IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

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

USCA Dkt. No. 21-0245/AF

Crim. App. Dkt. No. ACM 39696

REPLY BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 37389
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
david.bosner.1@us.af.mil

Counsel for Appellant

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.bruegger.1@us.af.mil

Counsel for Appellant

INDEX

Index.. *i*

Table of Authorities .... *ii*

Argument... 1

1. An oral statement is a communication provided contemporaneously or in person 1
2. Contrary to the Government's assertion, it is unclear whether the Crime Victims' Rights Act affords victims the right to present a statement through the medium of video 5
3. It is undisputed Trial Counsel made CE 4;
a fact which cannot be waived 9
4. Under Article 6b, UCMJ, R.H. was reasonably heard at sentencing through sworn testimony, a written unsworn statement, and an oral unsworn statement. 12
5. The inclusion of music and photographs within CE 4 was prejudicial error in and of itself. 13
6. The Military Judge's abuse of discretion prejudiced A1C Edwards.........14

Conclusion 18

Certificate of Filing and Service...

Certificate of Compliance...

TABLE OF AUTHORITIES

Cases

United States Supreme Court

Brady v. Maryland, 373 U.S. 83 (1963) 12

Giglio v. United States, 405 U.S. 150 (1972) 12

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

United States v. Barker, 77 M.J. 377 (C.A.A.F. 2018).......... 12

United States v. Gladue, 67 M.J. 311 C.A.A.F. 2009.......... 10

United States v. Hamilton, 78 M.J. 335 (C.A.A.F. 2020).......... 6, 12

United States v. Haynes, 79 M.J. 17 (C.A.A.F. 2019).......... 9, 10

United States v. Jerkins, 77 M.J. 225 (C.A.A.F. 2018) 15

United States v. Manley, 25 M.J. 346 (C.M.A. 1987) 4

United States v. Mooney, 47 M.J. 496 (C.A.A.F. 1998).......... 4

United States v. McPherson, __ M.J. __, No. 21-0042/AR, slip. op., (C.A.A.F. Aug. 3, 2021).......... 1

United States v. Tyler, 81 M.J. 108(C.A.A.F. 2021) 15

Federal Courts

Brandt v. Gooding, 636 F.3d 124 (4th Cir. 2011) 7

Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal., 435 F.3d 1011 (9th Cir. 2006)... 7

United States v. Burkholder, 590 F. 3d 1071 (9th Cir. 2010).......... 7, 8, 9

United States v. Degenhart, 405 F. Supp. 2d 1341 (D. Utah 2005) 7

United States v. Marcello, 370 F. Supp. 2d 745 (N.D. Ill. 2005) 7

United States v. Messina, 806 F. 3d 55 (2d Cir. 2015).......... 6, 7

United States v. Whitten, 610 F.3d 168 (2d Cir. 2010).......... 6

Statutes and Rules

Article 6b, UCMJ, 10 U.S.C. § 806b .... *passim*

Article 59(a), UCMJ, 10 U.S.C. § 859(a) 17
Crime Victims' Rights Act, 18 U.S.C. § 3771 ....6, 7, 8, 9
Fed. R. Crim. P. R. 32(i)(4)(B) 7, 9
Mil. R. Evid. 304(d) 3
Mil R. Evid. 403 15
Mil R. Evid. 801(a) 3
Mil R. Evid. 805 5
R.C.M. 304(d) 3
R.C.M. 405(f)(1)(A)(ii) 2
R.C.M. 405(i)(3)(B) 3
R.C.M. 701(a)(1)(C) 3
R.C.M. 701(a)(6) 12
R.C.M. 802(b) 3
R.C.M. 809(b)(2) 3
R.C.M. 811(a) 3
R.C.M. 903(b) 3
R.C.M. 905(a) 3, 4
R.C.M. 914(f)(2) 2
R.C.M. 1001A .... *passim*
R.C.M. 1001A(b)(4) 7, 13
R.C.M. 1001A(e) 1
R.C.M. 1001A(e)(2) 4

Other

150 Cong. Rec. S10910 (daily ed. Oct. 9, 2004) 8
Jessica L. Bregant, *Let's Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions*, 2009 U. Ill. L. Rev. 1213 (2009) 16

Pursuant to Rules 19(a)(7)(B) and 34(a) of this Court's Rules of Practice and Procedure, Airman First Class (A1C) Isaiah L. Edwards, the Appellant, hereby replies to the Government's brief (hereinafter Gov't Br.), filed on September 13, 2021.

