IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ISAIAH L. EDWARDS,
Airman First Class (E-3),
United States Air Force,
Appellant.

USCA Dkt. No. 21-0245/AF

Crim. App. Dkt. No. ACM 39696

BRIEF ON BEHALF OF APPELLANT

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Issue Presented

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE VICTIM TO PRESENT AS AN IMPACT STATEMENT A VIDEO—PRODUCED BY THE TRIAL COUNSEL—THAT INCLUDED PHOTOS AND BACKGROUND MUSIC.

Statement of Statutory Jurisdiction

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

Statement of the Case

Airman First Class (A1C) Isaiah L. Edwards, the Appellant, was tried at a general court-martial before officer members at Barksdale Air Force Base, Louisiana, on July 2, 2018; December 12, 2018; January 7-11, 2019; and January 14-18, 2019. Contrary to A1C Edwards's plea, the panel found him guilty of one charge and specification in violation of Article 118, UCMJ, for the unpremeditated murder of A1C B.H. (JA at 050.) The panel sentenced A1C Edwards to reduction to the grade of E-1, total forfeitures of all pay and allowances, 35 years confinement, and a dishonorable

[1] All references to the UCMJ, the Military Rules of Evidence, and Rules for Courts Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.) (*MCM*).

discharge. (JA at 142.) The Convening Authority approved the adjudged sentence. (JA at 044.) On March 10, 2021, the Air Force Court affirmed the findings and the sentence. (JA at 041.)

Statement of Facts

Trial Proceedings

After the panel convicted A1C Edwards of unpremeditated murder (JA at 050), the Military Judge solicited pre-admission of evidence for the presentencing proceeding. (JA at 051.) The Government offered Prosecution Exhibit (PE) 24 for identification—a disc containing 24 photos of A1C B.H., mostly alone or with family members. (*Id.*) The Defense objected, arguing the images were not proper sentencing evidence. (*Id.*) The Government responded they were matters in aggravation, going to victim impact. (JA at 052.) The Defense countered, *inter alia*, that a few photos could perhaps provide context, but that the 24 photos, as offered, failed the Mil. R. Evid. 403 balancing test. (*Id.*) The Military Judge overruled the objection. (JA at 060-061.)

Both of A1C B.H.'s parents testified under oath during sentencing. (JA at 068; JA at 096.) His father, R.H., further sought to provide an unsworn statement in the

form of a written letter,[2] with two attached video presentations—one from A1C B.H.'s parents that discussed their son and the other about A1C B.H.'s profession of arms. (JA at 056.) The Defense objected to portions of the written statement, as well as both videos. (JA at 056-057.) The Military Judge sustained the objections regarding portions of the written statement and the entire profession of arms video, and a redacted form of the written statement was accepted as CE 3. (JA at 057; JA at 064, JA at 067.)

Turning to the video recording of A1C B.H.'s parents,[3] the Defense argued that videos do not fall under R.C.M. 1001A because "a video in general is not a statement." (JA at 058.) The Defense further objected to the video's inclusion of various photos of A1C B.H., as well as the accompanying background music.[4] (*Id.*) The Government responded that the photos in the video were not "dramatically different" than from

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[2] The initial, unredacted version of this written statement was marked in the Record of Trial as Court Exhibit (CE) 1.

[3] The initial, unredacted version of this video was marked in the Record of Trial as CE 2.

[4] In the almost seven-minute video, 30 photos appear in slide-show format. Most are of A1C B.H., either by himself or with family and friends. One photo is of a training certificate and one is of A1C B.H.'s gravestone. Only one photo is a duplication of a photo contained within PE 24; the rest were not admitted into evidence. Additionally, there are two video clips wherein R.H. answers questions from an unknown interviewer and a background audio clip wherein A1C B.H.'s mother, C.H., answers questions from the same unknown interviewer. The background music is acoustical and without lyrics, and can be heard throughout the video. (JA at 154.)

what it was otherwise providing as evidence—an apparent reference to photographs in PEs 24, 25, and 26—and that A1C B.H.'s parents had a right to be reasonably heard and decided "that is what they want to present." (JA at 061; JA at 151-153.) The Military Judge initially assumed that the family created the video.[5] (JA at 061). The Government, however, revealed that the Trial Counsel actually produced the video after obtaining photos and "getting direction about from [sic] the family as to how this was going to be put together and consulting with them multiple times during this process . . . ." (JA at 062-063.)

Ultimately, the Military Judge found the video to be "a proper unsworn statement under [R.C.M.] 1001A" and attached a slightly redacted version of it as CE 4.[6] (JA at 065.) In regard to the video's inclusion of photos and music, the Military Judge stated:

> As to the music, it did not have any words, it was acoustical, the court certainly recognizes that certain music can be designed or intended to evoke certain emotions of sadness or sorrow or despair. The music in this case although obviously not upbeat, the court did not find that it invokes such emotion or sadness or rage. The impact was provided, in other words, the family, not the music choice. Though certainly there

[5] The Military Judge noted his concern that, if the video was produced by someone other than a victim or victim's representative, the video may no longer be personal to that individual and would, thus, not be permitted by R.C.M. 1001A. (JA at 062 (citing *United States v. Daniels*, No. ACM 38371, 2014 CCA LEXIS 769 (A.F. Ct. Crim. App. Oct. 14, 2014) (unpub. op.)).

[6] The Defense objected to the video's inclusion of a letter from Brigadier General D.C. (JA at 059), which the Military Judge sustained and ordered redacted. (JA at 065.)

> has been no evidence here I would not expect the music itself was anyway created by the victim I believe it was a neutral backdrop. There are pictures and discussions, not about the victim and how his loss or how his death impacted the family. It was not intended and will not and would not inflame the passions of the members.

(*Id.*)

Immediately after R.H. concluded his sworn testimony, the Government rested. (JA at 103.) R.H. then read his written unsworn statement. (JA at 104; JA at 155.) Immediately thereafter, the Court played the video presentation. (JA at 105; JA at 156.)

