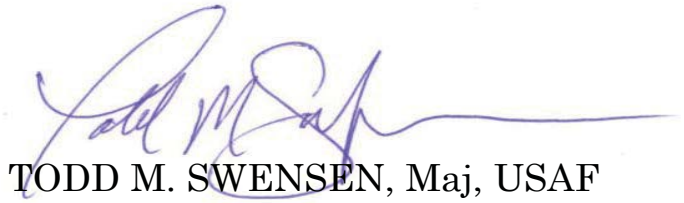

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