ARGUMENT

1. An oral statement is a communication provided contemporaneously or in person.

For the Government's primary argument to work—that pre-recorded video unsworn statements are permitted under Rule for Courts-Martial (R.C.M.) 1001A—the definition of "oral" statement must be broad enough to necessarily include a pre-recorded video. This is true because unsworn statements may only be oral, written, or both, and a video is clearly not written. R.C.M. 1001(A)(e). But such interpretation of the world "oral" is at odds with the plain meaning and usage of the word in the Manual for Courts-Martial (*MCM*), as well as common legal and ordinary vernacular. And because the plain meaning yields an unambiguous result—that prerecorded videos are impermissible—judicial inquiry is complete.[1] (App. Br. at 11) ("When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete.") (citation omitted).

---

[1] As such, the threshold question whether a pre-recorded video is acceptable should be answered in the negative and the analysis advanced to prejudice. (*See* App. Br. at 12) (discussing how an appellate court cannot wrench from a statute a meaning the words literally do not bear) (citing *United States v. McPherson*, __ M.J. __, No. 21-0042/AR, slip. op. at 1-2 (C.A.A.F. Aug. 3, 2021) (internal quotation marks and additional citations omitted).

The Government devotes significant effort arguing that the *MCM* interchangeably uses the word "statement" to refer to both video-recorded and contemporaneous communications. (Gov't Br. at 19-26.) What is missing from its brief, however, is any citation that establishes how an "*oral* statement" is generally understood to be synonymous with a pre-recorded video presentation. To the contrary, the Government actually helps highlight how the *MCM* treats recordings differently than any oral assertions contained therein.

For example, the Government accurately notes that R.C.M. 914(f)(2) 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." (Gov't Br. at 17) (quoting R.C.M. 914(f)(2)). But this language does not support the Government's contention that the *MCM* "generally refers to 'statements' . . . regardless whether the statements are made in the course of the court-martial or are prerecorded." (*Id*. at 17-18.) Rather, it acknowledges that "an oral statement" made outside the court-martial is typically separate and distinct from the video recording that captured it; otherwise, the definition expanding the word "statement" to explicitly include a recorded oral statement would be not be required. This rationale also applies to R.C.M. 405(f)(1)(A)(ii), which contains comparable language in the context of what is considered a "recorded statement." And notably, both rules allow for oral statements to be recorded *or transcribed*, further demonstrating how an oral

statement is not necessarily tantamount to a video recording.

An examination of other provisions in the R.C.M. yields similar results, as the word "oral" or "orally" is repeatedly used to denote in person or contemporaneous communications.[2] Even where the *MCM* implicitly intermixes an oral statement with a video recording—such as Military Rules of Evidence 304(d) (requiring the Government to "disclose to the defense the contents of all statements, oral or written, made by the accused. . .") and 801(a) (defining "statement" in the hearsay context to include "a person's oral assertion"), or R.C.M 701(a)(1)(C) (requiring the trial counsel to disclose "[a]ny sworn or signed statement")—these provisions do not evince how the terms are always interchangeable. Instead, they are discovery and evidentiary rules that, out of necessity, include video recordings, as they relate to communications that occurred prior to and outside the court-martial or presence of the parties, and which may not have even been made with a trial in mind.[3] This is a

---

[2] *See*, *e.g.*, R.C.M. 304(d) (requiring an order for pretrial restraint to be delivered orally or by written notification to the person being restrained); R.C.M. 802(b) (requiring matters agreed upon during outside-the-record conferences to be included in the record orally or in writing); R.C.M. 809(b)(2) (requiring an alleged perpetrator of contempt of court be informed orally or in writing of the alleged contempt); R.C.M. 811(a) (allowing the parties to make an oral or written stipulation to any fact or expected testimony of a witness); R.C.M. 903(b) (requiring an accused to announce forum selection in writing or orally on the record); R.C.M. 905(a) (allowing motions to be oral or, at the discretion of the military judge, written).

[3] R.C.M. 405(i)(3)(B), cited by the Government (Gov't Br. at 17), is similar to the discovery rules in that it involves statements made outside the preliminary hearing, not necessarily with the hearing or a trial in mind at the time they were produced.

far cry from R.C.M. 1001A, designed specifically to allow a victim to present information directly to the sentencing authority, which therefore warrants interpreting its authorization of an "oral" unsworn statement the same way the R.C.M. predominantly treats the terms "oral" or "orally"—as contemporaneous and/or in person communications.

The Government's attempt to expand the definition of an oral statement is not just at odds with the *MCM*, it contravenes the common meaning of the word "oral" in legal matters. For example, an oral agreement represents an unwritten understanding between parties, which military appellate courts may enforce if the parties verbalize the agreement on the record. *See*, *e.g.*, *United States v. Mooney*, 47 M.J. 496 (1998) (enforcing an oral agreement when its terms were set forth in the record); *United States v. Manley*, 25 M.J. 346 (C.M.A. 1987) (enforcing an oral modification to a pretrial agreement). It would be unheard of for such an agreement to be presented in video format. The same can be said about oral contracts and oral wills, not to mention oral motions under R.C.M. 905(a).

