IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

RODNEY M. TYLER,
Master Sergeant (E-7), USAF
Appellant

Crim. App. No. 39572

USCA Dkt. No. 20-0252/AF

APPELLANT'S REPLY BRIEF

MATTHEW L. BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.blyth@us.af.mil

TODD J. FANNIFF, Lt Col, USAF
Deputy Chief, Appellate Defense Division
U.S.C.A.A.F. Bar No. 33050
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762

(240) 612-4770
todd.fanniff@us.af.mil

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Court of Appeals for the Armed Forces and Court of Military Appeals

Federal Circuit Courts of Appeal

Statutes and Rules

Summary

The Government and the Appellant, MSgt Rodney Tyler, agree on several questions prefatory to the granted issue: (1) unsworn victim impact statements are not evidence; (2) the scope of the victim impact statements in this case was permissible; and (3) members may properly consider a victim impact statement when deciding on a sentence. While the Government ably argues these points, it falls short on the granted issue itself. This Court granted review of whether the military judge erred by allowing Trial Counsel (TC) to argue facts not in evidence, namely unsworn victim impact statements. Asserting no error at all, the Government embraces the military judge's problematic ruling and offers a troubling solution: a properly admitted unsworn victim impact statement is subject to "fair comment, inference, and argument." As explained below, the cognitive dissonance of this approach is jarring. The Government urges this Court to declare that an unsworn victim impact statement is not evidence, yet would have those statements treated comparably to evidence for the purpose of argument, which is inconsistent with this Court's treatment of an accused's unsworn statement. This Court should recognize that: (1) TC can only reference an unsworn victim impact statement; (2) TC exceeded that limit in this case; and (3) MSgt Tyler suffered prejudice as a result.

1. **The Government's proposed holding lacks a limiting principle and promises further confusion.**

The Government's brief devotes substantial space to explaining why this Court should hold that an unsworn victim impact statement is not evidence. (Government (Gov't) Brief at 12–18.) In laying out this argument, it notes: (1) the "pivotal" removal of the oath requirement; (2) that the "right to be heard" is an "independent right of allocution governed by separate rules and case law"; and, (3) that a victim impact statement parallels an accused's unsworn statement, which this Court has held is not evidence. (*Id.*) Yet after highlighting the differences between evidence and non-evidence, the Government jettisons its position when it attempts to apply that principle to *this* case. This Court should not accept both the argument in Part A of the Government Brief and the application in Parts C and D. The Government urges this Court to hold that counsel may "make reasonable arguments or rebut the contents" of an unsworn victim impact statement. This approach eschews the distinction between evidence and non-evidence, lacks a limiting principle for courts and practitioners to apply, and muddies the waters in an unsettled area of the law.

First, the Government's approach treats the evidence/non-evidence distinction as simultaneously important and unimportant. The victim's right of allocution, if exercised through an unsworn statement, is separate and distinct from Government aggravation evidence under R.C.M. 1001(b)(4). Yet the Government

would place that non-evidence on parallel footing with aggravation evidence. The Government cites *United States v. Baer* for the proposition that argument should be limited to "*evidence* in the record, as well as all reasonable inferences fairly derived from [that] *evidence*." (Gov't Brief at 28 (citing 53 M.J. 235, 237 (C.A.A.F. 2000)) (emphasis added). The Government then reformulates *Baer* by removing "evidence" and replacing it with a new category, "information properly before the Court," which includes unsworn statements. It then urges this Court to conclude TC's argument was permissible because it rested on "information properly before the Court" and reasonable inferences drawn therefrom. (*Id.*) But "evidence" and "information properly before the Court" are not interchangeable.

Second, the Government's approach lacks a limiting principle. It would have this Court hold that counsel may make "reasonable arguments" on the contents of an unsworn victim impact statement. But the malleable "reasonable" standard offers little practical limit. How far can a trial counsel take a victim impact statement before it is unreasonable? In effect, this would allow counsel to treat evidence and non-evidence alike, restrained only by the hope that the military judge's instructions can succinctly unpack the evidence/non-evidence distinction that has troubled practitioners since the military adopted unsworn victim impact statements.