The Defense later objected to the Government's request to play a portion of CE 4 during its sentencing argument; specifically, a clip of R.H. holding and smelling his son's Airman Battle Uniform. (JA at 116.) The Government replied, "[i]t is our intent, Your Honor, to show that as to fully illustrate the victim's impact" and that R.H. "sort of clinging to his son is incredibly probative for the members to understand the victim impact here so, that is the purpose in which that is there." (JA at 117.) The Trial Counsel continued, "[t]his is an appellate exhibit just simply for demonstrative purposes. This is not going to go back with them, it is just to show them this is the full scope of the victim's impact as reflected in his unsworn." (JA at 118.) The Military Judge overruled the objection and permitted the Trial Counsel to use the video during argument. (JA at 119.) The Military Judge opined that his ruling might have been

different had this type of information been the sort that would have been inadmissible outside the context of an unsworn statement. (JA at 119-120.)

The Government subsequently concluded its sentencing argument by playing the video clip in open court, and argued its contents:

> Now members, [R.H.] is left to cling to whatever he can from his son, and I invite you to take a look at this short clip again and as soon as it is done, I want to talk about something very, very important.
>
> [Played [R.H.'s] video clip.]
>
> Members, as you watch that clip you saw him take this uniform. His son's uniform. He brings it up his nose and breathes it in. Members that is a man who is clinging to the last vestiges of his son. He will never come back. Members, because of this man right here, Airman [B.H.'s] life is over forever. He is not coming back. The lives of those around him have been altered and it is completely appropriate, necessary, and fair that his punishment be fitting for his crime.

(JA at 130.) The members were given a copy of R.H.'s written statement as well as his video recording prior to deliberations, despite the Trial Counsel's prior suggestion that they would not have the video during deliberations. (JA at 141.)

Appellate Proceedings

A1C Edwards raised numerous issues on appeal, including whether the Military Judge erred by accepting the video as unsworn victim impact statement. (JA at 002.) Noting that this Court has never addressed the issue directly, the Air Force Court held that "a victim may present a verbal unsworn statement under R.C.M. 1001A through

the medium of a video." (JA at 034.) The lower court explained that it was "central" to its conclusion that "no provision of R.C.M. 1001A expressly disallows a victim to submit a video at a sentencing hearing," and opined that such presentation was neither unreasonable under R.C.M. 1001A nor outside the scope of how that rule utilized the term "statement." (*Id.*) It further concluded "that a 'statement' is usually afforded expansive meaning under the rules applicable to courts-martial," citing as support *United States v. Clark*, 79 M.J. 449, 454 (C.A.A.F. 2020) ("concluding 'any statement of the witness' under R.C.M. 914(a) includes a videotaped interrogation"), *United States v. Moreno*, 36 M.J. 107, 120 (C.M.A. 1992) ("analyzing a videotaped interview as a hearsay statement and subject to the Confrontation Clause"), and R.C.M. 702, which allows an "oral" deposition to be played by videotape.[7] (JA at 034-035.) The lower court then compared the video presentation at issue "to an unsworn statement delivered by a declarant in narrative format in the physical presence of the factfinder," and concluded that "[b]oth methods allow the members to hear and see information and give it the weight it is due." (JA at 035.)

[7] In referencing depositions under R.C.M. 702, the Air Force Court erroneously cited R.C.M. 703(g)(3) as authorizing a military judge to allow oral depositions "to be played in court by 'videotape, audiotape, or sound film." (JA at 035.) The citation should be R.C.M. 702(g)(3).

The Air Force Court also found no error regarding the video's inclusion of photographs and background music. (JA at 035-036.) Specifically, the lower court approved the photos as materials that "reasonably convey[ed]" the loss suffered by the victims, while concluding the background music—"unusual" though it may be—was "not obviously unreasonable in light of a crime victim's right to be reasonably heard." (JA at 036.) The Air Force Court then turned to prejudice, opining that even if it assumed error, the Government's sentencing case was strong and that "the objected-to portions of the video presentation were eclipsed by the evidence presented on the merits and in aggravation." (*Id.*) It never addressed the Government's role in producing the video nor how the Government highlighted the video during its sentencing argument.

Summary of Argument

A video unsworn statement is not permitted under R.C.M. 1001A. The text of R.C.M. 1001A is clear and unambiguous in all pertinent respects. First, as it relates to the *form* of the unsworn statement, the plain language of R.C.M. 1001A limits unsworn victim impact matters to "statements" that are "oral, written, or both." R.C.M. 1001A(e). Second, as it relates to the *content*, unsworn statements may only reference "victim impact" or "mitigation." R.C.M. 1001A(c); R.C.M. 1001A(b)(2); R.C.M. 1001A(b)(3).

A pre-recorded video presentation is clearly not written, and it exceeds in-court oral assertions by providing a modifiable visual depiction in addition to the spoken word, if the video at issue even contains spoken words. Indeed, a video producer—whether it is the victim or, as in this case, the Government—can film the presentation in any setting, use countless reshoots to best capture or manipulate desired emotions, and edit the recording for maximum effect, which can then be played back in sentencing argument or reviewed multiple times during deliberations. These capabilities far surpass oral statements delivered contemporaneously in the setting of a courtroom, and makes it likely a factfinder will be unable to accurately weigh a victim's credibility and true impact from the crime(s).

But, even assuming, *arguendo*, that videos are permissible, the Military Judge abused his discretion by accepting the video at issue in this case—CE 4. This video violates the prescribed rules for both *form* and *content*. As to form, this video contains background music and photographs displayed as a slideshow; neither qualify as oral or written statements. Similarly, with respect to content, the music and photographs are not, in and of themselves, victim impact or mitigation. The somber music and photographic slide-show are instead emotional enhancers that would not otherwise be available to accompany an unsworn statement presented in another form.

Moreover, victim unsworn statements belong to the victim, not trial counsel.

See United States v. Barker, 77 M.J. 377, 378 (C.A.A.F. 2018); *see also United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019). But here, the Trial Counsel did more than merely facilitate R.H.'s right to be reasonably heard. The Government took ownership of CE 4 by producing the video for R.H., thereby overstepping its role.

The Military Judge's abuse of discretion in accepting CE 4 prejudiced A1C Edwards. The video is both emotional and gut-wrenching; it would be expected to impact any viewer; this is, after all, what the Government intended. And it was not just played in the "substrate" between the parties' presentations. Rather, the Trial Counsel displayed arguably the most powerful portion of the video during argument, immediately prior to his sentence request. (JA at 130.) Under such circumstances, the panel's consideration of CE 4 was not harmless, much less harmless beyond a reasonable doubt.

