13 September 2021

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39696
Airman First Class (E-3), ISAIAH L. EDWARDS, USAF, *Appellee.*	)	USCA Dkt. No. 21-0245/AF

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

ISSUE GRANTED

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 (AFCCA) reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866 (2012). (JA at 1-40.) This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.[1]

STATEMENT OF FACTS

The Murder of BH

Appellant was convicted of murdering BH. Appellant and BH were roommates in the dormitories at Andersen Air Force Base, Guam. (JA at 3.) The airmen were there as part of a squadron deployment. (Id.) In February and March 2018, Appellant participated in two conversations discussing whether he, or any other member of the unit, was capable of killing another person. In the course of both conversations, Appellant said that he thought he could kill someone. (JA at 5.) In fact, at one point, Appellant volunteered, "I think I could just kill [BH] in the middle of the night." (Id.)

In the early hours of 27 March 2018, Appellant's suitemate "awoke to the sound of someone crying and screaming from the adjoining room." (JA at 3.) The suitemate heard BH exclaim, "Why?" (JA at 10.) The suitemate promptly walked through an adjoining bathroom to Appellant and BH's room, where he saw Appellant lying on top of BH, pinning BH's hands to the ground. (JA at 3-4.) The suitemate observed BH twisting from side to side while blood poured from his

[1] As Appellant's case was referred to trial before 1 January 2019, the 2016 edition of the Manual for Courts-Martial was in effect. All citations are to the 2016 edition.

neck. (JA at 4.) It appeared that Appellant was preventing BH from covering the neck wound with his hands. (Id.) BH died while the suitemate ran for help. (Id.)

BH suffered multiple lacerations to his neck, several of which would have been fatal on their own, as well as superficial wounds on his body. (JA at 4.) BH had injuries on his hands consistent with defensive wounds and had multiple bruises on the left side of his face, which could have been caused by either a blunt force object striking him, or from a fall. (JA at 4.) BH also suffered a fracture to his right central incisor; a fragment of the fractured tooth was found on the floor of the dorm room. (JA at 4.) Appellant, conversely, suffered only a small cut to his right hand and some minor abrasions on his knees. (JA at 4.)

Appellant testified in his own defense and admitted to killing BH. (JA at 6.) According to Appellant, he woke up during the night because he allegedly felt BH's hand on his butt, at which point he instigated a fight with BH. (JA at 6.) According to Appellant, he hit BH on the jaw, knocked BH to the floor, and then continued to strike BH in the face. (JA at 6.) While Appellant claimed that during the melee BH picked up a knife, Appellant also testified that he promptly seized the knife back and stabbed BH with it three times. (JA at 6.) During cross-examination, Appellant admitted to cutting BH at least 13 times with the knife – as he explained, he "stabbed [BH] really hard." (JA at 7.) The Air Force Court found that "the Prosecution presented overwhelming evidence that Appellant did

not kill BH in self-defense" but rather that "Appellant used overwhelming force to kill his roommate at a deployed location." (JA at 10, 38.)

The Unsworn Statements

Before beginning the pre-sentencing case, the military judge held an Article 39(a) session to discuss the preadmission of documentary evidence. Trial counsel moved to admit Prosecution Exhibit 24, which was a disc containing 24 images, 22 of which were of BH alone or with his family members. (JA at 51.) The government also introduced Prosecution Exhibit 25, which was a large, official photo of BH. (JA at 55.)

During the same hearing, trial counsel provided a court exhibit to the military judge. In its original form, the court exhibit was a one page, written unsworn statement authored by RH, the father of BH. (JA at 56.) Attached to the one page document were two CDs; one was the video at issue in this appeal, and the second was "[BH's] profession of arms."[2] (JA at 56.)

Trial defense counsel made some initial objections to the written unsworn document, which are not at issue in this appeal. (JA at 57.) The military judge then asked if there was an objection to the attached DVDs. (JA at 58.) Trial defense counsel stated, "We do not object to the statements themselves of [BH's

[2] Trial defense counsel described this second exhibit as "essentially a journal of [BH] from training." (JA at 58.) The military judge ultimately excluded this DVD, and it is not relevant to this appeal. (JA at 64.)

parents] but the photos with music, we do not believe that is proper victim impact. . ."[3] (JA at 58.)

The military judge asked trial counsel whether the video was "personally created for [RH] as something that he wanted the members to see." (JA at 62.) Trial counsel explained that "[t]he government has provided assistance for and helped compile this based on the different materials [the family] have provided with, but it is their statements, it is what they wanted." (JA at 62.) Trial defense counsel asked for additional clarification, and trial counsel explained that he "put the video together" but only "after getting direction from the family as to how this was going to be put together and consulting with them multiple times during this process about how this is going to look and does that meet what they want." (JA at 62-63.) The military judge then asked defense counsel if they were "contesting" trial counsel's assistance in putting together the video. (JA at 63.) Trial defense counsel responded: "That is not a point we are contesting, your Honor . . . I think we are in agreement that the family provided input and that it was put together by trial counsel." (JA at 63.)

The military judge admitted most of the video unsworn statement as Court Exhibit 4. He held that the video was "a statement of the victim," and that the

[3] The transcript in the case includes some typographical errors, which have been corrected within this brief for clarity.

music did not invoke "such emotion as sadness or rage" but rather was a "neutral backdrop." (JA at 65.)

The Sentencing Case

The government called eleven witnesses in its presentencing case. (JA at 59; JA at 68–103.)

CH, the mother of BH, testified that BH was an easy-going, curious child growing up, and that he loved to read. (JA at 68.) She explained that as BH grew older he continued to love to read, and loved music, and it was his dream to become a pilot and remain in the Air Force. (JA at 70.) She testified that she didn't want to continue breathing when she first heard of BH's murder, because her son was her "best friend. He was my heart. And it just felt like it was ripped from me." (JA at 73.)

BH's maternal aunt testified that BH's death had an impact on the extended family, and that BH's mother in particular had lots of nightmares and had been struggling since the murder. (JA at 77.) One of BH's friends testified that among their group of friends, BH's death "was really hard on all of us." (JA at 79.) BH's paternal aunt testified that BH had been a considerate, caring person, and his death was "absolutely devastating" to his father. (JA at 80.) Lt Col JA was Appellant and BH's squadron commander, and testified that the events resulted in "general disbelief and shock" for this unit, and the unit "took it significantly hard" not only

on Andersen Air Force Base, but also at their home station of Barksdale Air Force Base. (JA at 84.)

BH's father, RH, testified that BH was a good student growing up and enjoyed playing sports and participating in marching band. (JA at 99.) He reiterated his wife's testimony that BH "wanted to fly." (JA at 99.) He explained that BH's brother broke down during the funeral, and RH had to physically hold him up. (JA at 102.) He explained that since BH passed, it was like "a piece of me is missing." (JA at 103.) RH told the panel members he would go to his son's burial site regularly to talk to him and put wreath flowers on his grave. (JA at 103.)

At the conclusion of the government's case, RH provided an oral unsworn statement pursuant to his Article 6b right to be reasonably heard. (JA at 104.) The DVD containing the video-taped unsworn statement was next played in court. (JA at 105.)

Following publication of the victims' unsworn statements, Appellant published his documentary exhibits and called two witnesses. First, SrA DD testified during the defense's sentencing case. SrA DD was a confinement guard who oversaw the custody of Appellant during his time in pretrial confinement. (JA at 107.) SrA DD testified that Appellant had been "extremely compliant" while in custody. (JA at 107.) Appellant's father, TE, also testified, explaining that family

was important to him, and that Appellant used to play video games with his brother. (JA at 112.) TE testified that it was "really hard to hear" that his son had murdered another person, but explained that he was going to "keep loving him through it." (JA at 113-114.)

SUMMARY OF THE ARGUMENT

A crime victim has a personal right to be reasonably heard at a sentencing hearing under Article 6b, UCMJ. This right belongs to the victim, independently of the government's ability to present evidence of victim impact as a matter in aggravation during its sentencing case. A crime victim is defined by statute as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under [the UCMJ]." Article 6b(b), UCMJ. In homicide cases, both the deceased and his family members qualify as crime victims under Article 6b, UCMJ, and thus have an opportunity to be heard – the deceased through an Article 6b representative, and the family members as a matter of personal statutory right. *See* Article 6b(c); *see also* United States v. Pearson, 17 M.J. 149, 153 (C.M.A. 1984) (recognizing the direct pain felt by a homicide victim's family members as a result of a murder).

The President established R.C.M. 1001A as the procedure by which a crime victim may be reasonably heard. The Rule permits a victim to be heard through either an "oral" unsworn statement, or a "written" unsworn statement. There is no

requirement within the Rule that an "oral" unsworn statement be given in person during the court-martial proceeding. Thus, the definition of "oral statement" must be interpreted according to its plain meaning, which is a spoken assertion. Neither the legal nor common definitions of "oral statement" include a requirement that the assertion be made in court, nor does other language in the Manual for Courts-Martial support such a requirement. Rather, under both a plain language interpretation of R.C.M. 1001A, and as interpreted within the context with the other provisions of the Manual for Courts-Martial, an unsworn oral statement may be videotaped before the court-martial and the videotape itself then presented to the court-martial, provided there is evidence or a proffer indicating the crime victim personally made the statement with the intent it be used at the court-martial.

The crime victims in this case -- specifically BH's mother and father -- prepared a videotaped unsworn statement for presentation at the court-martial. As both the decedent's mother and father qualified as Article 6b victims, having suffered direct emotional harm from Appellant's violent and unprovoked murder of their son, they properly exercised their right to be reasonably heard at the presentencing hearing through the medium of a video.