Third, the Government's confusing approach would create further problems

for practitioners. In *United States v. Hamilton*, this Court recognized the potential for Government misuse of R.C.M. 1001A, writing that it "is not a mechanism whereby the government may slip in evidence in aggravation that that would otherwise be prohibited by the Military Rules of Evidence." 78 M.J. 335, 342 (C.A.A.F. 2019). Under the Government's proposal, the incentives would rise to smuggle information into sentencing by way of the unsworn victim impact statement. Why go through the trouble of sworn testimony and cross-examination when TC could simply urge a victim to include the same aggravation evidence in an unsworn victim impact statement and argue it the same way?[1]

2. <u>An objection to "facts not in evidence" appropriately informed the military judge of the issue.</u>

The Government argues that the Trial Defense Counsel's (TDC) objection to "facts not in evidence" was invalid for properly admitted information. (Gov't Brief at 24–25.) Reaching back to this Court's opinion in *United States v. Clifton*, 15 M.J. 26, 29–30 (C.M.A. 1983), the Government argues that the "facts not in evidence" case law is limited to TC improperly placing information in front of the sentencing authority. (Gov't Brief at 25.) Yet *Clifton* was a case of egregious

[1] In discussing the distinction between sworn and unsworn testimony, the Government correctly recognizes that there is no right to confrontation at sentencing. (Gov't Brief at 27.) To the extent MSgt Tyler's brief to this Court suggested otherwise, it was error.

improper argument on findings, and contains no limiting language that would preclude a "facts not in evidence" objection here. The Government cannot both state that unsworn victim impact statements are not evidence, and that a "facts not in evidence" objection is improper.

3. The Government's comparison of victim and accused unsworn statements draws the wrong conclusions.

a. Contrary Case Law

The Government contends that since argument of an accused's unsworn statement is permissible, the same should apply to a victim unsworn statement. Yet this Court's precedent permits only limited comment on an accused's unsworn statement. The Government quotes *United States v. Barrier*, 61 M.J. 482, 484 (C.A.A.F. 2005) for the proposition that an accused's unsworn statement "is subject to rebuttal, comment during the Government's closing argument." (Gov't Brief at 23.) *Barrier* involved an accused who mentioned another Airman's sentence in his unsworn statement. 61 M.J. at 483. The issue was instructions, not argument. This Court held that the military judge did not err in giving a *Friedmann* instruction which, in essence, instructed the members to ignore the accused's sentence comparison. *Id.* at 485–86. As authority for the quote above, *Barrier* cited to R.C.M. 1001(c)(2)(C)—which says nothing about argument—and *United States v. Grill*, 48 M.J. 131, 133 (C.A.A.F. 1998). *Grill* only made a passing reference to the ability of closing argument to "provide an appropriate

focus for the members' attention on sentencing." 48 M.J. at 133. In short, this dicta in *Barrier* does not establish a rule of law; instead, this Court should turn to the numerous cases establishing only limited opportunities for comment on an Accused's unsworn statement.

A TC may highlight that an accused's statement is unsworn—as opposed to sworn testimony. *See*, *e.g.*, *United States v. Marsh*, 70 M.J. 101, 105 (C.A.A.F. 2011). Or TC may argue an accused failed to express remorse, if a predicate foundation is laid. *See*, *e.g.*, *United States v. Paxton*, 64 M.J 484, 487 (C.A.A.F. 2007). These are sensible limitations; the Government's unbounded suggestion is not. Certainly this Court would not endorse a defense counsel's argument about sex offender registry, or sentence comparison, or other matters that are permissible in an accused's unsworn statement but impermissible in argument.

