23 November 2020

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br>*Appellee*,<br><br>v.<br><br>Master Sergeant (E-7),<br>RODNEY M. TYLER, USAF,<br>*Appellant.* | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | FINAL BRIEF ON BEHALF OF THE UNITED STATES<br><br><br>Crim. App. No. 39572<br><br>USCA Dkt. No. 20-0252/AF |

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**BRIEF ON BEHALF OF THE UNITED STATES**

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

## GRANTED ISSUE

**WHETHER THE MILITARY JUDGE ERRED WHEN HE PERMITTED TRIAL COUNSEL TO ARGUE FACTS NOT IN EVIDENCE; NAMELY, THE UNSWORN VICTIM IMPACT STATEMENTS WHICH WERE NOT ADMITTED AS EVIDENCE UNDER RULE FOR COURTS-MARTIAL 1001(b)(4).**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66, Uniform Code of Military Justice (UCMJ). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

## STATEMENT OF THE CASE

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

## STATEMENT OF FACTS

Appellant was convicted of intentionally touching the genitalia of ML, his 10 year old step-daughter; showing pornographic videos to ML; asking ML to masturbate while watching pornography with him and communicating indecent language to ML. (JA at 2.) Appellant was also convicted of committing an indecent act with his young biological daughter, MC, by requesting MC send him nude photographs of herself. (Id.)

### *Findings Evidence*

In her childhood years, ML affectionately called Appellant, her step-father, "Dad." (JA at 72.) When she was 10 years old and her mother was deployed, ML got scared during a storm and went to the master bedroom to sleep with her step-sister, MC, and Appellant. (JA 60-62.) This was the first time ML sought the comfort of family during the night while scared. (JA at 62.) Rather than providing comfort to the scared ML, Appellant grossly violated standards of decency and trust when put his hand underneath the clothes of ML and touched her genitalia. (JA at 65.) ML was scared to tell anyone what happened for years, but ensured she never got in bed with Appellant again. (JA at 66.)

Appellant found another chance to harm ML. After a family movie night, Appellant showed his young step-daughter pornographic videos on the family television for about an hour. (JA at 69.) ML recalled seeing nudity, and

remembered Appellant exposed her to various types of pornography, including straight and lesbian varieties. (Id.) To make matters worse, while showing ML this adult pornography, Appellant told ML she should touch herself on her genitalia while watching. (Id.) ML told Appellant no. (Id.)

Years later, then fourteen year old ML received text messages from her "Dad," Appellant, asking for nude pictures of her genitalia. (JA at 73; 214-15.) Appellant even offered to pay her for them, and when she declined, offered to settle for just a picture of her panties. (Id.) A different time, Appellant asked ML if she ever masturbated on her own, and repeated his request for pictures of ML's body. (JA at 75-76; 217-18.) ML continued to decline "Dad's" requests for nude photographs, but Appellant persisted, telling his fourteen year old step-daughter that he liked "Bad and Naughty" and he wished ML would give him a "peek" since he was an old man. (JA at 219.) When ML denied Appellant again, he threatened to tell ML's mother a secret unless ML sent him the picture he was asking for. (Id.) ML told her "Dad" his blackmail attempt was not fair. (Id.) Appellant insisted they exchange "secret for secret" and implored ML to "stop being afraid." (JA at 220.) ML replied to "Dad" it was just not right, and denied Appellant again. (Id.)

After Appellant and ML's mother divorced, ML was living with her aunt while her mother was deployed again. (JA at 77-78.) Appellant visited ML while

she was at her aunt's house. (JA at 78.) After ML and Appellant argued that weekend, ML told her aunt about Appellant's inappropriate text messages which opened the investigation leading to Appellant's convictions. (JA at 80.) At trial, the United States presented prior consistent statements of ML about the crimes of Appellant, and offered four witnesses who testified about her good character for truthfulness. (Pros Ex. 3; JA at 99; 103; 107; 112.)

Despite being her biological father, Appellant only came into MC's life when she was eleven years old. (JA at 116.) Despite Appellant's initial absence, MC was interested in knowing Appellant because "every little girl wants to be a daddy's girl." (JA at 116.) While Appellant was a "decent" father the first few years to MC, by the time she was thirteen years old Appellant was emailing her asking for nude photographs of her breasts. (JA at 118.) MC immediately told her mother about these emails. (JA at 119.) When MC was sixteen years old, Appellant tried again to get nude photos of his daughter. (JA at 120.) Like ML, MC always declined Appellant's requests. (Id.) The United States called two character witness for MC, who stated they believed MC to be a very truthful person. (JA at 132; 134.)

Appellant testified at findings that he did not touch ML in the bed during a storm, and testified he had no memory of sending sexual text messages or emails to either his daughter or step-daughter, blaming his alcoholism for both the lack of

memory and the acts themselves. (JA at 3.) Appellant's ex-wife, and mother of ML, testified that Appellant was an untruthful person. (JA at 137.) The court members were not persuaded by Appellant's version of the events, instead choosing to believe MC and ML. The members convicted Appellant of all charges and specifications.[1] (JA at 141.)

***Sentencing Information, Instruction, and Argument***

Despite Appellant's 23 years of service, Appellant had a significant disciplinary history. Appellant had a prior court-martial conviction for drunk driving, a letter of reprimand for leaving work early, and letter of reprimand for making inappropriate sexual comments to a married co-worker. (JA at 271-77; 284-86.) Appellant also received a letter of reprimand for untruthfulness—he falsified bullets for an enlisted performance report. (JA at 280-82.)