However, the video of the oral unsworn statement also contained background music and photographs which played over the audio recording. It is a closer question whether background music or photographs may be presented along

with an oral unsworn statement. There is no need for this Court to draw a bright-line rule in this case, and this Court need not resolve the question of whether a photograph or music can ever qualify as an unsworn statement, as under the facts of this case Appellant was not prejudiced by the admission of a video containing photographs and background music. The Air Force Court appropriately applied the harmless error prejudice requirement of Article 59(a), UCMJ. As the Air Force Court noted, the aggravating evidence "eclipsed" any possible error that arose from the inclusion of background music and cumulative photographs. This Court should similarly find that the inclusion of the photographs and music did not prejudice Appellant, and did not have a substantial influence on the sentence.

This Court should therefore affirm the Air Force Court's holding that a crime victim may be reasonably heard through presentation of an oral unsworn statement in a video medium, and affirm the Air Force Court's holding that Appellant was not prejudiced by any erroneously included material.

ARGUMENT

A CRIME VICTIM'S RIGHT TO BE REASONABLY HEARD ENCAPSULATES THE RIGHT TO BE REASONABLY HEARD THROUGH THE MEANS OF A PRE-RECORDED ORAL STATEMENT, AND APPELLANT WAS NOT PREJUDICED BY ANY ERRONEOUSLY INCLUDED MATTERS.

Standard of Review

A military judge's interpretation of R.C.M. 1001A is a question of law reviewed de novo. United States v. Barker, 77 M.J. 377, 383 (C.A.A.F. 2018). The Court reviews a military judge's admission of evidence for an abuse of discretion. Id. [1] This Court recently held that crime victim unsworn statements are not "evidence." United States v. Tyler, 81 M.J. 108, 113 (C.A.A.F. 2021). However, within that same opinion this Court also noted that the military judge acts as a "gatekeeper" to ensure that the content of a victim's unsworn statement comports with the parameters established by R.C.M. 1001A. Id. As certain content of an unsworn statement can be excluded, or the entire statement excluded by a military judge, the appellate standards of review for exclusion of evidence can properly be applied to military judge's determinations on the admission of a crime victim's unsworn statement.

Appellant timely preserved his objection to inclusion of photographs and background music in the videotaped unsworn statement. (*See* JA at 58.) Therefore,

the Court should review the general objection to the format of the unsworn statement for abuse of discretion.

However, Appellant also raises a series of arguments he waived at trial. (*See* App. Br. at 14 (arguing that the trial counsel's role in creating the video rendered it inadmissible)). Waiver is the intentional relinquishment of a known right. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (citations omitted). When an appellant waives an issue, "it is extinguished and may not be raised on appeal." Id.

While Appellant now argues trial counsel may have used the victim unsworn statement as a way to manipulate panel members or introduce additional aggravation, this argument was explicitly waived at trial. During the preadmission hearing, trial counsel explained that he assisted the family in compiling the video unsworn statement. Trial defense counsel asked for "a little bit more clarity" on how the video was put together, but also stated, "I am not in any way implying that any impropriety was done." (JA at 62.) After trial counsel explained further that he compiled the video based upon the victims' wishes, the military judge asked whether there was any contest about the way the video was put together. (JA at 62.) Trial defense counsel said "that is not a point we are contesting, Your Honor." (JA at 63.) The military judge subsequently relied upon the "agreement of the parties" that the statements themselves were those of the family and that trial counsel provided only assistance. (JA at 65.) At the conclusion of his ruling, the military judge asked the

parties if he had ruled on all the matters raised, and trial defense counsel answered, "I believe so, your Honor." (Id.) He did not contest the military judge's finding that the parties "agreed" that the family directed what was to be included in the video and how the video should be put together.

Taken together, trial defense counsel's statements that Appellant was not "contesting" the production of the video, combined with his unsolicited assertion that there was no assertion of impropriety, should result in this Court finding Appellant waived the question of trial counsel's involvement in the creation of the video. At best, Appellant forfeited the issue, and it should be subject to review solely for plain error.

Law and Analysis

Under the UCMJ, a crime victim has the "right to be reasonably heard" at "[a] sentencing hearing relating to the offense." Article 6b(a)(4). R.C.M. 1001A was promulgated in order to implement this statutory right. Tyler, 81 M.J. at 11; *see also* Manual for Courts-Martial, *Drafter's Analysis*, App. 21, A21-73. "Trial counsel shall ensure the victim is aware of the opportunity to exercise the right." R.C.M. 1001A(a). In any case, a crime victim has a right to provide a sworn statement. R.C.M. 1001A(b)(4)(A). In non-capital cases, a victim has a concurrent right to give an unsworn statement which is not subject to cross-examination. R.C.M. 1001A(e). The statement may be oral, written, or both. Id.

The only procedural requirement for the presentation of an unsworn statement at the time of Appellant's court-martial was that a victim wishing to present an unsworn statement "shall provide a copy to the trial counsel, defense counsel, and military judge." R.C.M. 1001A(e)(1).

Neither the statutory scheme of the UCMJ nor the R.C.M.s address whether an oral unsworn statement may be presented through the medium of a video. Appellant argues that use of the medium is prohibited by the Rules.

Similarly, neither the statutory scheme nor the R.C.M.s directly address whether a crime victim may include non-written or non-oral matters, such as photographs, with unsworn statements, or whether they may use photographs or music during the presentation of the unsworn statement. Appellant's secondary argument is that, even if an unsworn statement may be presented through the medium of video, an unsworn statement may not include photographs or music, as such matters are not "statements." This second question is a closer call. This Court need not resolve the question of whether photographs or music constitute "statements" within R.C.M. 1001A, as Appellant was not prejudiced by the inclusion of these extraneous items within the otherwise proper unsworn statement.

A. A crime victim may be reasonably heard through a pre-recorded oral statement.

Appellant predicates his assertion that a crime victim cannot present an oral unsworn statement through a pre-recorded video on a "plain understanding" of the

terms "oral" and "statement" but fails to define either word. Instead, Appellant argues, without citation to precedent or legal authority, that the word "oral" requires a "spoken format in the presence of the factfinder." (App. Br. at 17.) In fact, after reviewing the language of R.C.M. 1001A, applying both the common legal definitions of the words "oral" and "statement," and placing them within the context of the Manual for Courts-Martial as a whole, it is evident that a crime victim need not be physically present to deliver an unsworn statement and that such statements may be presented through video.

The prime principle of administrative construction is to give effect to the plain meaning of a statute of regulation. United States v. Blair, 10 U.S.M.C.A. 161 (1959). "When statutory language is unambiguous, the statute's plain language will control." United States v. Jacobsen, 77 M.J. 81, 84 (C.A.A.F. 2017) (citations omitted). However, the Court must also be "cognizant of the Manual's overall purpose, and view[] its terms in light of the regulatory context in which they are found." United States v. Malczewskyj, 26 M.J. 995, 998 (A.F.C.M.R. 1988) (*citing* United States v. Ortiz, 24 M.J. 164 (C.M.A. 1987)). Therefore, in interpreting statutory or regulatory language, a court should look "at each statute as a whole, considering its language, legislative history, the canons of statutory construction, applicable Supreme Court decisions, and [intent]. . ." United States v. Lopez de Victoria, 66 M.J. 67, 73 (C.A.A.F. 2008). Where there is ambiguity in terms, then "[t]he meaning of a

statement often turns on the context in which it is made, and that is no less true for statutory language." United States v. Briggs, 141 S. Ct. 467, 470 (2020).

The words "oral" and "statement" are commonly understood to encapsulate communications that are non-written. A "statement" is "a verbal assertion or non-verbal conduct intended as an assertion." Black's Law Dictionary, 11th ed. (2019); *see also* Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary (accessed 31 August 2021) (a statement is "the act or process of stating or presenting orally or on paper.") An "assertion" is "a person's speaking, writing, acting, or failing to act with the intent of expressing a fact or opinion; the act or an instance of engaging in communicative behavior." Black's Law Dictionary (2019). "Oral," meanwhile, is defined as "spoken or uttered; not expressed in writing." Id.; *see also* Merriam-Webster ("uttered by the mouth or in words; spoken.") Neither the legally understood definitions of these terms, nor the terms by their common meaning, would exclude communications that are pre-recorded. Contemporaneous, in-court presentation of the communication is not inherently included in a plain language interpretation of either the word "oral" or "statement."

Nor does anything within the Manual require an inference that an oral statement must be an in-court statement. The word "statement" is used continuously throughout the Manual to refer to both video-recorded and

contemporaneous communications. For instance, the word "statement" is defined in the Military Rules of Evidence as "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." Mil. R. Evid. 801(a). A preliminary hearing officer may consider "statements" offered by either party, which in practice regularly include video-taped interviews of witnesses, victims, or accuseds. *See* R.C.M. 405(i)(3)(B). As it pertains to discovery, trial counsel must provide "any sworn or signed statement," which includes any videotaped sworn statement. *See* R.C.M. 701(a)(1)(C). Similarly, R.C.M. 702 governs depositions, and provides for either "oral or written" depositions. R.C.M. 702(c)(2). When a deposition is "oral" it must be recorded, and the military judge may allow that oral deposition to be played in court by "videotape, audiotape, or sound film." R.C.M. 703(g)(3). Following the testimony of a witness, upon request, the military judge must order the production of "any statement of the witness" to the opposing party. R.C.M. 914(a). That Rule further defines statement as "a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement." R.C.M. 914(f)(2). Videotaped interrogations, including both the questions asked and the answers, constitute a "statement" under R.C.M. 914. United States v. Clark, 79 M.J. 449, 454 (C.A.A.F. 2020).