Argument

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ALLOWING THE VICTIM TO PRESENT AS AN IMPACT STATEMENT A VIDEO—PRODUCED BY THE TRIAL COUNSEL—THAT INCLUDED PHOTOS AND BACKGROUND MUSIC.

Standard of Review

A military judge's interpretation of R.C.M. 1001A is a question of law this Court reviews *de novo*. *Barker*, 77 M.J. at 383 (citations omitted). This Court reviews

"a military judge's decision to admit evidence for an abuse of discretion." *Hamilton*, 78 M.J. at 340 (quoting *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)).[8] A military judge abuses his discretion when he admits evidence based on an erroneous view of the law." *Id*. (quoting *Barker*, 77 M.J. at 383).[9] An abuse of discretion also occurs when a trial judge makes clearly erroneous factual findings. *United States v. Eugene*, 78 M.J. 132, 134 (C.A.A.F. 2018).

Law

"'Ordinary rules of statutory construction apply in interpreting the R.C.M.'" *Tyler*, 81 M.J. at 113 (quoting *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008)). Principal among the canons of statutory interpretation is an analysis of the plain meaning of the text. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Id*. at 254 ("When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (internal citation and quotations omitted); *Tyler*, 81 M.J. at 113 ("It is a

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[8] Later in *Tyler*, this Court concluded that unsworn statements are not evidence. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). This should not change the standard of review.
[9] *See* note 8, *supra*.

general rule of statutory construction that if a statute is clear and unambiguous—that is, susceptible to only one interpretation—we use its plain meaning and apply it as written.") (citations omitted).

To find something permissible that is not within the plain meaning of the statute, this Court would have to "'find justification for wrenching from the words of a statute a meaning which literally they [do] not bear [. . .],'" which it "cannot do." *United States v. McPherson*, __ M.J. __, No. 21-0042/AR, slip. op. at 1-2 (C.A.A.F. Aug. 3, 2021) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). The Supreme Court recently reaffirmed the supremacy of plain meaning interpretation, opining that "courts should not reject the plain meaning of a statute if '[a]rational Congress' *could have* intended that meaning. *Id*. at 13 (emphasis in original) (citing *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1484 (2021); *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1542 (2021)).

Another fundamental canon of statutory construction is "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *United States v. Kelly*, 77 M.J. 404, 406-07 (C.A.A.F. 2018) (citation omitted). Consequently, "'a reviewing court should not confine itself to examining a particular statutory provision in isolation.'" *United States v. McPherson*, 73 M.J. 393, 399 (C.A.A.F. 2014) (Baker, C.J., dissenting) (quoting *Food and Drug*

Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000). "'The meaning -- or ambiguity -- of certain words or phrases may only become evident when placed in context.'" *Id*. (quoting *Food and Drug Admin.*, 529 U.S. at 132-33).

Article 6b, UCMJ, provides victims the "[r]ight to be reasonably heard" at sentencing hearings. "The President promulgated R.C.M. 1001A to facilitate[] [this] statutory right." *Tyler*, 81 M.J. at 111 (citations omitted). R.C.M. 1001A(d) allows a victim to be reasonably heard at the sentencing for any case through a sworn statement. For non-capital cases, a victim may provide a sworn or unsworn statement. R.C.M. 1001A(b)(4)(B); R.C.M. 1001A(e). This unsworn statement "may be oral, written, or both." R.C.M. 1001A(e). The content of a victim's statement—either sworn or unsworn—is limited to "victim impact or matters in mitigation." R.C.M. 1001A(c). "'[V]ictim impact' includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001A(b)(2).

"Upon objection by either party or *sua sponte*, a military judge may stop or interrupt a victim's unsworn statement that includes matters outside the scope of R.C.M. 1001A(c)." R.C.M. 1001A(e)(2), Discussion. "If there are numerous victims, the military judge may reasonably limit the form of the statements provided." *Id*. In order to be presented at trial, a victim impact statement "must comply with the

requirements" of R.C.M. 1001A. *Barker*, 77 M.J. at 337.

This Court has concluded that "the right to be reasonably heard provided by R.C.M. 1001A [ ] belongs to the victim, not to the trial counsel." *Hamilton*, 78 M.J. at 342 (emphasis in original) (citing R.C.M. 1001A(a)); *see also Barker*, 77 M.J. at 378 ("R.C.M. 1001A is itself part of the presentencing procedure, and is temporally located between the trial and defense counsel's respective presentencing cases. 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).").

Interpreting this language, the Army Court of Criminal Appeals (hereinafter "Army Court") found that a military judged "erred by allowing the trial counsel to participate in the victim's unsworn statement." *United States v. Cornelison*, 78 M.J. 739, 744 (A. Ct. Crim. App. 2019). The Army Court was addressing the victim's question-and-answer format of her statement, wherein she used the trial counsel to ask her approximately fourteen questions. *Id*. at 741-72. The court opined that "R.C.M. 1001A does not contemplate either a trial counsel or defense counsel participating in a victim's unsworn statement" through such a manner. *Id*. at 744. The Air Force Court has similarly found error in trial counsel's participation in a victim's unsworn statement; specifically, where a trial counsel read the victims' unsworn statements to the court-martial at the victims' request. *United States v. Bailey*, No. ACM 39935,

2021 CCA LEXIS 380, at *12, 15 (A.F. Ct. Crim. App. Jul. 30, 2021) (unpub. op.) (concluding that trial counsel reading written unsworn statements to the court-martial at the request of the victim was clear or obvious error.).

"If an error occurs in the admission of evidence at sentencing, the test for prejudice is whether the error substantially influenced the adjudged sentence." *Hamilton*, 78 M.J. at 343 (citing *United States v. Sanders*, 67 M.J. 344, 346 (C.A.A.F. 2009)).[10] "When determining whether an error substantially influenced a sentence, this Court considers the following 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." *Id*. (citing *United States v. Bowen*, 76 M.J. 83, 89 (C.A.A.F. 2017)).

In *Hamilton*, however, this Court noted the parties had not raised the issue as a constitutional matter, so it evaluated whether the error prejudiced the substantial rights of the accused as articulated in Article 59(a), UCMJ. *Id*. at n. 10 ("Because Appellant only challenges the admission of Prosecution Exhibits 4, 5, and 6 as improper under R.C.M. 1001 (2016) and R.C.M. 1001A (2016), and does not assert constitutional error, we assess prejudice under Article 59, UCMJ.") (citation omitted). And this Court's decision in *Tyler* never addressed the appropriate standard for the prejudice

[10] *See* note 8, *supra*.

analysis because that case was resolved utilizing the principle that the military judge arrived at the correct result, albeit for the wrong reason. 81 M.J. at 114.