The unsworn victim statement from ML was marked as Court Exhibit 1. (JA at 143.) The finally approved unsworn statement from MC was marked as Court Exhibit 3. (JA at 156.)[2] ML also spoke directly to the members, reading nearly verbatim what she wrote in Court Exhibit 1,

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[1] The members found appellant guilty by exceptions and substitutions by changing the location at which the crime was committed for Specification 4 of the Charge. (JA at 141.)

[2] The military judge allowed tailoring of this court exhibit based on trial defense counsel's objection. (JA at 143.) Since Appellant is not arguing that the final exhibit, Court Exhibit 3, contained improper information, for purposes of the granted issue, these objections are irrelevant. The military judge did note that his

> The things that my ex-stepfather [Appellant] has done to me have affected me and my life in many ways. I used to be able to trust him as he was more of a father to me than my own biological father was. Because he took advantage of me I now have trust issues not just with men, but every friendship or relationship that I have and that I may have in the future. I was so young when he started to do these things to me. He has ruined my innocence of a child. I experienced traumatic events and saw things that most kids my age at that time may have not . . . may not have seen or known. I felt corrupted as a child because I knew about sex when other kids my age did not. This made it harder for me to make friends and connect with kids my age. My mother and I have always had a close mother/daughter relationship. What [Appellant] did has made me keep things from my own mother, which hindered our relationship. As a result of the things that he has done to me, he has made me feel worthless and less of a person. I feel that if he is punished for the disgusting and cruel things that he has done to me, I'll be able to move past this and get on with my life to be a successful adult. I will finally be able to let go of this part of my past and move on. Thank you for your time and consideration.

(JA at 158; 297.)

MC followed, and told the members,

> When I first reached out was first reached out to by [Appellant,] I was hopeful that I would finally get to have a father figure in my life, a chance to have someone to take to father/daughter dances and someone to ask for advice. When he asked for nude pictures of me . . . a nude picture of me, when I was 14, I first felt angry. No father should ever see his daughter in a sexual way. I don't think it was appropriate, let alone okay. I was confused because

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final decision on how to tailor the court exhibits was informed by the current view that the Military Rules of Evidence, including M.R.E. 403, did not apply to the court exhibits. (JA at 152.)

> he has no problem asking his own biological daughter for a nude picture. The request made me feel like he was no longer a father figure. He was barely a father and ruined what little father/daughter relationship we had. I lost all respect for him.

(JA 160; 298.)

Before sentencing arguments, the military judge properly instructed the members that,

> The court will not draw any adverse inference from the fact that a victim has elected to make a statement in sentencing which is not under oath. An unsworn statement is an authorized means for a victim to bring certain information to the attention of the court and must be given appropriate consideration. This information may be considered by you solely to evaluate the impact of the Accused's crimes on these victims, if any, or mitigating matters. The victim cannot be cross-examined by counsel, or interrogated by court members or me upon an unsworn statement, but counsel may offer evidence to rebut statements of fact contained in it. The weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member. You may consider the statement is not under oath, its inherent probability or improbability, whether it is supported or contradicted by evidence in the case, as well as any other matter that may have a bearing upon its credibility. In weighing an unsworn statement, you are expected to use your common sense and your knowledge of human nature and the ways of the world.

(JA at 168.) The military judge gave a similar instruction regarding Appellant's unsworn statement. (JA at 168-71.)

The government's sentencing argument takes up 14 pages of transcript, after removing the portions related to the defense objection discussed below. (JA 173-193.) In terms of time, the government's sentencing argument lasted just over 30 minutes. (Id.) The following initial statements by trial counsel drew an objection:

> "Given what little father/daughter relationship we had, I lost all respect for him." "He has ruined my innocence as a child." "He has made me feel worthless and less of a person." Those are the words of and from the statements that they provided you. Those words describe how they felt. How they were impacted by [Appellant's] actions, by his crimes against them. That's how he made those girls feel. Afraid.[3] That is how she felt, when she was 10 years old and she woke up in a bed, feeling the sensation of an adult male –

(JA at 173.) Trial defense counsel then objected to "facts not in evidence." (Id.) Counsel clarified his objection was that any reference to the victim impact statements "as if they are evidence . . . it's not evidence, and it can't be argued that way. . . Simply reference to it is certainly permissible. But arguing it as if it's evidence is what . . . where it crosses the line." (JA at 173-74.) When asked by the military judge about his client's own unsworn statement given at sentencing, defense counsel conceded he could talk about the accused unsworn in his sentencing argument. (R. at 174.)[4]

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[3] Along with mentioning fear in Court Exhibit 1, during trial on the merits, ML testified she was scared when Appellant touched her genitalia in bed. (JA at 65.)

[4] Trial counsel also commented on Appellant's unsworn statement in her sentencing argument. (JA at 190-91.) Trial defense counsel objected, saying it

Ultimately, the military judge ruled, "I will allow the Trial Counsel to argue information in the unsworn statement that would be . . . the same information that would otherwise be properly admissible if offered in the Government's case-in-chief." (JA at 176.) Defense counsel pushed back on the judge's ruling, saying, "[t]he victims in this case had the choice between testifying under oath, and bringing these matters to the panel's attention through an unsworn statement. They chose the latter, and so we would continue to make this objection." (JA at 176.) The judge noted their continued objection was preserved. (Id.)