b. MSgt Tyler's Unsworn Statement

One of the few permissible occasions to comment on an unsworn statement, which occurred in *Paxton*, also came up in this case: TDC objected when TC argued that MSgt Tyler failed to say "I'm sorry." (JA at 190–91.) In an Article 39(a), UCMJ, session, TDC clarified that he objected to the comment on MSgt Tyler's "absolute right to plead not guilty." (JA at 195.) The military judge found this was proper comment, at least with regard to rehabilitative potential. (JA at 196.) The military judge allowed TC's comment on MSgt Tyler's unsworn

statement, but *only* because it met the narrow criteria for permissible argument.

c. *A Hypothetical*

The Government proposes a hypothetical that supposedly undermines MSgt Tyler's argument: What if the victim offered an unsworn victim impact statement as mitigation? (Gov't Answer at 23–24.) Wouldn't MSgt Tyler's theory prevent a defense counsel from arguing the plea for mitigation? The answer, of course, is yes. The bar on arguing unsworn statements—when they contain facts not found elsewhere in the record—should apply to both parties, independent of whom it may favor.

4. <u>Trial Counsel's pervasive improper argument of unsworn victim impact statements prejudiced MSgt Tyler.</u>

This Court should discard the Government's mechanical application of *United States v. Fletcher*, 62 M.J. 175 (C.A.A.F. 2005) and find prejudice.

a. The Air Force Court's Approach

The Air Force Court focused on each individual statement and held all but one were supported by either findings testimony or a hybrid of fair inferences and the victim impact statement. (JA at 14.) It then assumed error in all statements and found no prejudice. (JA at 14, 16.) The Government asks this Court to adopt the Air Force Court's reasoning. This Court should decline to adopt the Air Force Court's narrow view of improper argument and the resulting prejudice. The proper analysis is broader: For sentencing this Court considers whether "trial counsel's

comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (citations, alterations, and internal quotation marks omitted.)

b. Severity of the Improper Argument

In addressing the first *Fletcher* factor—severity of the improper argument—the Government understates at least two key points: (1) improper argument on the continuing impact of the offenses; and (2) the timing of TC's use of victim impact.

Continuing Impact of the Offenses

Given the nature of findings testimony, ML and MC did not testify about the impact of the offenses. Because they each explained their feelings and whether the offenses had a continuing impact only through their unsworn statements, the Government must find another source for TC's comments. It tries two approaches. First, without citation to authority, it seeks to frame the impact as automatic: "The impact is solely the result of the nature of the crime committed by Appellant, not by the words written or spoken by the children in the court." (Gov't Brief at 32.) But the impact is what the victim feels; it is personal.

Second, the Government cites *Hamilton* to claim that counsel may make argument reasonably derived from the nature of the offenses, even in the absence of any information provided by a victim. (Gov't Brief at 32–33 (citing 78 M.J. at

343).) Yet *Hamilton*, a child pornography case, merely recognized the well-established principle that child pornography is a continuing offense, and that each distribution and viewing of an image may re-victimize the child. 78 M.J. at 340, 343 ("The unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim's abuse . . . plays a part in sustaining and aggravating this tragedy." (alteration in original) (quoting *Paroline v. United States*, 572 U.S. 434, 457 (2014))). *Hamilton* cited this principle simply to show that the improperly admitted victim impact statements did not prejudice the appellant because the themes of continued victimization in child pornography are well known to the law. *Id.* at 343. Here, the Government extrapolates from this rule to posit that Courts may presume a victim's feelings based on the nature of the crimes. (Gov't Brief at 33.) However, this again ignores that the victim's right of allocation is personal, and it is not for a third party to presume what the victim feels.