"The standard for determining prejudice in cases in which the military judge has abused her discretion by admitting or excluding sentencing evidence appears to be linked to whether the evidence has constitutional implications." *United States v. Jerkins*, 77 M.J. 225, 228 (C.A.A.F. 2018); *see also United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005) (utilizing the harmless error standard when the military judge erroneously excluded portions of six character letters from the defense); *United States v. Pope*, 63 M.J. 68, 75 (C.A.A.F. 2006) (applying the harmless beyond a reasonable doubt standard when the military judge erroneously admitted a letter from the appellant's commander suggesting a harsh punishment would be appropriate.). "'[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.'" *United States v. Moran*, 65 M.J. 178, 187 (C.A.A.F. 2007) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). To conclude that such an error is harmless beyond a reasonable doubt, this Court must be convinced that the error did not contribute to the sentence. *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016).

Analysis

1. <u>*A pre-recorded video is not a permissible means of presenting an unsworn statement under R.C.M. 1001A*</u>.

R.C.M. 1001A(e) states that "an unsworn statement [by a victim] may be oral, written, or both." Although the rule does not further define "statement" or "oral," it does not need to. A plain reading of this language indicates that the President intended the delivery of a victim's unsworn statement to be through a written product to the factfinder, by spoken format in the presence of the factfinder, or both. Just as terms like "oral arguments" and "oral motions" are commonly understood to mean verbal communications made by persons to and in the presence of the court, so too does R.C.M. 1001A's reference to an oral unsworn statement denote a verbal message provided contemporaneously to and in the presence of the factfinder. As such, judicial inquiry into whether a video presentation is allowed should be complete—videos are not permitted because the rule did not authorize them. *Germain*, 503 U.S. at 254. Indeed, applying the canon of *expressio unius est exclusio alterius*, the President's express authorization of "oral" and "written" statements indicates an intent to exclude any other form of "statement," including videos, a particularly ubiquitous form of communication in today's society.[11]

[11] *See also United States v. Hamilton*, 77 M.J. 579, 590 (A. F. Ct. Crim. App. 2017)

R.C.M. 1001A is based on a victim's right to be "reasonably heard" under Article 6b, UCMJ. R.C.M. 1001A(a); R.C.M. 1001A, Drafter's Analysis, *MCM*, App. 21, at A21-73. This applies to both the form and content of a victim's message, as evidenced by the rule limiting such a message to sworn or unsworn statements presenting victim impact or matters in mitigation. R.C.M. 1001A(c)-(e). Provided that a written unsworn statement stays within the scope of the rule's permissible content, there is nothing inherently unreasonable about its form. A victim's ability to discuss similarly permissible content by speaking directly to the sentencing authority through an unsworn oral statement is likewise reasonable, even with the possibility that a victim's outward display of emotion could engender a harsher punishment. Victim emotion has, after all, long been a staple of trial practice. It is different, however, if that emotion emanates from a pre-recorded, non-contemporaneous and modifiable video recording. It is even worse when the Government creates that video.

The maker of a video controls almost every aspect of its production and presentation. The lighting, location, time of recording, and display of a video's

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(en banc) (Huygen, J., concurring in the result in part and dissenting in part) ("R.C.M. 1001A(e) permits a victim unsworn statement to be 'oral, written, or both.' The rule provides for no other form or format. The video was not, despite the intent and attempt of trial counsel, played on the record as an oral statement, and it was not transcribed and provided as a written statement. The statement in its videotape form could not be considered under R.C.M. 1001A.").

subjects can all be managed and digitally manipulated, as can the performances of those subjects through the unlimited use of retakes. Thus, a video maker can create a psychological experience which may be at odds with reality and can be easily employed to exploit the emotions of the viewer. Unlike an oral statement provided once in a live courtroom setting, whereby a victim's true emotional impact is on full display,[12] a video recording can reflect any image that victim wants the sentencing authority to see, regardless of how true that image might actually be. A panel or military judge surely would never see the outtakes and the footage left on the editing room floor. It would be virtually impossible for the sentencing authority to accurately assess a victim's credibility and impact under such circumstances, which in turn calls into question the fairness of the presentencing procedures.

Pre-recorded unsworn video presentations also make it virtually impossible for the parties, the Court, or the sentencing authority to know if the video presentation is personal to the victim. While a video could be created by a victim, there is no guarantee that is the case. The Government may be involved in creating the video, as

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[12] *Cf. United States v. Harrington*, __ M.J. __, No. 21-0025/AF, 2021 CAAF LEXIS 434, at *17 (C.A.A.F. May 6, 2021) (discussing in the context of witness unavailability, "[o]ur predecessor Court noted that former testimony often is only a weaker substitute for live testimony, and that there is a preference for live testimony. This Court has reiterated that preference for live testimony.") (internal citations and quotations omitted).

occurred here, which, in and of itself, appears to violate R.C.M. 1001A. *See Hamilton*, 78 M.J. at 342; *Cornelison*, 78 M.J. at 744; *Bailey*, 2021 CCA LEXIS 380, at *12, 15 (unpub. op.). But a video could also be created by a special victim's counsel, family members, friends, or even a paid third party digital advertising company. Anyone other than the victim who touches these videos frustrates the congressional purpose behind Article 6b, UCMJ, and presidential purpose behind R.C.M. 1001A: to facilitate the *victim's* right of allocution.

Moreover, a video-recorded presentation offers the possibility—an opportunity accepted and leveraged by the Trial Counsel in this case—to replay the video during argument and use it as the basis for a certain punishment in a way that would not otherwise be available. (JA at 130.) For example, it would be impermissible for a trial counsel to pause during sentencing argument, invite a victim back into the well, have the victim re-deliver the unsworn statement, and immediately thereafter tell the members the proper sentence to adjudge. An unsworn video presentation, though, makes this possible. As this is surely not the result sought by Congress or the President, a video recording does not represent a "reasonable" method by which the victim may be heard.