Trial defense counsel's sentencing argument, like Appellant's sentencing photographs, did not mention or depict ML or MC. (JA 193; 197-207.) Trial defense counsel did refer to Appellant's unsworn in his own argument. (JA at 20; 204-05.)

Appellant's maximum possible sentence was reduction to the grade of E-1; forfeiture of all pay and allowances; confinement for 85 years; and a dishonorable discharge. (JA at 163.) Trial counsel asked for 20 years of confinement, reduction to E-1, total forfeitures, and a dishonorable discharge. (JA at 183; 186; 191.) Appellant's sentence was only a small part of the maximum punishment and trial counsel's recommendation, as he was only sentenced to reduction to E-4, a bad-

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was not "fair" argument. (JA at 195.) That said, and of note, trial defense counsel did not object to "facts not in evidence" related to trial counsel's reference to Appellant's unsworn statement. (Id.)

conduct discharge, and four years and six months of confinement. (JA at 186, 213.)

## SUMMARY OF THE ARGUMENT

The need to resolve the nascent jurisprudence on the scope of properly admitted information under R.C.M. 1001A[5] in military courts-martial is acutely highlighted by these facts. Fundamentally, the question before this Court is whether a victim's unsworn statement is "evidence" and, if not, can it still be argued by the parties?

As this brief will show, victim impact statements, sworn and unsworn, were intended to be introduced, heard and considered by the sentencing authority in crafting the appropriate sentence at a court-martial. The form, content, and vehicle for presenting this information to the sentencing authority may be subject to limitations, but once properly admitted, it may be referenced, discussed and rebutted by all sides during sentencing cases and argument. For these reasons, there was no error, and this Court need not reach any prejudice analysis. Even if this Court finds or assumes error, Appellant is not entitled to relief, as the Court below correctly held there was no prejudice to Appellant in this case.

[5] R.C.M. 1001A has been incorporated into the Manual for Courts-Martial (2019 ed.) (Appendix 15, Chapter X: *Sentencing*) at R.C.M. 1001(c). Appellant was sentenced in 2018 under the Rules for Courts-Martial as published in the Manual for Courts-Martial (2016 ed.). Accordingly, all references in this brief are to the Manual for Courts-Martial (2016 ed.) unless otherwise noted.

## ARGUMENT

**THE PROSECUTOR DID NOT MAKE IMPROPER ARGUMENT TO THE MEMBERS, NOR DID THE MILITARY JUDGE ERR IN ALLOWING THIS ARGUMENT. EVEN IF THERE WAS ERROR, APPELLANT WAS NOT PREJUDICED.**

### *Standard of Review*

Courts review de novo as a question of law whether an argument is improper. United States v Frey, 73 M.J. 245, 248 (C.A.A.F. 2014) (citing United States v. Marsh, 70 M.J. 101, 106 (C.A.A.F. 2011). When preserved by an objection, an allegation of improper argument is reviewed to determine whether the military judge's ruling constitutes an abuse of discretion. United States v. Sewell, 76 M.J. 14, 18 (C.A.A.F. 2017.) In the context of an allegedly improper sentencing argument, 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.)

Appellant contends (1) victim impact statements are not evidence; (2) that the military judge abused his discretion by ignoring the distinction between Rules for Courts-Marital 1001A and 1001(b)(4); and (3) that trial counsel's improper argument prejudiced Appellant. (App. Br. at 14, 16, 19.) An examination of these contentions shows there was no error or prejudice in this case.

## *Law and Analysis*

### A. Properly admitted victim impact statements under R.C.M. 1001A are not evidence and are not subject to or restricted by the other rules of evidence.

The United States agrees with Appellant that a properly admitted unsworn victim impact statement under R.C.M. 1001A is not "evidence" subject to the Military Rules of Evidence (M.R.E.s) because 1) it is not given under oath, 2) it is a right of allocution governed by its own statutory strictures, and 3) it is modeled after an accused's unsworn statement, which is also not evidence.

#### 1. Unsworn victim statements are not given under oath.

An unsworn statement by a victim is not evidence because it is unsworn. First, R.C.M. 1001A(a) removes the oath requirement, establishing that victims are "not considered a witness for purposes of Article 42(b)." R.C.M. 1001A(a). In turn, Article 42(b), UCMJ, provides that "each witness before a court-martial shall be examined on oath." 10 U.S.C. § 842(B). Removing this requirement is pivotal because taking an oath is what changes allocution into testimony. *See* M.R.E. 603; *see also* United States v. Barker, 77 M.J. 377, 382 (C.A.A.F. 2019.) ("victim testimony under R.C.M. 1001A does not constitute witness testimony."); *see cf.* United States v. Breese, 11 M.J. 17, 24 (C.M.A. 1981) ("[t]he truth of the matter is that these statements are not made under oath and, thus, the 'unsworn statement is not evidence.") (emphasis original.) This non-witness designation strips an unsworn victim statement from its testimonial status, which removes it from the

purview of the M.R.E.s. As a result, the relevant question is whether non-testimony, from a non-witness, still constitutes evidence. It does not.