The Manual, then, generally refers to "statements" regardless of whether they are made orally or in written form, and regardless whether the statements are made in the course of the court-martial or are prerecorded. The fact that the President sometimes demarcated "statements" as being either oral or written demonstrates a recognition that "statements" may be made in many different forms, outside of the testimony and unsworn statements which occur during a court-martial itself. The fact that the President, in various Rules, has further defined "statement" to be oral or written, demonstrates that he never intended the word "statement" to be limited to assertions made during court-martial. *See, e.g.,* City of Chicago v. Envtl. Def. Fund, 511 U.S. 328, 337-38 (1994) (confirming interpretation of disputed statutory term by comparison with another statutory exemption. . . "this other provision shows that Congress knew how to draft a waste stream exemption . . . when it wanted to.")

Nowhere in the Manual is the word "statement" limited to assertions made in court. Rather, the word "statement" is regularly used to refer to recorded statements – whether recorded through written means or through a video recording.

Finally, video-recorded "statements" have been admitted in courts-martial for decades, and while there have been arguments against admissibility based upon the content of the recordings, or whether sufficient foundation was laid, the ability to introduce a pre-recorded statement based upon the fact that it was pre-recorded

has not been seriously questioned. *See* United States v. Moreno, 36 M.J. 107, 120 (C.M.A. 1992) (analyzing admission of a video-recording for Confrontation Clause purposes); United States v. Hamilton, 78 M.J. 335 (C.A.A.F. 2019) (requiring "actual victim participation" in an unsworn statement, but seemingly accepting the format of a video-recorded statement); United States v. Lovely, 73 M.J. 658, 675-76 (A.F. Ct. Crim. App. 2014) (allowing an accused to present a video unsworn statement).

Meanwhile, federal courts have also allowed video-recorded victim impact statements, under the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771(a)(4). *See* United States v. Messina, 806 F.3d 55, 65 (2d. Cir. 2015) (noting that the court "has never held that district courts cannot allow victims' family members to be 'heard,' in whole or in part, through a video presentation."). Article 6b, UCMJ, was drafted to mirror the federal rights for crime victims. *See* Hamilton, 77 M.J. at 582-83.

Thus, a plain reading of the term "statement," a review of that word in the context of the Manual as a whole, and a review of legal precedent, all support the military judge's interpretation at trial that a victim unsworn statement may be presented through the medium of a video.

The military judge did not commit error or abuse his discretion when he allowed a video-recorded statement to be published to the members. His decision

to allow victims to be heard through this manner was not "arbitrary, fanciful, clearly unreasonable, or clearly erroneous" such that it would constitute an abuse of discretion. *See* United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010) (citations omitted) (iterating that the abuse of discretions standard is "a strict one.")

B. Appellant waived other general objections to introduction of a video unsworn statement.

Appellant advances a series of novel objections to the video medium beyond his argument that the plain language precludes video-recorded statements, none of which were raised at trial. For instance, Appellant seeks to argue that a "pre-recorded unsworn video presentation" makes it impossible "to know if the video presentation is personal to the victim." (App. Br. at 19.) Appellant also argues that when trial counsel "produces" a video unsworn statement, it puts the "producer" in the position of manipulating a statement so as to "create a psychological experience" which is manipulative of the emotions of viewers. (App. Br. at 19.) Finally, Appellant argues, essentially, that there is an inherent level of prejudice in producing a video such that the risk of prejudice outweighs a victim's right to be reasonably heard. (App. Br. at 20.) All of Appellant's arguments are unavailing and lack support in the record.

i. The video consisted of the personal statements of RH and CH, intended to be considered by the sentencing authority at Appellant's court-martial.

Appellant's first new objection refers to the standard in United States v. Barker, 77 M.J. at 382, which states that the rights provided by R.C.M. 1001A are "personal to the victim" and the introduction of such statements requires "either the presence or request of the victim." But Barker did not require that a victim personally appear and present a statement in person, but rather that the statement must be "offered by" the victim or her advocate. Id. at 383-384. This Court focused upon the "right to be reasonably heard" as requiring that the victims in a case "be contacted and have the choice to participate and be consulted in cases where they are victims." Id. at 383. In Hamilton, this Court further refined that holding, stating that both Article 6b, UCMJ, and R.C.M. 1001A "envision actual victim participation in the proceedings and assume that a victim offers an impact statement for a particular accused at a specific court-martial." 78 M.J. at 343.

There is no real question that the statements contained in Court Exhibit 4 are the statements of RH and his wife, CH. Both are qualified victims under Article 6b, UCMJ, having suffered direct harm from the pain of losing their child. *See* Pearson, 17 M.J. at 153 (Courts-martial "can only make intelligent decisions about sentences when they are aware of the full measure of loss suffered by all of the victims, including the family and the close community"); *see also* United States v. Akbar, 74 M.J. 364, 393 (C.A.A.F. 2015) (victim impact testimony may include

"evidence about (1) the victim's personal characteristics or (2) the emotional impact of the murder on the victim's family.") Trial counsel asserted that the court exhibit was the personal statement of the victims and trial defense counsel agreed that he had no reason to contest that point. (*See* JA at 62-63.) A crime victim has a statutory right to consult with trial counsel. Article 6b(5), UCMJ. Trial counsel, meanwhile, has an obligation under R.C.M. 1001A(a) to "ensure the victim is aware of the opportunity to exercise" the right to be heard at sentencing proceedings. For an unrepresented victim, and as an officer of the court, it stands to reason that trial counsel can represent and proffer a statement as that of a victim.[4]

Court Exhibit 4 was originally an attachment to Court Exhibit 1, the written unsworn statement of RH, further showing that the video contains the personal statements of the speakers. Most importantly, in Court Exhibit 4, RH and CH can actually be heard, and RH physically appears on video. BH's parents speak directly about the impact that the loss of their son had upon them. Unlike cases

[4] This is not to say that trial defense counsel could not contest a trial counsel's representations, at which time a military judge would be called upon to exercise "sound discretion in determining whether the 'right to be reasonably heard'" is being complied with, or exceeded. *See* Hamilton, 78 M.J. at 342. In such a case, a military judge might require some additional indication that the victim was contacted about his right to be heard and elected to exercise that personal right in a particular court-martial, against a particular accused. Again, however, there is no reasonable interpretation of the statement in this case as belonging to any person other than RH and CH.

involving child exploitation, there is no ever-expanding class of accuseds in this case, who continue a cycle of victimization; rather, there was one crime committed by one man. *Compare with* Barker, 77 M.J. at 383; Hamilton, 78 M.J. at 341. In Hamilton, the investigating detectives represented to the court that the crime victims desired their statements to be "submitted in cases involving their images." 78 M.J. at 341. This Court held that "such all-encompassing requests" do not satisfy the requirements of R.C.M. 1001A. Similarly, in Barker, the government attempted to introduce an exhibit including an unsworn statement of a victim of child exploitation which was provided by an FBI database, and trial counsel expressly noted that the victim did not want to be contacted about every individual case. Again, this Court noted that there was no indication the victim wanted her statement to be used in a court-martial against the particular accused, and thus was not publishable under R.C.M. 1001A. Here, there was no confusion about whether RH or CH intended their statements to be heard by the court-martial in Appellant's case – this was not a generalized statement to be used without their express consent or participation in future cases, thus eliminating the concern raised by this Court in Hamilton and Barker.

RH and CH did not speak about general harm suffered – they discussed the particular loss of their son's life resulting from Appellant's actions alone. What's more, the military judge could easily identify RH and CH in the video as BH's

parents, as they testified in the government's sentencing case, and trial counsel proffered on their behalf their desire to have the unsworn statement presented to the sentencing authority. Unlike in Barker or Hamilton, the intent to make a statement for use in Appellant's court-martial was evident on its face. The statements are unquestionably personal and intended to be received and considered by the sentencing authority in Appellant's case.

ii. There is no evidence in the Record that trial counsel usurped the victim's right to present a statement by "producing" the video in a way to enhance its value in aggravation.

Appellant next argues that "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." (App. Br. at 19.) Certainly, a victim impact statement is not "a mechanism whereby the government may slip in evidence in aggravation that would otherwise be prohibited by the Military Rules of Evidence." Hamilton, 78 M.J. at 342. However, Appellant waived, or at best forfeited, a claim that the victim unsworn statement should be excluded because it was not a personal statement of the victims, but was in actuality a product of trial counsel's imagination or that trial counsel somehow manipulated the video. Appellant could have raised a claim of prosecutorial misconduct – he did not. Appellant could have challenged admission of the court exhibit based upon trial counsel's assistance in creating the video – he did not. Rather, as addressed,

above, trial defense counsel noted that he "was not in any way implying that any impropriety was done." (JA at 62.) When asked whether there was any contest about the way the video was put together, the defense counsel said "that is not a point we are contesting, Your Honor, that the family provided input into the video." The military judge, given the lack of objection to the manner in which the video was created, did not conduct any further inquiry.