It is also notable that R.C.M. 1001A(e)(2) affords a victim the ability to "permit the victim's counsel to deliver all or part of the victim's unsworn statement." If the Government is correct in its contention that a victim's oral statement may be pre-recorded, then the natural result would be to allow a victim's counsel to prerecord a video of himself or herself. This is an absurd scenario, and one which does not seem

designed to best present the victim's communications to the sentencing authority.

Finally, the Government's argument confuses a critical point, conflating two concepts that are simply not the same. It is just not whether the person in the video recording is making a permissible "oral statement" on the screen. There is also the threshold question of whether the video—the literal digital file[4]—qualifies as an oral or written statement, or a statement at all. This analysis is not dissimilar to "hearsay within hearsay," where all potential sources of information must meet hearsay exclusions or exceptions. Mil. R. Evid. 805. Here, the video itself *and* all of its contents must independently meet the requirements of R.C.M. 1001A. (*See generally* App. Br. at 17-22, 25-30.) For the aforementioned reasons, not only is CE 4 impermissible because the digital video file is not an oral or written statement, the contents of the video largely do not pass muster either. (App. Br. at 25-30.)

2. Contrary to the Government's assertion, it is unclear whether the Crime Victims' Rights Act affords victims the right to present a statement through the medium of video.

An analysis of other sources of law, to include those in the federal system, is only relevant for this Court if the military's statutory and regulatory scheme is ambiguous and requires additional clarification. A1C Edwards's position is that Article 6b, UCMJ, and R.C.M. 1001A are clear and unambiguous in all pertinent

[4] The video in question, Court Exhibit (CE) 4, is a digital media file marked as a court exhibit the same way as a written unsworn statement.

respects. But to the extent additional sources of law are helpful or necessary in resolving the granted issue, federal law and legislative history actually support A1C Edwards.

The Government is correct that Article 6b, UCMJ, "was drafted to mirror the federal rights for crime victims" pursuant to the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. (Gov't Br. at 19 (citing *United States v. Hamilton*, 77 M.J. 579, 582-83 (A.F. Ct. Crim. App. 2017)).) It steps too far, however, by suggesting that federal courts readily accept video statements from victims during sentencing. (*Id.*) Indeed, the lone potential source of support the Government cites is *United States v. Messina*, wherein the Second Circuit noted that it "has never held that district courts cannot allow victims' family members to be 'heard,' . . . through a video presentation." (*Id*. (quoting *Messina*, 806 F. 3d 55, 65 (2d Cir. 2015)).) But this observation was not a pronouncement that such practice was widely permissible; rather, it was in the context of reviewing the issue for plain error. *Messina*, 806 F.3d at 65 ("Thus, Messina can hardly demonstrate plain procedural error in the district court's review of a video presentation here.").

The reality is that there is a dearth of federal case law regarding whether a victim's right to be "reasonably heard" under the CVRA extends to video statements.[5]

[5] In *Messina*, the Second Circuit did not reference any cases that expressly permitted video statements under the CVRA; rather, it cited only *United States v. Whitten*, 610

Neither the CVRA itself nor the procedural rules that implement it dictate how a federal court is to implement the "reasonably heard" mandate, and fail to differentiate even between oral and written statements.[6] *See* Fed. R. Crim. P. R. 32(i)(4)(B) (requiring the court to "address any victim of the crime who is present at sentencing and [to] permit the victim to be reasonably heard."). Unsurprisingly then, several federal courts have turned to the statute's legislative history to resolve the ambiguity of "reasonably heard," albeit not in regard to video statements. *See*, *e.g.*, *United States v. Burkholder*, 590 F. 3d 1071, 1075 (9th Cir. 2010); *Kenna v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 435 F.3d 1011 (9th Cir. 2006); *Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011); *United States v. Degenhart*, 405 F. Supp. 2d 1341 (D. Utah 2005).

To this end, "[w]hat little record exists focuses primarily on the goals of the legislation as a whole and those individuals whose experiences inspired the legislation." *United States v. Marcello*, 370 F. Supp. 2d 745, 749 n.8 (N.D. Ill. 2005). The comments of the statute's sponsor are nevertheless instructive:

> This right of crime victims not to be excluded from the proceedings provides a foundation for [18 U.S.C. § 3771(a)(4)], which provides victims the right to reasonably be heard at any public proceeding

---

F.3d 168 (2d Cir. 2010), a case which addressed the contours of sworn testimony regarding a victim's professional life in a capital case. *Messina*, 806 F.3d at 65.