M.R.E. 603 is not just a rule of evidence, it is the gateway through which all witness testimony must pass to become evidence. The rule mandates: "[b]efore testifying, a witness must give an oath or affirmation to testify truthfully." M.R.E. 603. In other words, the designation of testimony is preconditioned on oath or affirmation. It follows that eliminating the oath requirement must also eliminate the testimonial status of the statement. Without an oath, and without testimonial status, allocution is the only thing a victim unsworn statement can be.[6]

**2. Statements given under R.C.M. 1001A are allocution and not subject to the other rules of evidence.**

Second, the victim's right to be heard through an unsworn statement is an independent right of allocution governed by separate rules and case law. The drafters placed unsworn victim statements beyond the reach of the M.R.E.s when they removed judicial discretion—requiring courts to call any victim who chooses to exercise that right. "If the victim exercises the right to be reasonably heard, the victim shall be called by the court-martial." R.C.M. 1001A(a). This Court has

[6] Allocution is defined in the law as "a crime victim's address to the court before sentencing." Black's Law Dictionary (8th ed. 2004) (entry for "victim allocution.") More broadly, allocution is defined as a "formal speech, especially an authoritative or hortatory address." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/allocution (last visited Nov 23, 2020.)

noted that "[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." United States v. Hamilton, 78 M.J. 335, 342 (C.A.A.F. 2019.)

Unsworn victim statements are not evidence subject to the M.R.E.s because Congress created separate rules to govern their admission. R.C.M. 1001A limits the content, form, notice, and presentation of unsworn victim statements.[7] These restrictions would be superfluous if, for example, M.R.E.s 401-414 (pertaining to content), M.R.E.s 603, 801-807 (pertaining to the form — sworn testimony and hearsay), M.R.E. 611 (pertaining to presentation — "mode and order of examining witnesses and presenting evidence") were already governing unsworn victim statements.

There is also an irreconcilable contradiction between R.C.M. 1001A and the M.R.E.s. Specifically, the M.R.E.s provide the military judge with substantial discretion to prevent evidence which he or she believes to pose a risk of: "unfair

[7] R.C.M. 1001A(c) ("the content of statements made under . . . this rule may include victim impact or matters in mitigation."); R.C.M. 1001A(e)(2) Discussion ("A victim's unsworn statement should not exceed what is permitted under R.C.M. 1001A(c) and may not include a recommendation of a specific sentence). R.C.M. 1001A(e) ("The unsworn statement may be oral, written, or both."); *see also* R.C.M. 1001A(e)(2) Discussion ("If there are numerous victim, the military judge may reasonable limit the form of the statements provided."). R.C.M. 1001A(e)(1) ("a victim who would like to present an unsworn statement shall provide a copy to the trial counsel, trial defense counsel, and military judge.); *see also* R.C.M. 1001A(e)(1) Discussion. R.C.M. 1001A(e)(2) ("the military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement.")

prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." M.R.E. 403; *see also* M.R.E. 611. In other words, if the M.R.E.s applied, in some cases the military judge would have the discretion to prevent the victim from "be[ing] called by the court-martial," that is, deny the victim's right to be heard wholesale, simply because the judge found the information cumulative. R.C.M. 1001A(a). However, Congress removed judicial discretion on this matter, saying simply: "[i]f a victim exercises the right to be reasonably heard, the victim *shall be called* by the court-martial." R.C.M. 1001A(a) (emphasis added). Thus, the military judge has little discretion over whether a victim may present an impact statement. So long as the individual qualifies as a victim and the statement relates to impact or mitigation, "the victim shall be called."

Similarly, if the M.R.E.s governed unsworn victim statements, then the opposing party could simply exclude written statements based on hearsay or foundation. In other words, if the M.R.E.s were in play, Congress not only forgot to exempt unsworn victim statements from M.R.E. 603, but also from the M.R.E 800 series and the M.R.E. 900 series. These omissions demonstrate that Congress was not trying to create implied exceptions to the M.R.E.s, but establishing separate rules to govern the admission of unsworn victim statements.

Additionally, the right to be reasonably heard was drawn specifically from the Crime Victims' Rights Act (CVRA) which makes clear that this is a right of allocution—not a presentation of evidence. *See* United States v. Barker, 76 M.J. 748, 752-53 (A.F. Ct. Crim. App. 2017) (aff'd on different grounds) ("Article 6b is based on the [CVRA], 18 U.S.C § 3771.") The provenance of Article 6b, UCMJ, matters because federal courts consistently interpret the victim's right to be heard under the CVRA as a right of allocution. Kenna v. United States Dist. Court, 435 F.3d 1011, 1016-17 (9th Cir.2006) ("The court can't deny the defendant allocution" and after the introduction of the CVRA "victims now have an indefeasible right to speak, similar to that of the defendant.") Moreover, strictures on the form and substance of unsworn victim statements are found in Rule for Courts-Martial (R.C.M.) 1001A itself, not the M.R.E.s. There are internal limits on the content, form, and method of presentation within the rule. If the M.R.E.s governed these statements, they would not have their own separate rules.

Turning to other federal jurisdictions to see how they view this kind of information, one finds that "[v]ictim impact statements are distinctly different from formal courtroom testimony offered during trial in that they are largely unconstrained by either state or federal rules of evidence or other procedural limitations." Colo. v. Holmes, 11 2013 Colo. Dist. LEXIS 1632, unpub. op. at *114. Importantly, "the right of a victim to be reasonably heard at a sentencing

hearing . . . is consistent with the principles of law and federal practice prescribed in 18 U.S.C. § 3771(a)(4)[8] and Federal Rule of Criminal Procedure 32(i)(4)(B), which requires the court to 'address any victim of the crime who is present at sentencing' and 'permit the victim to be reasonably heard.'" Manual for Courts-Martial, United States (2016 ed.) (MCM), App. 21, at A21–73.