The result of the waiver by Appellant is that no witness – neither the trial counsel who assisted in creating the video, nor the family members themselves – testified as to the creation of the video. Instead, this Court has only two proffers from the government explaining how the video was created. First, trial counsel explained "the government has provided assistance for and helping compile this based on the different materials they have been provided with that, but it is their statement, it is what they wanted." (JA at 62) (error in original). Trial counsel then added that he put together the video "after getting direction about from the family as to how this was going to be put together and consulting with them multiple times during this process about how this is going to look and does that meet what they want." (JA at 63.)

There is, thus, no evidence before this Court that the trial team in some way manipulated, produced, or engineered a victim impact statement with the intent of

introducing more aggravation evidence.[5] Rather, the record supports the military judge's finding – that the statements were personal to the victims, and thus properly presented to the sentencing authority.

In contrast to Appellant's position, and as addressed above, a crime victim has a statutory right to confer with government counsel at sentencing proceedings, and trial counsel has a regulatory obligation to inform a crime victim of his right to be reasonably heard. R.C.M. 1001A(a). It would be an absurd result for this Court to hold that trial counsel has an obligation to inform of a crime victim of his right to be heard, but was then obligated not to facilitate that right, or provide a victim any assistance in exercising that right. For instance, it would be an absurd result were a trial counsel prohibited from providing a computer for a crime victim to use in typing up an unsworn written statement, or prohibited from providing a victim with a pen and paper to hand write an unsworn statement. There is no legal distinction between a trial counsel facilitating a victim in being reasonably heard through logistical assistance with a written statement and logistical assistance with a videotaped oral statement generally. The question to be resolved by the Court is not whether trial counsel provided assistance to a crime victim in exercising the

[5] Nor, for that matter, has Appellant ever objected, at trial or on appeal, to the content of the verbal statements made by the victims on the video. In fact, trial defense counsel at one point acknowledged that "we do not object to statements themselves of [RH] or [CH] but photos with music. . ." (JA at 58.)

victim's right to be reasonably heard, but rather whether the record demonstrates that the crime victim has exercised his or her personal right at the court-martial proceeding. In other words: did trial counsel exceed the bounds of propriety, and in some way convert a victim's personal right into an opportunity to present additional evidence in aggravation? While a different case might involve a trial counsel attempting to usurp a victim's independent right to be heard, there is no evidence or indication of that within this record, and Appellant waived, or at best forfeited, his right to develop the record further by failing to raise that as a basis for exclusion.

iii. There was no risk of unfair prejudice sufficient to nullify a victim's right to be reasonably heard.

Appellant next argues that by using the medium of a video, a panel can view the statement multiple times, and in ways prejudicial to an accused. (App. Br. at 20.) However, Appellant did not raise any such fairness concerns at court, nor did he request a limiting instruction, or request that the military judge not send the video back to the members.[6] Appellant also fails, yet again, to cite to any legal authority or precedent preventing a video from going back to the members.[7] This

[6] Appellant did object to displaying portions of the video under trial counsel's argument. (JA at 118-120.)

[7] It bears mentioning that Appellant, despite his claim that allowing a video to go back to members is inherently prejudicial, himself introduced a video presentation containing statements and family photos. (JA at 36; JA at 147; Def. Ex. M.)

is particularly true given that the panel can review all physical evidence in a case multiple times – Appellant fails to demonstrate why an unsworn statement should be treated differently than evidence in this matter, or why a recorded video unsworn statement requires different rules than a recorded written unsworn statement.

To the extent that Appellant's argument is focused upon the display of emotion itself contained within the video, this Court has acknowledged that "emotional displays by aggrieved family members, though understandable, can quickly exceed the limits of propriety." Pearson, 17 M.J. at 153. As demonstrated by the Pearson decision, published decades before crime victims had an independent right to present a statement, the concern with overly emotional displays is not limited to the medium used to present victim impact evidence or statements. Rather, the concern is raised by the demeanor and actions of the crime victim, whether in testimony or in an unsworn statement. No such issue was raised in this case. While in a different case, a video unsworn statement with sobbing family members might raise due process concerns and the military judge might place constraints upon the victims' right to be heard, Court Exhibit 4 is not such a video. RH and CH are, overall, remarkably restrained as they spoke to their personal loss and the loss of life suffered by their son. There is only one brief moment when emotion makes its way into the video, when RH appears to be

speechless for a moment. But, even in this one moment, there is no swelling of music, or contrived, engineered tears. Appellant's argument, then, that a video is necessarily prejudicial because of the ability to "perform" an emotional display is not supported by the record in this case.

Appellant's generalized arguments about the inherently prejudicial nature of a videotape are unsupported by the video itself. This court should not exclude an entire medium of expression simply because of the risk of future prejudice when the bounds of propriety are stretched – rather, such issues should be raised on a case-by-case basis at trial, as with victim impact testimony presented during the prosecution's case in aggravation.

Article 6b provides a statutory right for a victim to be reasonably heard, and it remains with the sound discretion of the military judge to determine whether those bounds have been exceeded. *See* Hamilton, 78 M.J. at 342. Just as Appellant's arguments that video-recorded unsworn statements exceed the plain language of R.C.M. 1001A fails, so, too, do is vague statements attempting to limit a victims' ability to be heard by the court-martial. Had Congress intended to limit victim statements, it certainly could have done so. However, Congress intentionally used inclusive language – not limiting a victims' right to being one of testifying or appearing at a sentencing proceeding, but as being a right to be "reasonably heard." This right encompasses the ability of non-present victims to

present statements – through written medium, or through oral, video-recorded medium. Nothing in the language of the statute, or the Presidential language limits the victim's right to require physical presence – yet that it a rule that Appellant would have this Court promulgate. By requiring an oral statement to be made in person, Appellant would necessarily require physical presence.

In an unpublished decision, the Air Force Court declined to interpret R.C.M. 1001A as requiring physical presence. Rather, the court "rejected[ed] the argument that Congress, in providing rights for victims, also meant to add to their emotional, psychological, and potentially financial burden by requiring their physical presence in every case . . ." United States v. Clark-Bellamy, 2020 CCA LEXIS 391 at *17 (A.F. Ct. Crim. App. 27 Oct 2020) (unpub. op.). The court also noted that such a rule would require a victim to be "at the beck and call of prosecutors, rendering inconsequential the statutes and rules that are specifically designed to give them a voice." Id. Nor would just a rule make sense in light of the Manual's purpose of promoting justice, maintaining good order and discipline, and promoting efficiency and effectiveness. *Preamble*, MCM. Such a rule would require, even in the instance of negotiated plea agreements, that a victim interrupt his life to ensure that he was available to either travel to court, or to be available at a moment's notice to provide a telephonic statement. Videotaped statements provide a reasonable method for a victim to make an unsworn, oral statement – one

to which an appellant may make specific, tailored objections, and which a military judge may then review and address on a case-by-case basis.

Since Appellant failed to fully preserve these objections at trial, denying the military judge the opportunity to assess such arguments under the facts and context of this particular case, this Court should decline to reach these waived issues.

C. Even if erroneously admitted, Appellant suffered no prejudice from the victim unsworn statement.

Finally, Appellant argues that even if a video-recorded statement is permissible, the inclusion of photographs and background music did not constitute a written or oral statement and should not have been included in Court Exhibit 4. (App. Br. at 25.) It is a closer call in determining whether photographs or music are permissible within the language of R.C.M. 1001A. In this case, the military judge considered the video-recorded statement as a whole, without parsing out its various elements. It is a novel issue for this Court, whether a written or oral unsworn statement may include photographs, music, or other elements, which may then be incorporated into the statement. The President does not define what he means by "oral" or "written" statement in R.C.M. 1001A. However, later in the Rules, he promulgated the procedure by which a victim may present views to a convening authority for consideration before action. There, the President limited a crime victim's right to be heard to submitting "a written statement." R.C.M. 1105A(a). He then further defines the right to provide a written statement, stating

that it "may include photographs" – apparently expanding the definition of "written statement" beyond its plain terms. R.C.M. 1105A(c). This expansion in R.C.M. 1105A serves to demonstrate that the term "written statement" does not inherently encompass the right to incorporate other modes of expression.

However, this Court need not make a bright-line rule on whether photographs or music can be included in written or oral unsworn statements, as their inclusion in this particular case would constitute harmless error. The military's codification of the "harmless error" doctrine exists under Article 59(a), UCMJ. Under Article 59(a), UCMJ, the "finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." The test for harmless error is "whether the error itself had substantial influence on the sentence." Hamilton, 78 M.J. at 343. When the error involves a constitutional right, the Court looks to whether "there was no reasonable possibility that the error might have contributed to the conviction." United States v. Tovarchavez, 78 M.J. 450, 465 (C.A.A.F. 2019).

No constitutional right is implicated. First, this Court has already implicitly applied the nonconstitutional harmless error test for erroneous admission of unsworn victim statements. *See* Hamilton, 78 M.J. at 343; *see also* Barker, 77 M.J.

at 384.[8] Second, admission of a statement through video means, when the Confrontation Clause is not at issue, is non-constitutional in nature. *See* United States v. Finch, 79 M.J. 389, 398-99 (C.A.A.F. 2020) (nonconstitutional harmless error standard applied when the entirety of a victims' videotaped interview with investigators was erroneously admitted into evidence.)[9] Meanwhile, the fact that the unsworn statement can be "emotionally charged" does not implicate a constitutional right. In United States v. Fetrow, a military judge erroneously admitted propensity evidence under Mil. R. Evid. 414 – specifically, a child victim presented testimony that was powerful, "apparently emotional and heartfelt," with the victim "becoming visibly upset while testifying. . ." 76 M.J. 181,187-88 (C.A.A.F. 2017.) Nonetheless, the court proceeded with a nonconstitutional harmless error prejudice analysis, as no constitutional right was implicated by the evidentiary error. It is, then, settled law that the admission of evidence, when it

[8] Appellant attempts to distinguish his case by pointing to a footnote in Hamilton where this noted that the Appellant had only challenged the admission of evidence under R.C.M. 1001 and R.C.M. 1001A and did not raise a constitutional challenge. (*See* App. Br. at 37.) However, here, too, Appellant has only challenged the admission of the video unsworn statement under R.C.M. 1001A and has not pointed to a constitutional basis for exclusion.