In addition to being replayed during argument, a video accepted as a Court Exhibit is subject to repeat viewings during deliberations. Thus, unlike "an unsworn

statement delivered by a declarant in narrative format in the physical presence of the factfinder" (JA at 035), a video producer can distribute his message multiple times to an audience—a circumstance which appears to have occurred here. (JA at 141.) This ensures that a video, particularly one as powerful and poignant as CE 4, will be foremost in a panel's mind when deliberating on a sentence.

Notably, "if a victim exercises the right to be reasonably heard" at a sentencing proceeding, R.C.M. 1001A(a) provides that "the victim shall be called by the court-martial." R.C.M. 1001A(d) and (e) further allow a victim to exercise this right through a special victim's counsel or representative. These provisions mean that the introduction of a victim's statement "is prohibited without, at a minimum either the presence or request of the victim . . . the special victim's counsel . . . or the victim's representative." *Barker*, 77 M.J. at 382 (citations omitted). But R.C.M. 1001A(e)(2) clarifies that a special victim's counsel may deliver "all or part of the victim's unsworn statement" only "[u]pon good cause shown." And the accompanying Discussion further indicates that "a military judge may stop or interrupt a victim's unsworn statement that includes matters outside the scope of R.C.M. 1001A(c)." R.C.M. 1001A(e)(2), Discussion.

This language demonstrates that a victim—or the victim's designee—must be present to deliver an oral statement contemporaneously to the factfinder. Otherwise,

good cause would not be needed to allow the special victim's counsel to deliver that statement and there would be no need to highlight how a military judge can "stop or interrupt" a statement. Such actions are unneeded for written statements, which are provided to the sentencing authority after objections have been lodged and redactions (if any) effected. When read collectively with other portions of R.C.M. 1001A, including the prerequisite for a "reasonable" form of the statement, and in recognition of the plain understanding of the terms "oral" and "statement," the President's intent in promulgating the rule was to provide a victim with the opportunity to present a verbal message contemporaneously to and in the presence of the factfinder—an intent that is consistent with the rights afforded by Article 6b, UCMJ. For all these reasons, a pre-recorded video presentation offered as an unsworn statement by a victim is not allowed.

2. *Interpreting R.C.M. 1001A to permit videos as "oral" statements would place it in conflict with other provisions of the MCM.*

In an effort to support its proclamation that a victim can present an oral unsworn statement through the medium of a video, the Air Force Court opined that its conclusion "was consistent with [its] reading of other provisions in the *MCM*," which provide an "expansive meaning" to the term "oral statement." (JA at 034.) Yet, none of the citations the lower court provides actually support this proposition.

First, while it is true that a videotaped interrogation qualifies as a "statement"

under R.C.M. 914(a), this is only because the President explicitly designated it as such in the same rule. *See* R.C.M. 914(f)(2);[13] *see also Clark*, 79 M.J. at 454. Likewise, R.C.M. 702's provisions relating to "oral depositions" expressly require that such proceedings be recorded and further authorize the military judge to play video recordings of these proceedings in court. R.C.M. 702(f)(6); R.C.M. 702(g)(3). The Air Force Court's reliance on these provisions is thus misplaced. (JA at 034-035.) They do not illustrate how the term "oral statement," standing alone, is interpreted expansively to include video recordings; rather, it is that an "oral statement" is generally understood to mean only a verbal statement, and that other express language is needed if a party desires to convey this statement through a video. Correspondingly, these rules illuminate the President's contrary intent regarding R.C.M. 1001A—had he wanted an oral unsworn statement to mean more than a verbal assertion made in the presence of the factfinder, he would have expressly articulated it in the rule.

The Air Force Court's citation to *United States v. Moreno*, 36 M.J. 107 (C.M.A. 1992), which "analy[zed] a videotaped interview as a hearsay statement and subject to

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[13] In a recent decision, Chief Judge Ohlson noted in the R.C.M. 914 context that, "the witness must have 'made the statement.'" *United States v. Thompson*, __ M.J. __, No. 21-0111/AR, slip. op. at 1 (C.A.A.F. Aug. 9, 2021) (Ohlson, C.J., concurring in the result). Here, Trial Counsel made the video, not R.H. (JA at 062-063.) Further, there are oral statements within the video that belong to C.H. and an unknown interviewer, presumably the Trial Counsel. Using R.C.M. 914 language, this video cannot be a "statement."

the Confrontation Clause," is similarly unavailing. (JA at 035.) Presumably, the Air Force Court focused on Mil. R. Evid. 801(a)'s definition of a "statement," which "means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Under the Air Force Court's apparent reasoning, if a video recording qualifies as an "oral assertion" under *Moreno*, then this supports the *MCM*'s purported expansive view of "oral statement." But this ignores the purpose, scope, and application of the hearsay rules.

When read in context, an "oral assertion" that qualifies as hearsay cannot be an assertion made in court; otherwise, it would not be hearsay. Mil. R. Evid. 801(c). Therefore, Mil. R. Evid. 801(a)'s definition of a statement merely relates to the method by which the declarant made it—orally, written, or through nonverbal conduct—and not the means by which to present it at court. In other words, the fact that an out-of-court "oral assertion" can be introduced at trial, subject to a hearsay exception or exclusion, through a video recording does not automatically expand the definition of such assertions. It merely reflects the particular manner a proponent may introduce the assertion at court, akin to how oral depositions may be presented pursuant to R.C.M. 702.

Finally, although not cited by the Air Force Court, R.C.M. 1105A(c) limits post-trial submissions by crime victims to written statements and photographs, while

excluding video, audio, and other media. R.C.M. 1103(j)(1) also references how—if authorized by the Services—records of trial may be made by "videotape, audiotape, or similar material from which sound and visual images may be reproduced." These rules demonstrate the President's clear understanding that video capabilities exist and can be utilized in certain ways for courts-martial. And R.C.M. 1105A(c) further evinces the President's distinction between statements on video and other forms of presentation. These rules are thus more evidence that the President could have included video recordings as an acceptable form of communication in R.C.M. 1001A, but chose not to.

3. *Assuming, arguendo, that videos are generally permissible under R.C.M. 1001A, the form and content of the video here violate the rule*.

Even if this Court concludes that R.C.M. 1001A generally permits video unsworn statements, the Military Judge abused his discretion when he accepted the video in this case because CE 4 does not comport with the requirements of R.C.M. 1001A in either its form or its content.

a. *Form: The music and photographs contained within CE 4 are not themselves oral or written statements*.