**3. A victim's unsworn allocution is nearly identical to an accused unsworn statement, which is not evidence.**

Finally, and importantly, Congress patterned the victim's right to give an unsworn statement after the accused's right to give an unsworn statement. The accused has a right of allocution at sentencing. The M.R.E.s do not govern this right. Instead, R.C.M. 1001(c)(2)(C) itself outlines the parameters and scope of an accused's unsworn statement. United States v. Sowell, 62 M.J. 150, 152 (C.A.A.F. 2005) ("the [accused's] unsworn statement remains a product of R.C.M. 1001(c) and thus remains *defined in scope by the rule's reference,*" i.e., not the M.R.E.s.) (emphasis added.) The victim's right to be reasonably heard is patterned after this right of the accused and should be treated accordingly. United States v. Marcello, 370 F. Supp. 2d 745, 750 (N.D. Ill. 2005) (Due to the CVRA, "victims have a right to speak in open court in a manner analogous to the defendant's personal right of allocution at sentencing.")

[8] The Crime Victims' Rights Act (CVRA).

This Court has found that an accused's unsworn statement is not evidence. United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011) (finding that the "unsworn statement is not evidence"); Breese, 11 M.J. at 24 (C.M.A. 1981) ("[t]he truth of the matter is that these statements are *not* made under oath and, thus, the unsworn statement is not evidence."); United States v. Provost, 32 M.J. 98, 99 (C.M.A. 1991) ("It must be remembered that, if an accused elects to make an unsworn statement, he is not offering evidence.") As a result, by necessary parallel, a victim's unsworn statement is also not evidence.

**4. Conclusion**

For all the above reasons, this Court should find that victim unsworn statements presented under R.C.M. 1001A are not evidence. Previously, this Court has declined to answer this question. Hamilton, 78 M.J. at 342. In this case, Appellant correctly asserts that the granted issue turns on this Court finally answering this question. (App. Br. at 14.) Indeed, if this Court finds that victim unsworn statements under R.C.M. 1001A *are* evidence, then trial counsel's argument about that evidence would not have been error at all. Finally deciding whether victim impact statements are or are not evidence subject to some rules of evidence would also avoid continued confusion among trial practitioners, trial judges, and courts of criminal appeals.

**B. Court Exhibits 1 and 3 contained information properly placed before the selected sentencing authority for consideration in determining Appellant's appropriate sentence.**

Rules for Courts-Martial, Chapter X, Sentencing, sets forth how a court-martial may receive evidence and other information to aid it in determining an appropriate sentence. *See* R.C.M. 1001(a); 1001A (2016). The Rules describe two ways that a court-martial can learn of victim impact. First, trial counsel may offer evidence of "aggravating circumstances," subject to the Military Rules of Evidence, related to any "social, psychological, and medical impact on or cost to any person or entity who was the victim" of the crime of which the accused was convicted. R.C.M. 1001(b)(4); United States v. Saferite, 59 M.J. 270, 273 (C.A.A.F. 2004).

Second, a court-martial may also receive information under R.C.M. 1001A, which implements Article 6b, UCMJ, 10 U.S.C. § 806b, and creates an independent right for "a crime victim of an offense of which the accused has been found guilty . . . to be reasonably heard at a sentencing hearing relating to that offense." The victim may present "financial, social, psychological, or medical impact" of the crime, as well as matters in mitigation, through a sworn statement subject to cross-examination or through an unsworn statement. R.C.M. 1001A. If the victim elects to make an unsworn statement, it may be oral, written, or both, and he or she cannot be cross-examined on its contents. R.C.M. 1001A(c).

This Court has already begun to shape how the information contained in a victim unsworn statement is supposed to be viewed at a court martial. This Court has reviewed information admitted under R.C.M. 1001A and found that "the content of the victim impact statements was material for sentencing purposes," and could affect an Appellant's sentence. Hamilton, 78 M.J. at 343. Further, this Court stated that RCM 1001A "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, or information that does not relate to the impact from the offense of which the accused is convicted." Hamilton, 78 M.J. at 342. By warning that the *government* cannot use R.C.M. 1001A as a loophole to get their information to the members, by implication, R.C.M. 1001A is a means to get *something* to the members. Clearly, the plain language of the R.C.M. shows that *something* is the allocution of the victim.

Also, it is well-recognized that the effect of an accused's crime on the victim is generally an appropriate matter for the members' consideration. Holt, 33 M.J. 400, 408 (C.M.A. 1991); United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000.). The text of the R.C.M. 1001 itself strongly suggests that victim unsworn statements admitted under R.C.M. 1001A are supposed to aid the court-martial in determining a sentence. "The prosecution and defense may present matter pursuant to this rule *to aid the court-martial in determining an appropriate*

*sentence.*" R.C.M. 1001(a) (emphasis added). The Rule goes on to say that, "[s]uch matter shall ordinarily be presented in the following sequence," and includes in the sequence of matters, a "[v]ictim's right to be reasonably heard. *See* R.C.M. 1001A." R.C.M. 1001(a)(1)(B).