[9] This Court has previously held that the Sixth Amendment's confrontation clause does not apply to presentencing proceedings. United States v. McDonald, 55 M.J. 173, 177 (C.A.A.F. 2001).

does not directly implicate a constitutional right, is reviewed for harmless error, and not harmless error beyond a reasonable doubt.

Appellant points to no error of constitutional proportion within his own case. Rather, he cites to cases in which concerns with unlawful command influence led this Court to apply a harmless beyond a reasonable doubt prejudice standard. *See* United States v. Jerkins, 77 M.J. 25, 228-29 (C.A.A.F. 2018) ("unlawfully influencing a court-martial raises constitutional due process concerns"); United States v. Pope, 63 M.J. 68, 75 (C.A.A.F. 2006) (command letter suggesting harsh punishment was appropriate had an appearance of improperly influencing the court-martial). Unlawful influence certainly can implicate concerns with due process. Here, there is no question of unlawful command influence, nor does Appellant advance a persuasive theory of how his due process rights were influenced by erroneous admission of photographs or instrumental music.[10] Therefore, this court should apply the nonconstitutional harmless error standard of Article 59(a), UCMJ.

The government bears the burdening of demonstrating that the admission of erroneous evidence is harmless. United States v. Flesher, 73 M.J. 303, 318

[10] Appellant's argument that the "harmless beyond a reasonable doubt" standard applies to circumstances in which the government puts evidence in front of the sentencing authority is not supported by law. Nor, for that matter, would it make sense to apply this standard to crime victims' unsworn statements, in which neither party is introducing the statement.

(C.A.A.F. 2014). "In conducting the [harmless error] prejudice analysis, this Court weighs: (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. Hamilton, 78 M.J. at 343.

Even assuming the photographs and instrumental music were erroneously admitted, Appellant suffered no harm from their inclusion in the unsworn statement. As the Air Force Court aptly noted, "Here, there was exceptionally strong aggravation evidence considering the unprovoked violence that preceded the killing as well as the impact of Appellant's crime on BH's family and friends." (JA at 36.) The government's case in sentencing included not only the victim impact testimony and additional aggravation evidence presented during the pre-sentencing hearing, but also all of the aggravating evidence derived from the findings case. This included the senseless and unprovoked murder of a fellow airman, in the dorms, at a deployed location. After having committed the fatal stabbings, Appellant held BH's hands away from his neck, preventing him from covering his wounds. Appellant also misled and slowed down first responders from helping BH. (*See* JA at 4.) The excessive violence employed in the murder was an additional factor in aggravation, as were Appellant's cold-blooded assertions that he "had to kill my roommate" and his musings about his ability to murder another person. (*See* JA at 7.) In addition, during the pre-sentencing

hearing, the government introduced testimony of BH's family, friends, and squadron commander, all of whom attested to the loss within their respective communities. Finally, the government presented photographs of BH himself, giving the members a tangible representation of the life that was lost and the future that was unjustly ended. *See* United States v. Taylor, 41 M.J. 701, 705 (A.F. Ct. Crim. App. 1995) ("just as the murderer should be considered as an individual, so too the victim is an individual whose death presents a unique loss to society and particularly to his family.")

By comparison, Appellant's sentencing case was weak. He introduced five character letters, a video presentation, and called two witnesses. (JA at 36, JA at 188.) His father testified Appellant was generally a good child growing up, and testified he would love his son unconditionally, and love him through the court-martial and the offense. (JA at 110.) The confinement guard testified briefly that Appellant had been compliant while in pretrial confinement. (JA at 108.) Appellant failed to demonstrate any remorse throughout the presentencing proceedings. While Appellant acknowledged that BH's family had lost a son and brother, he did not acknowledge the pain, suffering, or loss of a future suffered by BH himself.[11] (*See* JA at 184-186.)

[11] At one point, Appellant argues that BH's loss of a future was "a matter in aggravation" and "not content for an unsworn statement. Of course, BH's loss of life was the most severe and tragic victim impact evidence in the case. No victim

The Air Force Court properly noted that "the materiality and quality of the objected-to[12] portions of the video presentation were eclipsed by the evidence presented on the merits and in aggravation." (JA at 36.) Trial counsel had previously admitted photographs of BH, depicting his life as a child through adulthood. (Pros. Ex. 24, located at JA 151.) RH and CH had testified during pre-sentencing, and explained and provided context for the photographs which were introduced by the government.[13] Appellant has advanced no argument as to why additional photographs of BH would themselves be prejudicial, nor is any prejudicial impact apparent from the record. Nor has he argued that photographs cannot be used to demonstrate victim impact. The federal courts, as well as this Court, have allowed the government to introduce evidence of victim impact in

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suffered more direct physical harm than BH. The UCMJ also recognizes that deceased victims still maintain their Article 6b rights, as it allows for appointment of an individual to assume the rights for a person who is deceased. Article 6b(b).

[12] At approximately 03:55 in the video, trial counsel asks, "Were you proud of your son?" (Court Exhibit 4, JA at 156.) Again, at 5:40, trial counsel can be heard asking a question. Appellant did not object to inclusion of this question, nor did the military judge rule on it. The questions asked were extremely similar to the testimony by CH and RH.

[13] Appellant erroneously states that RH elected sworn testimony. (App. Br. at 34.) That is inaccurate. RH testified in the government's case – he did not provide a sworn statement under RCM 1001A subject to cross-examination by trial counsel and defense counsel, but was called by government counsel and testified in the government's case.

homicide cases by showing photographs of the deceased while they were still alive. *See* United States v. Curtis, 44 M.J. 106, 140 (C.A.A.F. 1996); United States v. Chanthadara, 230 F.3d 1237, 1274 (10th Cir. 2000).

Meanwhile, the military judge and the Air Force Court both noted that the music was not prejudicial, would not incite the passions of the panel members, and was not improperly emotional. (JA at 37.) This Court should hold the same. The music contained on Court Exhibit 4 seems to be a simple, free-form jazz instrumental, which does not carry with it any particular emotional significance. As the Air Force Court aptly noted, the music "had neither probative nor prejudicial value." (JA at 37.)

Appellate courts which have addressed music contained on court exhibits have focused the concern on whether music is overly sentimental in such a way that it would cause an "emotional outpouring" from panel members. *See* People v. Kelly, 42 Cal. 4th 763, 799 (2007) (noting that "these days, background music in videotapes is very common; the soft music here would not have had a significant impact on the jury"); Lopez v. State, 231 Md. App. 457, 486 (2017) (six minute video with background music was not "unduly inflammatory" as it was not "lengthy" nor "highly emotional").

Here, even if the music was not properly admitted, Appellant was not prejudiced. The music played in the background of Court Exhibit 4 is more

distraction than anything – it certainly is not the type of music to cause emotional outpourings. Put simply, the music was not relevant – therefore, the materiality and quality of the music were low, and unlikely to have contributed to the government's case, nor was the music used by the government in any way in its sentencing argument. *See* United States v. Washington, 80 M.J. 106, 111 (C.A.A.F. 2020) (highlighting the factual circumstances of cases which may be used in assessing the materiality and quality of evidence).

Any prejudice that could have resulted from any erroneous inclusion of photos was obviated by the fact that the government had already laid the foundation for and admitted photographs of BH in its case in aggravation. In fact, Appellant seemingly argued that the photos were not particularly relevant, as one of his objections to the unsworn statement was that the photos would be "cumulative." (JA at 58.) Issues concerning the admission of cumulative evidence are unlikely to result in prejudice. *See* Wong v. Belmontes, 558 U.S. 15, 27 (2009) (defendant could not demonstrate prejudice when omitted evidence was cumulative); United States v. El-Mezain, 664 F.3d 467, 526 (5th Cir. 2011) ("It is well established that error in admitting evidence will be found harmless when the evidence is cumulative.") Along similar lines, this Court has held that "[a]n error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an

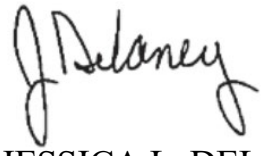
appellant." Barker, 77 M.J. at 384. Given that similar photographs of BH while alive had been previously admitted, there is no reasonable probability Appellant's sentence would have been different – in short, the erroneous admission of photographs and music did not have a substantial influence on the sentence.

Lastly, Appellant argues the video unsworn statement was prejudicial because trial counsel incorporated it into his argument. (App. Br. at 37.) While trial counsel's argument is some measure of the materiality of the video, it must be noted that trial counsel's argument was limited to RH's actions and words in the unsworn video – actions which he could have taken while on the stand as well. Trial counsel did not focus on either the music, or the photographs contained within Court Exhibit 4.