If a video unsworn statement can be conceptualized as a container, the items inside that container must also themselves be oral or written statements by a victim to comply with the form requirements of R.C.M. 1001A. The Military Judge

acknowledged as much when he sustained the Defense's objection with respect to the inclusion of the non-victim commander's letter in the video. (*See* JA at 062 (*citing Daniels*, unpub. op.); JA at 065.) As applied to the remaining aspects of the video, there are at least two additional components that do not comply with R.C.M. 1001A: the music and the photographs.

First, the background music that appears throughout the video is instrumental. Even assuming *arguendo* that a victim could deliver a statement musically, the music here does not qualify as a written or oral "statement" because it contains no lyrics or words. Moreover, no victim from this case made or produced the music for the video, stripping it of any status personal to the victim. (*See* JA at 030 n. 17). It is also instructive that the word "music" is entirely missing from the *2016 MCM*, as well as its current iteration. Congress and the President undoubtedly would have included "music" in the *MCM* had they intended to authorize it as a statement or some other means of conveying a message.

Second, the photographs contained in CE 4 do not constitute written and/or oral "statements." Although the word "photographing" is referenced in the R.C.M.'s definition of "writing," it is only in the context of "reproductions of visual symbols." R.C.M. 103(20). The Rules do not otherwise equate a photograph to a statement. In fact, as it pertains to clemency, the discussion section of R.C.M. 1105(b)(2)(D)

acknowledges the difference between "written submissions" and photographs in comparing how a convening authority must consider the former but possesses the discretion to consider the latter.

Further undercutting the notion that a photograph could qualify as a statement is the Eleventh Circuit's analysis in *United States v. Clotaire*, wherein it addressed whether enhanced photographs could be considered testimonial statements. 963 F.3d 1288 (11th Cir. 2020). The Court began with the premise that "[s]till frame pictures are not statements at all, let alone testimonial ones." *Id*. at 1295. It then noted that "[a]n assertion happens when a person speaks, writes, or acts 'with the intent of expressing a fact or opinion.'" *Id*. at 1296 (quoting *Black's Law Dictionary* (11th ed. 2019)). Ultimately, the Court held that even enhanced photos are not statements, as "[p]rocessing an image is not an oral or written assertion . . . it could only be a statement if it were nonverbal conduct intended as an assertion." *Id*. (citing Fed. R. Evid. 801(a)). Other Circuits have reached similar conclusions. *See*, *e.g.*, *United States v. Lizarraga-Tirado*, 787 F.3d 1107, 1109 (9th Cir. 2015) ("Because a satellite image, like a photograph, makes no assertion, it isn't hearsay."). As applied here, none of the photographs in CE 4 appear to be intended as nonverbal assertions; rather, they mostly depict A1C B.H. by himself or with others.

b. *Content: The music and photographs contained within CE 4 are outside the scope of "victim impact" as defined in R.C.M. 1001A(b)(2). The Military Judge also made a clearly erroneous finding of fact regarding the music.*

As a starting point, the Military Judge clearly erred when he found, as fact, the music contained in CE 4 merely provided a "neutral backdrop" and did not invoke "emotion or sadness or rage." (JA at 065.) The background music *does* invoke emotion, sadness, or rage. That was, in fact, that is the *very purpose* of the music. The music was not selected to make anyone feel better about this tragic case. Rather, the music is slow and somber. Given the circumstances in which it was presented, it served to inflame the passions of the members and create an opportunity for an emotional decision rather than one based on evidence or other proper "matters." Consequently, the Military Judge's finding of fact represents an abuse of discretion.

But the Military Judge further abused his discretion because the music and photographs in CE 4 do not meet the definition of victim impact under R.C.M. 1001A. "'[V]ictim impact' includes any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001A(b)(2). It cannot be said the music or the photographs—in and of themselves—are the *victim impact*. Even the Military Judge himself seemed to acknowledge this fact, noting that the impact to the family was "not the music choice." (JA at 065.) He likewise concluded that the "pictures" and accompanying

discussions were "not about the victim and how his loss of how his death impacted the family." (*Id.*) If neither the music nor the pictures contained victim impact, then they were impermissible content for a victim's unsworn statement.[14]

The issue that loomed over sentencing in this case was how A1C B.H. no longer had a future due to A1C Edwards's crime; something the Trial Counsel forcefully argued. (JA at 130.) But that is a matter in aggravation, not content for an unsworn statement. If these photographs were prosecution exhibits instead, a witness could properly describe them to articulate that looking at the photographs is a painful experience. The Trial Counsel performed this exercise with R.H. at PE 24 during sworn testimony. (JA at 097-102.) PE 24 represents such matters in aggravation; in much the same way, so do PE 25 and 26. Objecting to PE 24, the Defense argued that "a few photographs" maybe "two or three" could provide context, but the 24 images in PE 24 triggered Mil. R. Evid. 403 concerns. The Military Judge overruled the objection, noting that the photographs would properly be used by witnesses and family members to describe the "impact" of "the loss." (JA at 061.) CE 4, however, not subject the Military Rules of Evidence, contained *30* photographs, only one of which is a duplicate of a photo contained within PE 24. The rest are photographs that are not

[14] Although a victim may also include matters in mitigation in an unsworn statement, the Military Judge correctly concluded that such matters "are not at issue in this case." (JA at 065.)

aided by witness testimony to put the loss in context. By offering them through CE 4 and not PE 24, the Government—who already faced a Mil. R. Evid. 403 objection—was able to avoid dealing with any other cumulativeness or prejudice concerns. And, had PE 24 contained more than 50 photographs, the Military Judge's Mil. R. Evid 403 analysis would likely have turned.

In *Hamilton*, this Court cautioned that R.C.M. 1001A is "not a mechanism whereby the government may slip in evidence in aggravation that would otherwise be prohibited by the Military Rules of Evidence." 78 M.J. at 302. In a case where a victim personally prepares such a video, perhaps, the evidentiary concerns do not loom quite as large. But in a case, as here, where the *Government created the unsworn presentation*, and those counsel fully understand the rules of evidence, R.C.M.'s, and this Court's case law, the potential for abuse is significant. This Court should not endorse a trial counsel's ability to effectively present evidence to the sentencing authority, cloaked as an unsworn statement, not subject to the rules of evidence. If the Government wanted the members to consider more photographs during deliberations, it was incumbent upon the Trial Counsel to offer the pictures into evidence, subject to proper objection.