Finally, federal courts also allow a victim's right to allocution to be considered when crafting a sentence. United States v. Yamashiro, 788 F.3d 1231, 1235 (9th Cir. 2015.) ("victim allocution provides the court with information it may use in sentencing the defendant.") Since the military rules on victim statements were intended to mirror the federal rules, it follows that a court-martial should be able to use a victim statement in determining an appropriate sentence. Ultimately, it would be unreasonable to believe that Congress and the President intended to give the victim the ability to address the court members during sentencing proceedings and yet prohibit the sentencing authority from considering it.

Here, the military judge marked the two unsworn victim statements as Court Exhibits 1 and 3. (JA 297-98). The military judge scrutinized the statements in ruling on trial defense counsel's objections to portions of their content, sustaining some and overruling others. (JA 143- 156.) The military judge did not admit the unsworn victim statements as "evidence" or suggest to the members that they should consider them as such, but instead properly instructed the members these

were court exhibits and that "an unsworn statement is an authorized means for a victim to bring information to the attention of the court and must be given appropriate consideration" and that "the weight and significance to be attached to an unsworn statement rests within the sound discretion of each court member." (JA at 168).

It follows then, that since Court Exhibits 1 and 3 were properly admitted information at Appellant's court martial, the members could have and should have relied on those exhibits in sentencing Appellant. With this information before the members, the question remains as to what either counsel may do with it at argument.

**C. Trial Defense counsel's objection was unfounded—counsel for both sides may make reasonable argument related to properly admitted court exhibits.**

Since the information in Court Exhibits 1 and 3 was properly admitted and able to be considered by the sentencing authority in crafting the sentence, this Court should conclude that that either counsel may make reasonable arguments or rebut the contents of these statements in argument.

Adopting the analysis above that a victim's unsworn statement is like an accused's unsworn statement, this Court should conclude that fair comment, inference and argument of victim impact statements for sentencing is appropriate. The victim's right to make an unsworn statement is virtually identical to the accused's right of allocution as evidenced by the respective statutory language

establishing these rights. Despite not being evidence, "The [accused's] unsworn statement . . . it is subject to rebuttal, *comment during the Government's closing argument*." United States v. Barrier, 61 M.J. 482, 484 (C.A.A.F. 2005.) (emphasis added.) Since counsel may comment, within limits, on the unsworn statement of the accused, Appellant offers no logical reason why victim unsworn statements should different. *See* United States v. Paxton, 64 M.J. 484, 487 (C.A.A.F. 2007) (citing United States v. Edwards, 35 M.J. 15 351, 355 (C.M.A. 1992)). At trial, trial defense counsel conceded he could talk about the accused's unsworn in his sentencing argument, even though an accused's unsworn statement is not "evidence." (R. at 174.) Still, trial defense counsel and Appellant offer no good reason why a victim unworn statement should be any different.

Furthermore, and notably, R.C.M 1001A, as does the current R.C.M. 1001(c), recognizes that right to be heard under Article 6b, UCMJ, belongs to the individual victim, not to either trial or trial defense counsel. Hamilton, 78 M.J. at 342. The statute and the rule permit victims to present both impact and mitigation to the court-martial during sentencing proceedings. R.C.M. 1001A(b)(3). Mitigation is defined in part as "a matter to lessen the punishment to be adjudged by the court-martial." Id. For that reason, a victim has the right to inform the court-martial that he or she is no longer affected by the crime, has forgiven the accused, or to request leniency for Appellant in determining a sentence. Under

Appellant's theory, trial defense counsel would be prohibited from commenting on a victim's plea for mitigation, a result as equally unreasonable as placing such restrictions on trial counsel's arguments on victim impact.

Furthermore, the concern that arises when counsel argues "facts not in evidence" is not present here. In Clifton, this Court said:

> It is axiomatic that a court-martial must render its verdict solely on the basis of the evidence presented at trial. A corollary to this principle is, as the judge instructed, that counsel's arguments are not evidence. The reasons are obvious: arguments are not given under oath, are not subject to objection based upon the rules of evidence, and are not subject to the testing process of cross-examination. If the rule were contrary, an accused's right of confrontation would be abridged, and the opportunity to impeach the source denied. When counsel argues facts not in evidence, or when he discusses the facts of other cases, he violates both of these principles.

United States v. Clifton, 15 M.J. 26, 29-30 (C.M.A. 1983.)(internal citations omitted.) This Court concluded this behavior is improper in findings argument when "[a prosecutor is] inviting the members to accept new information as factual, based on his authority." Clifton, 15 M.J. at 30. Translating the same argument to sentencing, the members must not "be asked to fashion their sentence 'upon blind outrage and visceral anguish,' but upon 'cool, calm consideration of the evidence and commonly accepted principles of sentencing.'" Baer, 53 M.J at 237 (internal citations omitted.)

In applying this case law to the landscape of military sentencing since the incorporation of R.C.M. 1001A, there is no concern with the actions of trial counsel in this case. The fear mentioned in Clifton, that counsel would introduce improper information to the sentencing authority in argument and that an appellant would be sentenced on that information from outside the record, cannot be realized when the information in question was properly admitted under R.C.M. 1001A. First, the military judge gives instructions that court members should consider that the statements were not given under oath. Members are "presumed to follow the military judge's instructions." United States v. Loving, 41 M.J. 213, 235 (C.M.A. 1994.). Second, fair argument by counsel beyond verbatim recitation of an unsworn victim impact is not asking the sentencing authority to sentence an appellant improperly. It is merely asking the members to sentence an accused based upon matters already properly before them. Therefore, the objection "facts not in evidence," is unfounded for any properly admitted information under R.C.M. 1001A.