This Court should also note that the maximum sentence possible in the case was confinement for life without the possibility of parole, and yet Appellant received only 35 years of confinement. Thus, the sentence itself reflects that the members were not improperly persuaded by the music or photos in the victim unsworn statement, but rather weighed the horrific crime committed by Appellant, and the resulting harm felt by BH's family, friends, and community against his case in mitigation and extenuation. In short, inclusion of the non-relevant music and the cumulative photographs of BH while he was alive did not substantially influence the sentence.

CONCLUSION

WHEREFORE, the United States respectfully requests this Honorable Court answer the granted issue in the negative and affirm the lower court's decision.



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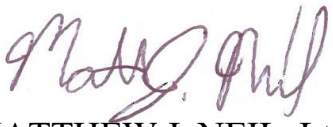

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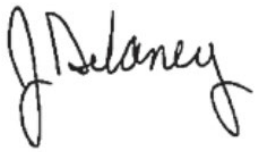
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division via electronic means on 13 September 2021.



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/s/_____

JESSICA L. DELANEY, Maj, USAF

Attorney for USAF, Government Trial and Appellate Operations

Dated: 13 September 2021

APPENDIX

United States v. Clark-Bellamy

United States Air Force Court of Criminal Appeals

October 27, 2020, Decided

No. ACM 39709

Reporter
2020 CCA LEXIS 391 *; 2020 WL 6301347

UNITED STATES, Appellee v. Christopher D. CLARK-BELLAMY, Senior Airman (E-4), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: John C. Degnan. Sentence: Sentence adjudged 29 March 2019 by GCM convened at Holloman Air Force Base, New Mexico. Sentence entered by military judge on 22 April 2019: Dishonorable discharge, confinement for 1 year and 6 months, forfeiture of all pay and allowances, and reduction to E-1.

Counsel: For Appellant: Major Benjamin H. DeYoung, USAF; Major Yolanda D. Miller, USAF.

For Appellee: Captain Kelsey B. Shust, USAF; Mary Ellen Payne, Esquire.

Judges: Before POSCH, RICHARDSON, and MEGINLEY, Appellate Military Judges. Judge MEGINLEY delivered the opinion of the court, in which Senior Judge POSCH and Judge RICHARDSON joined.

Opinion by: MEGINLEY

Opinion

MEGINLEY, Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, in accordance with his pleas and a pretrial agreement (PTA), of one specification of wrongfully and knowingly possessing child pornography, in violation of *Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934*.[1] The military judge sentenced Appellant to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the grade of E-1. Consistent with the terms **[*2]** of the PTA, the convening authority approved only one year and six months of confinement. Otherwise, the convening authority approved the sentence as adjudged.[2]

On appeal, Appellant raises three issues: (1) whether the military judge abused his discretion when he considered a victim impact statement; (2) whether Appellant is entitled to sentence relief because his case was not docketed with this court within 30 days of action by the convening authority; and (3) whether Appellant is entitled to sentence relief because the record of trial is defective and incomplete. Regarding Appellant's third assertion, given that the defects were either resolved or waived, we find this assertion does not require further discussion or warrant relief. *See United States v. Matias, 25 M.J. 356, 361 (C.M.A. 1987)*. Finding no prejudicial error, we affirm the findings and sentence.

I. Background

Appellant entered active duty in September 2012. At the time of the offense alleged in the charge and its specification, he was stationed at Holloman Air Force Base (AFB), New Mexico. On 8 January 2018, Appellant used his phone to post a child pornography image to a group chat on "Kik," a messenger application. On 5 March 2018, **[*3]** Homeland Security Investigations (HSI), Las Cruces, New Mexico, received notice, through Kik, that Appellant had uploaded illegal content to its platform. After identifying Appellant as the subscriber who uploaded the image, and that he lived on Holloman AFB, HSI notified the Air Force Office of Special Investigations (AFOSI); HSI agreed to turn the case over to AFOSI agents for investigation.

On 5 April 2018, an AFOSI agent obtained a search authorization from a Holloman AFB military magistrate to search Appellant's electronic devices for child pornography.

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

[2] As part of the pretrial agreement (PTA), the convening authority also agreed to not refer to trial by court-martial any additional misconduct concerning Appellant's alleged distribution of child pornography on or about 24 January 2018.

Subsequently, AFOSI agents seized Appellant's hard drive and cellular phone. On 6 April 2018, Appellant was interviewed by AFOSI agents. Following a rights advisement, Appellant declined counsel and answered questions. During this interview, Appellant denied sending the image but also stated his fiancée had access to his phone, although but he did not think she would have uploaded the image.

A subsequent search of Appellant's electronic devices conducted by the Defense Computer Forensics Laboratory found video and image files of child pornography on Appellant's phone and a hard drive. During his providence inquiry, Appellant acknowledged **[*4]** he posted a child pornography image on Kik to a group chat that was interested in these types of photographs. Appellant also admitted he used "Tumblr," another social media site, to purposely look for child pornography; used search terms to look for child pornography; and that he possessed four videos and over 20 photographs, on two devices, containing child pornography.

Trial counsel reached out to KF, a known child pornography victim from the series known as "Vicky," whose sexual abuse was depicted in the images in Appellant's collection.[3] During presentencing, trial counsel moved to introduce a written unsworn statement (Court Exhibit 1) and a prerecorded (video) oral unsworn statement from KF (Court Exhibit 2). The military judge made it clear that both exhibits were not government exhibits but were court exhibits. Ms. CLH, KF's attorney, provided Court Exhibit 2 to trial counsel, on behalf of KF, for the court to consider. Neither KF, nor her attorney, were present during the court-martial proceedings; however, Ms. CLH provided a signed letter to the court verifying that she had represented KF since 2008, that "it was [KF's] desire to have her victim impact statement dated 2011 **[*5]** and or her video impact statement used in the proceeding, US v. SrA Christopher D. Clark-Bellamy," and "[be] considered by the military judge presiding in this matter." Ms. CLH also stated she had "specifically communicated with [KF] concerning this proceeding to obtain her consent and direction concerning use of her impact statements." Ms. CLH's letter was marked as Appellate Exhibit V.[4]

Trial defense counsel objected to the content of KF's victim impact statements, arguing that KF's statement made reference to evidence or facts that were not at issue in the case, including KF's statement related to other intervening actors, "like people who have stalked her." Trial defense counsel also objected to Ms. CLH's letter, Appellate Exhibit V, for lack of authenticity. The military judge acknowledged the authentication issues, noting Ms. CLH's letter was neither notarized nor certified, and that it "is just a memorandum." The military judge considered the issue of Ms. CLH's statement and believed it "an interlocutory question that could be resolved by her testifying on the telephone to [the trial court] and allowing both sides the opportunity to question her and to cross-examine **[*6]** her to establish the authenticity of Appellate Exhibit V." Trial counsel argued that under Mil. R. Evid. 901, he did not believe there was an authenticity argument, in that a judge's discretion to exclude evidence on authenticity grounds is "limited to deciding whether sufficient proof exists for a reasonable juror to determine the authenticity of the document." Trial counsel later again argued, after Ms. CLH testified telephonically, the "government does not believe there is an authenticity requirement under M[il]. R. E[vid]. 901 as to an Appellate Exhibit."

Trial defense counsel stated that even if the document was authenticated, he objected to Ms. CLH's telephonic testimony to introduce KF's statement. Trial defense counsel argued if it was so important for KF's statement to be considered, the Government had ample time to produce Ms. CLH to testify in advance of trial.

The military judge, believing it would be helpful for the record to have Ms. CLH articulate facts about her letter, overruled trial defense counsel's objection to her testifying telephonically on the issue of authentication. Citing R.C.M. 703(b)(1) (2016 *MCM*), the military judge opined:

> [T]he Court is considering the testimony of Ms. [CLH] as testimony **[*7]** on an interlocutory question. Understanding, defense, you're not consenting to this. But looking at the factors under the rule, these are factors to be considered but are not limited to the cost of producing the witness, the timing of the request for the production of [sic] witness, potential delay, and the interlocutory proceeding that may be caused by the

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[3] The record indicates KF in Appellant's case is the same KF in *United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2018)*. The CAAF noted in its *Barker* opinion, "We have no doubt that KF is indeed the child in the 'Vicky series,' and that she is a 'victim' of child pornography for the purposes of R.C.M. 1001A." *77 M.J. at 381*. The "Vicky" child pornography series refers to the recorded rape and abuse of KF by her father when she was ten years old. *See United States v. Kearney, 672 F.3d 81 (1st Cir. 2012)*; *United States v. McDaniel, 631 F.3d 1204 (11th Cir. 2011)*.

[4] Trial counsel also added Appellate Exhibits VI through IX to the record to provide the military judge with information regarding Ms. CLH's bar license, her Seattle law practice, and correspondence with the base legal office regarding KF's representation. The correspondence shows Ms. CLH received a redacted charge sheet for Appellant's case, as well as an excerpt of a report from the National Center for Missing and Exploited Children (known more commonly as NCMEC) identifying the series of which KF was a part.

> production of the witness, the willingness of the witness to testify in person, the likelihood of significant interference with military operational deployments, mission accomplishment, or essential training and/or child witness traumatic effects of providing the in-court testimony.