Given this complexity and uncertainty of continuing victim impact, no court should presume—as the Government would—the nature, depth, and persistence of victim impact. *See Kenna v. United States District Court*, 435 F.3d 1011, 1016–17 (9th Cir. 2006) (interpreting the Crime Victims' Rights Act and finding a victim's right to be heard was not satisfied by an opportunity to speak at a parallel sentencing hearing months earlier, because "[t]he effects of a crime aren't fixed forever once the crime is committed--physical injuries sometimes worsen; victims'

feelings change; secondary and tertiary effects such as broken families and lost jobs may not manifest themselves until much time has passed").

The Timing of Trial Counsel's References

TC repeatedly and effectively used victim impact in close proximity to making specific requests for a sentence. When discussing sentencing recommendations, TC invoked impact on ML and MC, who "have been dealing with the consequences of his actions for years now, and they're still dealing with that today" and stated MSgt Tyler needed to account in a "meaningful and proportional way," (JA at 182), "to account for the pain he's caused," (JA at 186), and that an appropriate sentence was needed "for the pain that he's caused them for a decade now that they're still working through." (JA at 209.) These are not innocuous comments; this is the TC telling the members that the continuing impact justifies a greater sentence.

c. Lack of Curative Measures

As to the second *Fletcher* factor, the Government briefly mentions that the "military judge gave two curative instructions." (Gov't Brief at 31.) Yet the military judge was not issuing curative instructions because he believed no error occurred. His ruling allowed TC to argue information in the victim impact statement if the same information "would otherwise be properly admissible if offered in the Government's case-in-chief." (JA at 176.) When TC did just that

during her argument, the military judge issued almost exclusively standard instructions. In a typical improper argument, the trial counsel may engage in bolstering or personal attacks on the Accused. This would then yield a curative instruction. *See United States v. Voorhees*, 79 M.J. 5, 12–13 (C.A.A.F. 2019) (lamenting the lack of curative instructions in response to pervasive improper argument); *Fletcher*, 62 M.J. at 186 (explaining the duty of a judge to interrupt impermissible argument early with corrective instructions to "dispel[] the taint of the initial remarks." (citation omitted)). Nothing like that happened here. The members were left without substantial aid to unpack the fine distinction between evidence and non-evidence. The military judge's failure to issue a curative instruction significantly aggravated the situation.

d. The Basis for MSgt Tyler's Sentence

When applying the third *Fletcher* factor, in light of *Halpin*, this Court should consider not just whether the Government had a strong sentencing case or whether the offenses were grave; instead, the analysis must look at whether TC's comments may have led the sentencing authority to issue a sentence on an incorrect basis. Here, TC used the unsworn victim impact statements to great effect, urging the members to adjudge a long sentence to compensate for the continuing pain of the victims. (JA at 182.) This Court cannot be sure the members issued the sentence on a proper basis.

Conclusion

The military judge abused his discretion when he disregarded the meaningful distinction between aggravation evidence under R.C.M. 1001(b)(4) and victim impact statements under R.C.M. 1001A. The Government urges this Court to excuse this error by allowing the parties to argue unsworn victim impact statements as if they were evidence. This Court should decline the invitation and again recognize that unsworn victim impact statements and aggravation evidence are not equal. Because TC treated the two as interchangeable, this Court cannot be certain the members sentenced MSgt Tyler based on the evidence alone.

WHEREFORE, MSgt Tyler respectfully asks this Honorable Court to set aside his sentence.

Respectfully submitted,

MATTHEW L. BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
matthew.blyth@us.af.mil

TODD J. FANNIFF, Lt Col, USAF
Deputy Chief, Appellate Defense Division

U.S.C.A.A.F. Bar No. 33050
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
todd.fanniff@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Director, Air Force Government Trial and Appellate Counsel Division, on December 3, 2020.

Respectfully submitted,

MATTHEW BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762-6604
(240) 612-4770
matthew.blyth@us.af.mil

Counsel for Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains 2,650 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word Version 2016 with Times New Roman 14-point typeface.

Respectfully Submitted,

MATTHEW BLYTH, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 36470
Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
Matthew.blyth@us.af.mil

Counsel for Appellant