The error of trial defense counsel's objection is highlighted when trying to apply his logic to an accused's unsworn statement. No judge would have entertained an objection to "facts not in evidence" for a comment on an accused's unsworn statement in sentencing argument, because an accused's unsworn statement's place in the military justice system is well-settled. Just because this

Court has not yet settled the matter with regard to victim statements made under R.C.M. 1001A, does not mean that error occurred.

In summary, the military judge allowed counsel to make fair arguments from the victim impact statements and properly instructed the members on how they could consider both argument and the unsworn statements. Since none of this is error, the military judge did not err in overruling trial defense counsel's objection.

Appellant also alleges error because "[t]he choice between providing a sworn or an unsworn statement must have meaning," and that "[s]worn testimony allows cross-examination to probe the source and extent of victim impact. Denying cross-examination by treating sworn and unsworn testimony alike takes on a Constitutional dimension when trial counsel is allowed to argue based on unsworn statements that are not in evidence." (App. Br. at 17.) These arguments lack merit. The choice between sworn and unsworn testimony *does* have meaning, which was properly explained to the members by the military judge —the weight and significance of the unsworn statements, if any, are to be decided by the members, and they can consider that unsworn statements are not made under oath. (JA at 168.) That difference does not mean comments on victim impact information is error.

To the contrary, the right of a victim to give a statement in allocution to the sentencing authority must have meaning. Allowing the victim to be heard, and

then not allowing that information to be considered by the sentencing authority would transform the right of allocution into a meaningless one. Logically then, allowing for the victim's statement to be made, considered, recited, rebutted and argued by all sides provides it that necessary meaning.

Further, it is settled law that there is no right to confrontation in sentencing. United States v. MacDonald, 55 M.J. 173, 174 (C.A.A.F. 2001.)[9] This negates Appellant's argument that arguing unsworn statements in sentencing violates an accused's constitutional right – no such right exists at sentencing. Given that neither of these arguments allege actual error, the contention that military judge's ruling had an "enduring impact" on the sentence fails. (App. Br. at 18.)

In conclusion, trial defense counsel's objection was unfounded, there was no error in this case. The members were provided lawful information under R.C.M. 1001A, applicable law for how to consider that information, and trial counsel properly argued this information for their consideration.

[9] Many federal courts have also held that Crawford v. Washington, 541 U.S. 36 (2004) does not apply to sentencing. See, e.g., United States v. Katzopoulos, 437 F.3d 569 (6th Cir. 2006); United States v. Brown, 430 F.3d 942 (8th Cir. 2005); United States v. Chau, 426 F.3d 1318 (11th Cir. 2005); United States v. Roche, 415 F.3d 614 (7th Cir. 2005); United States v. Luciano, 414 F.3d 174 (1st Cir. 2005); United States v. Martinez, 413 F.3d 239 (2d Cir. 2005).

**D. The Trial Counsel gave proper argument as a whole and did not err.**

Counsel for both sides are permitted to "argue for an appropriate sentence." R.C.M. 1001(a)(E)-(F); 1001(g). Taking a step back from the information in the victim impact statement, there is no concern that trial counsel gave an otherwise improper sentencing argument. Appellant does not allege, nor should this Court find, that other than simply making references to Court Exhibits 1 and 3, trial counsel mischaracterized the victim statements, asked the panel to draw unsupported or unfair inferences, or made any argument that would unduly inflame the passions of the panel members. As this Court requires that argument be limited "the evidence of record, as well as all reasonable inferences fairly derived from [that] evidence," Baer, 53 M.J. at 237, in this case, argument was limited to information properly before the Court and reasonable inference derived therefrom.

The Court below concluded that nearly all the alleged improper argument "directly references evidence properly before the members, or reasonable inferences therefrom, and is therefore proper argument." (JA at 12.) It explained,

> For example, in the excerpt, "Corrupted, that's how [ML] felt when she was exposed to pornography for an hour, when she had to stare at that screen and listen to her stepfather explain to her the sexual acts that were taking place in front of her eyes," the word "corrupted" is a direct quote from ML's victim impact statement. However, the majority of the remainder of the statement is from ML's testimony during findings. It is a reasonable inference—and therefore proper argument—that a child who is forced

> to watch a pornographic video with their stepfather is "corrupted."

United States v. Tyler, 2020 CCA LEXIS 106 at *22-23 (AF. Ct. Crim. App. 20 March 2020.)(unpub. op.) AFCCA's reasoning was sound and should be adopted by this Court.

Even so, the Air Force Court then assumed error to conduct a prejudice analysis. Id. at *24. It correctly concluded there is no prejudice in this case.

**E. Assuming error, Appellant was not prejudiced**

Improper argument does not automatically require a new trial or the dismissal of the charges against the accused. United States v. Fletcher, 62 M.J. 175, 178 (C.A.A.F. 2005.) Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (i.e., resulted in prejudice)." Id. (quoting United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996)). When assessing prosecutorial misconduct's prejudicial effect, this Court has outlined a balancing approach of three factors: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." Id. at 184. The Fletcher court did not articulate how much weight to give each factor. Tyler, 2020 CCA LEXIS 106 at *18, (citing United States v. Pabelona, 76 M.J. 9, 12 (C.A.A.F. 2017)).