Ms. CLH, who was on standby to participate at Appellant's sentencing hearing, was called as a witness by the court, sworn, and testified telephoni-cally on the interlocutory issue. Ms. CLH stated it was her understanding the trial was for the "prosecution of [Appellant] that involves child sex abuse exploitation images of [her] client, who is the victim in the Vicky series." Trial defense counsel continued his examination as follows:

> Q [Trial Defense Counsel]. Could you explain a little bit what your knowledge of this case is?
>
> A [Ms. CLH]. I don't know **[*8]** much beyond that. As I explained before, I'm not at my office. . . . I had left the office by the time I learned that my testimony was needed.
>
> Q. Were you at any time made aware of what the evidence in this case was?
>
> A. I couldn't say that I was aware of the specific evidence in detail. And I'm actually never advised of that in either civilian prosecutions or the military prosecutions that I speak to prosecutors about, other than the fact that my client's images are in a particular defendant's collection and what he or she may have done with them.
>
> Q. And was that in this case that you were advised of that?
>
> A. I was advised that my client's sexual assault images in this case were in [Appellant's] collection, yes.
>
> Q. Were you told anything about videos?
>
> A. I may have been told about it. In fact, it's my understanding that primarily the Vicky series is made up of videos.

After Ms. CLH's testimony, trial defense counsel argued against consideration of KF's victim impact statement, specifically highlighting that Ms. CLH and her client misunderstood that the case involved videos when it did not. Finding that the issue regarding authentication of Ms. CLH's statement was resolved, and that Ms. CLH **[*9]** was authorized to present KF's statement as KF's representative, the military judge overruled the Defense's objections, and accepted KF's unsworn video statement (Court Exhibit 2), as was the preference of the victim; he did not accept KF's written statement (Court Exhibit 1).[5]

The following are portions from Court Exhibit 2, KF's eight-minute video statement to the court. KF stated:

> I still have nightmares that come from knowing the pictures of me are spread around on the internet by people with perverted interests in my pain. I have panic attacks and flashbacks, I can't sleep a lot of nights, no matter how early I go to bed . . . sleep doesn't come easy for me . . . something about the nighttime puts my mind on alert. . . . I have a constant fear for my children's safety, as pedophiles have continued to stalk me over social media and have hacked into my Facebook and Instagram accounts to steal pictures of what I look like now. . . . I fear what would happen if they did found [sic] out where we lived or got a hold of pictures or information about my children considering the efforts that some have gone to as they have continued to stalk me online. I take many safety measures but my anxiety **[*10]** remains. . . . I want you to know that dealing with the effects of the stress of random men looking at pictures of my sex abuse as a child is like a full-time job and it wears me down and colors every aspect of my life.

II. Discussion

A. Victim's Impact Statement

1. Law

A military judge's interpretation of R.C.M. 1001A is a question of law we review de novo. *See* *United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2018)* (citations omitted). However, we review a military judge's decision to accept a victim impact statement offered pursuant to R.C.M. 1001A for an abuse of discretion. *See* *id. at 383* (citing *United States v. Humpherys, 57 M.J. 83, 90 (C.A.A.F. 2002)* (reviewing a military judge's application of R.C.M. 1001A (2016 *MCM*) for an abuse of discretion)). "The 'judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.'" *Humpherys, 57 M.J. at 90* (quoting *United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995)*).

Issues of statutory interpretation are reviewed de novo. *United States v. Jacobsen, 77 M.J. 81, 84 (C.A.A.F. 2017)* (citing

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[5] Although he overruled the Defense's objection, the military judge did not play Court Exhibit 2 in open court; he watched the video during deliberations. The military judge did note after he announced the sentence that he watched the video in chambers, and that it was eight minutes and ten seconds long.

United States v. Vargas, 74 M.J. 1, 5 (C.A.A.F. 2014)). Courts first look to the text of the statute. *Id.* (citing *United States v. Tucker, 76 M.J. 257, 258 (C.A.A.F. 2017)*; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000)* ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal quotation marks and citation omitted))). "When statutory language is unambiguous, the statute's plain language will control." *United States v. Jacobsen, 77 M.J. 81, 84 (C.A.A.F. 2017)* (citing *United States v. Schell, 72 M.J. 339, 343 (C.A.A.F. 2013))*.

R.C.M. 1001A(b)(1) defines **[*11]** a "crime victim" 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." Child pornography is a continuing crime and a child depicted in the images is victimized each time the images are downloaded and viewed. *Paroline v. United States, 572 U.S. 434, 439, 134 S. Ct. 1710, 188 L. Ed. 2d 714 (2014)* (citation omitted).

A victim has a right to be reasonably heard in a sentencing hearing. *Article 6b(a)(4)(B), UCMJ, 10 U.S.C. § 806b(a)(4)(B)*.

> At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard.

R.C.M. 1001A(a). "[T]he right to be reasonably heard requires that the victims be contacted, given the choice to participate in a particular case, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a 'victim's designee' where appropriate." *United States v. Hamilton, 78 M.J. 335, 340-41 (C.A.A.F. 2019)* (citations omitted). A victim may make a sworn or unsworn **[*12]** statement during sentencing in a non-capital case. R.C.M. 1001A(b)(4). An unsworn statement may be oral, written, or both. R.C.M. 1001A(e). Statements offered under R.C.M. 1001A(b) may include victim impact or matters in mitigation. "[V]ictim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001A(b)(2).

However, "the rights vindicated by R.C.M. 1001A [(2016 *MCM*)] are personal to the victim in each individual case. Therefore, the introduction of statements under this rule is prohibited without, at a minimum, either the presence or request of the victim, R.C.M. 1001A(a), the special victim's counsel or the victim's representative, R.C.M. 1001A(d)-(e)." *Barker, 77 M.J. at 382*. The military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement. R.C.M. 1001A(e)(2); *see also LRM v. Kastenberg, 72 M.J. 364, 370 (C.A.A.F. 2013)* ("A reasonable opportunity to be heard at a hearing includes . . . that a victim . . . who is represented by counsel be heard through counsel.") "During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." R.C.M. 1001(f)(1).

Victim impact statements offered under **[*13]** R.C.M. 1001A are not "evidence," and thus "the balancing test in Mil. R. Evid. 403 is inapplicable to assessing the reasonable constraints that may be placed upon such statements." *United States v. Hamilton, 77 M.J. 579, 586 (A.F. Ct. Crim. App. 2017)* (en banc), *aff'd*, *78 M.J. 335 (C.A.A.F. 2019)*. As this court explained in *Hamilton*,

> Mil. R. Evid. 403 addresses "legal relevance" and provides that "evidence" may be excluded notwithstanding its logical relevance. In the decision to allow a victim to exercise their right to be heard on sentencing, a military judge is neither making a relevance determination nor ruling on the admissibility of otherwise relevant evidence. Instead, the military judge assesses the content of a victim's unsworn statement not for relevance, but for scope . . . .

Id.

In *Hamilton*, this court acknowledged the military judge has an "obligation to ensure the content of a victim's unsworn statement comports with the defined parameters of victim impact or mitigation as defined by the statute and R.C.M. 1001A."[6] *Id. at 585-86* (citing R.C.M. 1001A, Discussion ("A victim's unsworn statement should not exceed what is permitted under R.C.M. 1001A(c) . . . . Upon objection or *sua sponte*, a military judge may stop or interrupt a victim's unsworn statement that includes matters outside the scope of

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[6] Our holding was limited to the determination that victim impact statements, like an accused's unsworn statement, are not evidence: "Reading the plain language of the rules, we hold that unsworn victim impact statements offered pursuant to R.C.M. 1001A are not evidence." *United States v. Hamilton, 77 M.J. 579, 583 (A.F. Ct. Crim. App. 2017)* (en banc), *aff'd*, *78 M.J. 335 (C.A.A.F. 2019)* (citing *United States v. Provost, 32 M.J. 98, 99 (C.M.A. 1991)* (if an accused elects to make an unsworn statement, he is not offering evidence)).

R.C.M. 1001A.")).

The United States Court of Appeals for the Armed Forces (CAAF) **[*14]** affirmed this court's decision in *Hamilton* on grounds that the appellant suffered no prejudice by "[t]he victim impact statements . . . [that] d[id] not comply with the requirements of R.C.M. 1001A (2016), and, thus, were improperly admitted." *Hamilton, 78 M.J. at 342*. Consequently, the CAAF did not reach the question whether R.C.M. 1001A (2016 *MCM*) statements are subject to the Military Rules of Evidence, but acknowledged "[t]he plain language of R.C.M. 1001A (2016) clearly contemplates that at least some of the Military Rules of Evidence are inapplicable to victim impact statements." *Id.* The CAAF observed,

> [I]n those cases where a military judge complies with the detailed parameters set forth in R.C.M. 1001A (2016) and exercises sound discretion in determining whether the "right to be reasonably heard" is exceeded, resolution of [the issue whether R.C.M. 1001A statements are subject to the Military Rules of Evidence] is unlikely to be dispositive.

Id.

When there is error regarding the presentation of victim statements under R.C.M. 1001A, the test for prejudice "is whether the error substantially influenced the adjudged sentence." *Barker, 77 M.J. at 384* (citation omitted). When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: "(1) **[*15]** 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." *United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017)*. "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." *United States v. Machen, No. ACM 39295, 2018 CCA LEXIS 419, *12 (A.F. Ct. Crim. App. 29 Aug. 2018)* (unpub. op.) (citing *United States v. Harrow, 65 M.J. 190, 200 (C.A.A.F. 2007)*).