4. *R.C.M. 1001A's limitations to oral and/or written statements afford a victim the right to be reasonably heard under Article 6b, UCMJ*.

The Air Force Court labeled the video's inclusion of photos and background

music as “unusual,” but sanctioned their presentation because “it is not obviously unreasonable in light of a crime victim’s right to be reasonably heard under Article 6b(a)(4)(B), UCMJ, and R.C.M. 1001A(a).” (JA at 035-036.) As described above, the Air Force Court’s conclusion with respect to R.C.M. 1001A—both in terms of the video as a whole and its respective contents—contrasts with the rule’s plain language and other provisions from the R.C.M. and *MCM*. And because R.C.M. 1001A represents a valid implementation of Article 6b, UCMJ, this Court should conclude the Military Judge’s acceptance of CE 4 was erroneous.

a. *R.C.M. 1001A is facially consistent with Article 6b, UCMJ.*

With R.C.M. 1001A, the President carefully ensured the implementation of the statutory right provided by Article 6b, UCMJ, promulgating multiple mechanisms and procedures through which the victim’s right to be reasonably heard could be honored. *See* Article 36(a), UCMJ.

First, a victim has a right to provide sworn testimony as a witness under R.C.M. 1001 and be reasonably heard under R.C.M. 1001A; these options are not mutually exclusive. R.C.M. 1001A(a). Under the provisions of R.C.M. 1001A(b)(4)(B), a victim is reasonably heard if he or she provides a sworn or unsworn statement. R.C.M. 1001A(d) and (e) further allow a victim to exercise this right personally or through a designee appointed under R.C.M. 801(a)(6). If a victim elects to be reasonably heard

through an unsworn statement, R.C.M. 1001A(e)(2) authorizes that victim's counsel to deliver "all or part of the victim's unsworn statement" with sufficient cause shown. And while R.C.M. 1001A(e) limits an unsworn statement to "oral, written, or both," the rule as a whole nevertheless provides a victim—either personally, through counsel, or through a representative—the opportunity to exercise the right of allocution in the two most common forms of communicative expression. These broad and permissive authorizations demonstrate that the President clearly considered and validly implemented the congressionally-mandated reasonableness requirement from Article 6b, UCMJ. This Court has never held otherwise and nor should it.

The Air Force Court, though, concluded that a video presentation under R.C.M. 1001A would be permissible in light of the right to be reasonably heard in Article 6b, UCMJ, because the rule did not expressly disallow such presentations. (JA at 034.) This assessment was "central" to the lower court's conclusion. (*Id.*) In essence, then, the Air Force Court determined that something is permissible under the rule if not clearly unreasonable in its own view, rather than focus on the explicit authorizations the President made regarding reasonableness and apply the rule as written. Respectfully, the Air Force Court's analysis misses the mark and potentially encroaches upon the President's rulemaking authority. *See* Article 36, UCMJ.

This is not a case involving a presumption of non-exclusivity, where use of a

word like "include" would denote mere examples vice an exhaustive list. Rather, the language of R.C.M. 1001A is clear—an unsworn victim impact statement may be "oral, written, or both," nothing more. If this Court were to adopt the rationale that anything not expressly disallowed by the R.C.M. is permissible, it would have far reaching consequences on every aspect of the military justice system, to include judicial expansion of promulgated rules. Instead, this Court should acknowledge that the *MCM* provides a tight, circumscribed system to control both the process of, and the substantive information that gets presented to, a court-martial. But in any event, the Air Force Court's application of "anything not expressly disallowed is permissible" is not among the canons of statutory construction.

By limiting statements to oral or written form, a rational rule-maker could have intended to exclude video presentations to avoid the possibilities, discussed *supra*, that the Government could be using the video presentation to avoid the rules of evidence, that someone other than the victim may produce the video, that the video is subject to multiple reshoots and digital editing, the sentencing authority would not get to accurately assess victim impact in sentencing determinations, or that it could be played back by counsel during sentencing argument coupled with a request for a specific

sentence.[15] *McPherson*, slip. op. at 13. The plain meaning of the rule, which only permits "statements" that are "oral, written, or both" must control. R.C.M. 1001A(e).

b. *Even without the video*, *the victims were reasonably heard in this case*.

All that remains in the video besides the music and photographs are two smaller video clips of R.H. answering questions from an unknown individual, as well as some audio of A1C B.H.'s mother, C.H., answering questions from the same individual while photos displayed across the screen.[16] If that is all that remains, this unsworn video presentation is not necessary to facilitate the victim's right to be reasonably heard. R.H. elected sworn testimony, wrote a written unsworn statement, and read it aloud to the members, something permitted under R.C.M. 1001A(a). (JA at 096-103; JA at 156; JA at 104.) If the military judge has authority to reasonably limit the form of the statements provided if there are numerous victims, he or she also likely has the

[15] The Discussion section to R.C.M. 1001A(e)(2) clarifies it is not permissible for a victim to personally include a recommendation for a specific sentence. The President likely did not intend for counsel to turn the unsworn statement into a sentence request in argument.

[16] The Trial Defense Counsel declined to object to whether these clips are in accordance with R.C.M. 1001A. (JA at 058.) R.H.'s statements likely are, but those of C.H. would not be because this video was supposed to be personal to R.H. C.H. would presumably qualify to present her own unsworn statement as mother of the deceased, but that does not mean her addition to R.H.'s video is permissible under the rule. Finally, an unknown individual is asking questions of the parents. Those questions—particularly since they could have come from the Trial Counsel—should not have been accepted, or considered, either. *See Cornelison*, 78 M.J. at 744.

authority to reasonably limit the form of the statements provided by a single victim when that victim has already exercised their right of allocution in every explicitly authorized manner, and more. R.C.M. 1001A(e)(2), Discussion. Moreover, C.H. provided sworn testimony (JA at 068-074), and elected not to present an unsworn statement under R.C.M. 1001A.

Though the Trial Counsel averred that the video "is what they want to present," the right to offer an unsworn statement under R.C.M. 1001A is not an unfettered right. *See LRM v. Kastenberg*, 72 M.J. 364, 372 (C.A.A.F. 2013) (victim's "right to a reasonable opportunity to be heard" is "subject to reasonable limitations and the military judge retains appropriate discretion under R.C.M. 801"). The right must be analyzed within the overall statutory scheme (*see Kelly*, 77 M.J. at 406-07), one which expressly authorizes the form and content of such a statement—and nothing greater.