The first Fletcher prong does not weigh in favor of Appellant, as any error in argument by trial counsel was not severe. Fletcher established five factors for determining severity –

> (1) the raw numbers—the instances of misconduct as compared to the overall length of the argument; (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge.

Fletcher 62 M.J. at 184. The lower court summarized the first factor, comparing the "raw numbers" of instances of alleged misconduct as compared to the overall argument, and it correctly concluded trial counsel's arguments were not "egregious" and instead were interspersed throughout the argument. Tyler, 2020 CCA LEXIS 106 at *24. The nearly 30-minute argument did not revolve around the information in the victim impact statements, but more generally around the severe misconduct of Appellant, Appellant's character as well as his rehabilitative potential. The lower court also found that the second severity factor in Fletcher, as adapted to sentencing, favored the United States. Id. at *24-25. The second factor "whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the whole findings argument or the case as a whole," as applied to this case shows no prejudice. Fletcher, 62 M.J. at 184. Again, the crux of trial counsel's argument did not focus on the statements of the victims and in looking at

the trial as a whole, these brief statements were not a significant part of the trial. Tyler, 2020 LEXIS 106 at *25. The remaining severity factors favor the United States, as Appellant had a lengthy trial, thorough trial deliberations, and legally sufficient instructions from the military judge. Therefore, overall this factor weighs in favor of the United States.

The second Fletcher factor is "curative measures," and as applied to this case, favors the United States. Fletcher 62 M.J. at 185. As the lower Court determined, the military judge gave two curative instructions in this case, both reminding the members that counsels' argument is not evidence. (JA at 14.)

In Frey, this Court defined the third factor of Fletcher as "the weight of the evidence supporting the sentence." Frey, 73 M.J. at 249 (citation omitted). There is no question here that Appellant's court-martial sentence is based on information that was properly before the Court, and not based on trial counsel's sentencing argument. Clifton, 15 M.J. at 29. In looking to the maximum punishment authorized for Appellant's crimes, and the sentencing case put on by the United States, the force of the government's evidence at trial clearly outweighed Appellant's sentencing evidence. Appellant's prior court martial conviction, letter of reprimand for sending a civilian co-worker inappropriate sexual comments while under investigation for these offenses, a letter of reprimand for lying about

performance report bullets, and the mendacity instruction relating to his trial testimony supported a strong government sentencing case.

In comparison to this strong government case in sentencing, Appellant did not have a compelling or strong sentencing case. Appellant talked at length about his struggle with alcoholism, gave a few character letters, and a long history of service. Even in considering this sentencing case, the lower Court correctly noted that "the weight of the evidence clearly supported the adjudged and approved sentence." Appellant received well below the maximum punishment and well below what trial counsel argued for. Given the sentence actually adjudged, there is no indication that trial counsel's reference in argument to the unsworn victim impact statements unduly inflamed the passions of the members.

This Court should also consider the nature of the offenses committed by Appellant. Appellant is correct that "victim impact in a child sexual abuse case harbors tremendous power." This is because the crime of child sexual abuse, especially from the father figure of a child, is one of the worst crimes one can commit. (App. Br. at 20.) This 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.

This Court has also found that the government may make permissible sentencing arguments referencing victim impact, where this argument is

reasonably derived from the nature of the offenses, even in the absence of any information provided by a victim. Hamilton, 78 M.J. at 343. In this court-martial, both victims gave important, but not overly verbose, statements to the sentencing authority.[10] But even if the victims had not made these statements, much of the victim impact they discussed could have been fairly derived from the nature of Appellant's crimes. It is hardly surprising that a child victim would feel afraid, corrupted, angry, or confused because of sexual abuse perpetrated by her father or stepfather. Thus, the focus of the case, and ultimately Appellant's sentence, did not rest primarily on the victim impact statements or the argument about them, but on the nature of the crimes themselves. Finally, whether or not it was proper for trial counsel to argue the R.C.M. 1001A statements to the members, the information was already appropriately before the members for their consideration. Therefore, it is unlikely that trial counsel merely talking about the same statements the members were already allowed to consider made the members adjudge a sentence they wouldn't have otherwise.

"As Appellant was not prejudiced by the sentencing argument, he cannot have been prejudiced by the military judge's ruling." Tyler, 2020 CCA LEXIS 106 at *28, citing Halpin, 71 M.J. at 480 (finding that where an appellant was not

[10] Appellant himself admitted this was "limited" evidence given by the victims. (App. Br. at 20-21.)

prejudiced by the sentencing argument he "cannot have been prejudiced by the military judge's failure to interrupt the arguments or issue a curative instruction." (citation omitted).

It bears repeating that Appellant got significantly less than what trial counsel asked for in sentencing, and well below the permissible maximum punishment. Therefore, there is no chance that trial counsel's argument, even if improper, unduly swayed the members in their sentence. Looking at the entire case and argument, it is clear Appellant was not prejudiced by any argument of counsel.

## CONCLUSION

In conclusion, properly admitted victim unsworn statements contain information, evidence or otherwise, that is properly before members for purposes of crafting a sentence. It is not error for either counsel to comment on properly admitted victim impact statements under R.C.M. 1001A in sentencing argument. Even if there was any error in argument in this case, Appellant was not prejudiced because he was appropriately sentenced for the severe crimes he committed.

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

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 23 November 2020 via electronic filing.

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/s/_____

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