2. Analysis

Appellant challenges the authenticity of Ms. CLH's written statement, her telephonic testimony regarding KF's (video) victim impact statement, and the overall admissibility of KF's statement. Regarding the authenticity of Ms. CLH's written statement, we find that Mil. R. Evid. 901 is inapplicable. Mil. R. Evid. 901 states that "[t]o satisfy the requirement of authenticating or identifying an *item of evidence*, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." (Emphasis added). Ms. CLH's written statement was not being offered into evidence. Nevertheless, as the CAAF indicated in *Barker*, military judges are expected to exercise sound discretion when it comes to a victim being reasonably heard, and in this case, we find the military **[*16]** judge exercised sound discretion in ensuring that Ms. CLH was KF's representative and that she accurately disclosed her client's views of the case. *See Barker, 77 M.J. at 382-83*. Even assuming *arguendo* that Mil. R. Evid. 901 applies, Ms. CLH's letter was authenticated through her testimony. *See* Mil. R. Evid. 901(b)(1). "Authentication simply requires establishing that the evidence is what the proponent claims it to be." *United States v. Lubich, 72 M.J. 170, 173 (C.A.A.F. 2013)* (citation omitted).

We now turn to Appellant's argument that the plain language of the law *unambiguously* requires a victim (or representative) to be physically present when presenting matters at sentencing proceedings. The language "*shall be called* by the court-martial" is not a mandate for presence at the court-martial. It means that a victim is not a prosecution or a defense witness (although the victim could be called as a witness); a victim is called by the court-martial. Additionally, Appellant appears to conflate the duty of the military judge under R.C.M. 1001(a)(3)(A) to *notify victims who are present* of their right to be heard, with the *right of any victim* to be reasonably heard under R.C.M. 1001A(a).

Thus, we disagree with Appellant's proposition that a victim (or representative) who is not *physically* present at the sentencing hearing forfeits his or her **[*17]** right to make a statement. R.C.M. 1001A conveys a personal right to the victim and does not expressly mandate physical presence. R.C.M. 1001A(a) merely states that a victim has the right to be "reasonably heard." In cases involving child pornography, a recognized continuing offense, we reject the argument that Congress, in providing rights for victims, also meant to add to their emotional, psychological, and potentially financial burden by requiring their physical presence in every case, where re-victimization has no limitation geographically or temporally, and a victim's right to make a statement would be hidden behind an impractical barrier of constantly being at the beck and call of prosecutors, rendering inconsequential the statutes and rules that are specifically designed to give them a voice.

Appellant argues "[t]he requirement that a victim (or her representative) be present is made even more necessary to ensure that a victim is actually aware of an accused's offenses," and that the victim's (or representative's) opinion could change by knowing the evidence in a case or "by

hearing more about an accused's background." Again, we disagree. While it may be true that child pornography victims, such as KF, **[*18]** could change their opinion about their victimization based on the particular accused, it is unlikely. Further, we see no confrontation issue; KF was making an unsworn statement and Appellant had no right to cross-examine her. R.C.M. 1001A(e). Additionally, this court has no expectation that KF would prepare a separate statement for every case where she was re-victimized by a stranger possessing or watching an image or video of her sexual abuse. As we stated in *United States v. Barker*, "[i]n 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." *76 M.J. 748, 754 (A.F. Ct. Crim. App. 2017)*, *aff'd on other grounds by* *Barker, 77 M.J. at 378*; *overruled on other grounds by* *Hamilton, 77 M.J. at 586*. We hold that the plain language of R.C.M. 1001A(e) does not require the physical presence of a child pornography victim (or their representative) to present or offer a victim impact statement to the court, and that telephonic or other reliable means is sufficient to meet the intent of R.C.M. 1001A(e).[7]

Lastly, we look at trial defense counsel's objection to considering KF's statement. As stated in *Hamilton*, "the military judge assesses the content of a victim's unsworn statement not for relevance, but for scope." *77 M.J. at 586*. The facts surrounding Appellant's possession of child pornography were established through his providence inquiry and the stipulation of fact and its attachments. As noted, child pornography is a continuing offense. KF's video statement, made without showing her face, describes the lifelong social, emotional, and psychological toll her constant re-victimization has on her well-being. Many of the themes and harms contained in her statement **[*20]** are well known to the law and thus are presumed to have been known by the military judge. *See* *Barker, 77 M.J. at 384*. The military judge advised the parties he would consider KF's video statement, but not her written statement (Court Exhibit 1). The military judge said he would give KF's statement the weight it deserved.

Although the military judge did not provide comment on KF's statement,[8] "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary. . . . As part of this presumption we further presume that the military judge is able to distinguish between proper and improper sentencing arguments." *United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)* (citation omitted). This presumption holds regardless of whether the military judge notes the improper portions or states what portions he will consider. *Id.* Reviewing the record, there is no evidence to rebut this presumption and we are confident the military judge sentenced Appellant based on the appropriate victim-impact matters and evidence, and as such, did not abuse his discretion.

B. Post-Trial Docketing

Appellant argues he is entitled to relief because his case was not docketed with this court within 30 days of action by the convening authority. In *United States v. Moody-Neukom, No. ACM S32594, 2019 CCA LEXIS 521* **[*21]** (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.), this court addressed issues regarding entries of judgment in place of convening authority action[9] and how future post-trial processing will be analyzed under *United States v. Moreno, 63 M.J. 129, 142 (C.A.A.F. 2006)*:

> In *Moreno*, the CAAF identified thresholds for facially

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[7] *See* *United States v. Cink, No. ACM 39594, 2020 CCA LEXIS 208 (AF. Crim. Ct. App. 12 Jun. 2020)* (unpub. op.). In *Cink*, this court declined to opine on the necessity of "actual appearance":

> To be clear, we need not and do not decide here that actual appearance by a victim at the court-martial, either in person, by live remote means, or through counsel or a designated representative, is necessarily **[*19]** required in order to be heard pursuant to R.C.M. 1001A. *See* *Barker, 77 M.J. at 382* ("[T]he introduction of statements under [R.C.M. 1001A] is prohibited without, at a minimum, either the presence *or request* of the victim, . . . the special victim's counsel, . . . or the victim's representative . . . ." (emphasis added)). For purposes of the instant case, it is sufficient to rely on our superior court's holdings that the victim, victim's counsel, or the victim's representative must offer the statement. Representations by a non-designated parent or by trial counsel are insufficient.

*Id. at *11*.

[8] This court would recommend that military judges note on the record which portions of victim's statements were considered in the sentence.

[9] *See* *United States v. Moody-Neukom, No. ACM S32594, 2019 CCA LEXIS 521, at *3-4* (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.):

> The entry of judgment takes the place of action by the convening authority under the former procedures in the sense that it "terminates the trial proceedings and initiates the appellate process." R.C.M. 1111(a)(2). After the military judge enters the judgment, the court reporter prepares and certifies the record of trial and attaches additional matters to the record **[*22]** for appellate review. R.C.M. 1112(c), (f).

> unreasonable delay for particular segments of the post-trial and appellate process. *Id. at 141-43*. Specifically, the CAAF established a presumption of facially unreasonable delay where the convening authority did not take action within 120 days of the completion of trial, where the record was not docketed with the Court of Criminal Appeals within 30 days of the convening authority's action, or where the Court of Criminal Appeals did not render a decision within 18 months of docketing.

*Moody-Neukom, 2019 CCA LEXIS 521 at *4.*

However, as we recently noted in *United States v. Livak*,

> Depending on the length and complexity of the record involved, we can envision cases in which the court reporter is still transcribing the proceedings after the convening authority's decision. As such, the prior 30-day period from action to docketing, which primarily involved transmitting an already-completed [record of trial] to the Court of Criminal Appeals, now overlays substantive actions such as completing the preparation of the record.

*80 M.J. 631 , No. ACM S32617, 2020 CCA LEXIS 315, at *6* (A.F. Ct. Crim. App. 14 Sep. 2020). This court held that:

> [T]he specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules. However, we can apply the aggregate standard threshold the majority established in *Moreno*: 150 days from the day Appellant was sentenced to docketing with this court. *See Moreno, 63 M.J. at 142*. This 150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*.

*Id. at *6-7*.

Applying *Livak* to the current case, Appellant's trial concluded **[*23]** on 29 March 2019; the Defense submitted clemency matters on 5 April 2019; the convening authority took action on the sentence on 9 April 2019; the military judge signed the entry of judgment on 22 April 2019; the court reporter certified the record of trial and a verbatim written transcript of the proceedings on 17 May 2019; and the record was docketed with this court on 18 June 2019. From the conclusion of trial to the docketing of Appellant's case with this court, 81 days passed. While it appears some of this delay could have been avoided, the delay is well below the 150-day threshold discussed above, and we find no facially unreasonable delay occurred and no violation of the Appellant's due process rights.

Assuming *arguendo* that there was a facially unreasonable delay, we have assessed whether there was a due process violation by considering the four factors the CAAF identified in *Moreno*: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review and appeal; and (4) prejudice [to the appellant]." *Moreno, 63 M.J. at 135* (citations omitted). We have also considered that where an appellant has not shown prejudice from the delay, there is no **[*24]** due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006)*. We discern no prejudice, and we find no violation of Appellant's due process rights.

In the absence of a due process violation, this court considers whether relief for excessive post-trial delay is warranted consistent with this court's authority under *Article 66(d), UCMJ, 10 U.S.C. § 866(d)*. *See United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015)*, *aff'd*, *75 M.J. 264 (C.A.A.F. 2016)*; *United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002)*. Having considered the entire record and the particular facts and circumstances of this case, we find Appellant is not entitled to any relief on this issue.

III. CONCLUSION

The findings and sentence entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. *Articles 59(a)* and *66(d)*, UCMJ, *10 U.S.C. §§ 859(a)*, *866(d)*. Accordingly, the findings and sentence are **AFFIRMED.**

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