5. <u>*The Military Judge's error in accepting CE 4 prejudiced A1C Edwards*</u>.

a. *This Court should adopt the "harmless beyond a reasonable doubt" standard in its prejudice analysis*.

This case presents an opportunity for this Court to articulate whether a military judge's abuse of discretion in accepting unsworn statements outside the scope R.C.M. 1001A should be reviewed under the harmless error or harmless beyond a reasonable doubt standard. In *Barker* and *Hamilton*, this Court reviewed the abuse of discretion for harmless error. *See* 77 M.J. at 384; 78 M.J. at 343. But, in *Hamilton*, this Court

noted that the errors were not raised constitutionally; therefore, the appropriate standard for prejudice analysis was not squarely presented to the Court. 78 M.J. at 343, n. 10. Prejudice analysis was not necessary under this Court's rationale in *Tyler*. 81 M.J. at 114.

As a threshold matter, this Court's jurisprudence has only reviewed whether the introduction of *evidence* was harmless error or harmless beyond a reasonable doubt. It has never before confronted whether other *matters* introduced in pre-sentencing ought to be considered constitutionally or otherwise.[17] *See Tyler*, 81 M.J. at 113 (referencing R.C.M. 1001(g)). This Court's line of cases, to include *Griggs*, *Pope*, and *Jerkins*, indicate that a military judge's error in presentencing has constitutional dimensions—specifically, due process and the right to a fair trial—if the Government puts evidence in front of the sentencing authority that should have been excluded, yielding a harmless beyond a reasonable doubt analysis. *Jerkins*, 77 M.J. at 228; *Pope*, 61 M.J. at 406. By contrast, if a military judge erroneously excludes evidence offered by the Defense, the error is likely nonconstitutional, and harmless error applies. *Griggs*, 63 M.J. at 75.

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[17] As such, the cited cases are instructive rather than authoritative. On the non-evidence designation of unsworn statements alone, the harmless beyond a reasonable doubt standard would apply if this Court were to conclude that unsworn statements that do not meet the requirements of R.C.M. 1001A infringe on an accused's right to due process and a fair trial.

Generally speaking, unsworn statements are likely to invoke victim impact under R.C.M. 1001A(b)(2) as opposed to mitigation under R.C.M. 1001A(b)(3). As such, the matters presented to the sentencing authority are much more likely to adversely affect an accused than benefit him or her, and in essence, be more akin to Government evidence than Defense evidence. But—in this case especially—CE 4 was *created by the Trial Counsel*. The Government may not usurp the victim's right of allocution to offer what effectively amounts to matters in aggravation under R.C.M. 1001(b)(4). *Tyler*, 81 M.J. at 112. When the Government acts in such a way, the appropriate prejudice analysis ought to be the one this Court would utilize had the Military Judge erred by admitting improper presentencing evidence offered by the Government: harmless beyond a reasonable doubt.

b. *Under either standard, the court's acceptance of the video prejudiced A1C Edwards*.

The Military Judge's abuse of discretion materially harmed A1C Edwards under either formulation of prejudice. The unique attribute of video recordings, as opposed to oral or written unsworn statements, is the ability to play the recording back to members—either in deliberations, and as in this case, *during argument*. The Trial Counsel sought and received permission from the Military Judge to play back arguably the most emotionally captivating portion of CE 4 during argument—when R.H. held and smelled his deceased son's Airman Battle Uniform. (JA at 118-119.) In doing so,

the Military Judge committed the same error as in *Tyler* that playing the video during sentencing argument was permissible because it was the same "type of information" that would have been admissible outside the context of an unsworn statement. 81 M.J. at 112 (finding the "military judge erred in reasoning that trial counsel can argue the content of the unsworn statements simply because they could have been admitted as substantive evidence under R.C.M. 1001(b)(4)"); (JA at 119.) Then, the Trial Counsel immediately and explicitly tied that experience, with the emotion still permeating the air, to request the members sentence A1C Edwards to life in confinement without the possibility of parole. (JA at 130.)

This leveraging of CE 4 highlights the gravity of the Military Judge's abuse of discretion. If this were an in-court oral unsworn statement from a victim, the victim would never be allowed to resume his or her position in the well, mid-argument, to re-present their unsworn statement. But here, because it was a video, the Government was able to do that for R.H. in the role of victim, and then the Trial Counsel transitioned back into the role of advocate to request the panel sentence A1C Edwards to life in confinement. The members, also, at least had the ability to watch the video as many times as desired during deliberations, something that also would not be available had the victim elected to present a traditional oral unsworn statement from the well during the "substrate" of the pre-sentencing proceedings.

Regardless of the strength of the Government's case, the materiality and quality of CE 4—and the way it was used by Trial Counsel in sentencing argument—is so significant that it cannot be said the video did not substantially influence the adjudged sentence. The Government evidently understood the power of such a presentation, as it took the time to produce the video,[18] ensure its acceptance by the Court, and then repeatedly utilize it in argument. Moreover, the Defense's presentencing case offered significant mitigating evidence, evidence it was able to obtain under circumstances where all knew A1C Edwards was charged with murder. (JA at 157-188.)

Alternatively, under the harmless beyond a reasonable doubt standard, it cannot be said that this video did not contribute to the adjudged sentence. Although the members did not ultimately sentence A1C Edwards to a lifetime of confinement, there is no way for this Court to be confident that the error, and argument that flowed from it, did not significantly upwards-adjust the sentence the members would have adjudged.

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[18] This is no small feat. The Trial Counsel would have needed to obtain photographs, arrange them in a particular order, find the background music, audio-record at least question and answer session with C.H., video record at least two question and answer sessions with R.H. in different locations, upload all of the content onto a computer's digital editing software, arrange all the components in a certain order, set the video to music, edit and clip consolidated video, finalize the product for viewing, and communicate with the family about the product.

CONCLUSION

WHEREFORE, A1C Edwards respectfully requests this Honorable Court set aside the sentence, and order a rehearing on sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on August 13, 2021.

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CERTIFICATE OF COMPLIANCE WITH RULES 24(d) and 37

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 9,901 words.

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