[6] In contrast, R.C.M. 1001A *does* define what the right to be reasonably heard under Article 6b, UCMJ, means. R.C.M. 1001A(b)(4).

> involving release, plea, or sentencing. This provision is intended to allow crime victims to directly address the court *in person*.
>
> . . . .
>
> It is not the intent of the term "reasonably" in the phrase "to be reasonably heard" to provide any excuse for denying a victim the right to appear in person and directly address the court. *Indeed, the very purpose of this section is to allow the victim to appear personally and directly address the court*. This section would fail in its intent if courts determined that written, rather than oral communication, could generally satisfy this right. *On the other hand, the term "reasonably" is meant to allow for alternative methods of communicating a victim's views to the court when the victim is unable to attend the proceedings*. Such circumstances might arise, for example, if the victim is incarcerated on unrelated matters at the time of the proceedings or if a victim cannot afford to travel to a courthouse. *In such cases, communication by the victim to the court is permitted by other reasonable means*. In short, the victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused. This bill intends for this right to be heard to be an independent right of the victim.
>
> It is important that the "reasonably be heard" language not be an excuse for minimizing the victim's opportunity to be heard. *Only if it is not practical for the victim to speak in person or if the victim wishes to be heard by the court in a different fashion should this provision mean anything other than an in-person right to be heard*.

150 Cong. Rec. S10910, S10911 (daily ed. Oct. 9, 2004) (statement of Sen Kyl) (emphasis added).

This clarification clearly indicates that the purpose of the CVRA was to "ensur[e] that crime victims be allowed to speak at proceedings." *Burkholder*, 590 F.3d at 1075. And while the final reference to a victim's "wishes to be heard by the

court in a different fashion" could potentially be viewed as permitting a victim to choose any form by which to provide a statement, this passage cannot be read in isolation. *Id*. The remaining language plainly provides that a victim may either appear personally to address the court or provide a statement through "alternative methods" or "other reasonable means" if "unable to attend" or an oral statement "is not practical." *Id.*; *cf.* Fed. R. Crim. P. 32(i)(4)(B) advisory committee notes ("Absent unusual circumstances, any victim who is present should be allowed a reasonable opportunity to speak directly to the judge."). Consequently, a video presentation—if allowed *at all* under the CVRA—would only be authorized if a victim were unable to attend the sentencing proceeding; a circumstance not present in the instant case.

3. It is undisputed Trial Counsel made CE 4; a fact which cannot be waived.

Trial Counsel conceded to the Military Judge that he produced the video. (JA at 063.) This was more than mere "logistical assistance" akin to providing a computer for a victim to type their own statement or pen and paper to handwrite it. (Gov't Br. at 26.) In fact, Trial Counsel's actions were quite extensive. (*See* App. Br. at 39, n. 18). To make the Government's computer analogy hold, the Government would need to provide digital editing software—the mechanism to make the video—and then retreat, instead of literally preparing the video, which occurred here.

Waiver extinguishes the right to challenge a *legal error* on appeal. *United*

States v. Haynes, 79 M.J. 17, 19 (C.A.A.F. 2019) ("When . . . an appellant intentionally waives a known right at trial it is extinguished and may not be raised on appeal." (citing *United States v. Gladue*, 67 M.J. 311, 313, C.A.A.F. 2009) (emphasis added). Legal issues can be waived; facts cannot.[7] A1C Edwards does not primarily allege that CE 4 was improperly accepted *because* the Trial Counsel created it. A1C Edwards's arguments on the granted issue are principally that R.C.M. 1001A never permits prerecorded videos as unsworn statements; that even if videos are generally permissible under the rule, CE 4 is impermissible due to its form and content; and that the video's presentation to the panel prejudiced him, necessitating the sentence be set aside.

The Government does not win this case on waiver. The granted issue asks whether the Military Judge abused his discretion in accepting the video, which plainly takes into account all of R.C.M. 1001A and Article 6b, UCMJ. The issue is not centered upon Trial Counsel's participation, as other legal sources demonstrate that: 1) prerecorded videos are impermissible; and 2) the form and content of CE 4 were

[7] Directly on the issue of waiver, A1C Edwards maintains he did not waive the legal issue of Trial Counsel's participation. The Defense was merely agreeing, as a matter of fact, that Trial Counsel made the video, rather than conceding, as a matter of law, that such actions were legally appropriate. (*See* JA at 063) ("That is not a point we are contesting, Your Honor, that the family provided input into the video. I think we are in agreement that the family provided input and that it was put together by trial counsel.").

impermissible. (*See generally* App. Br. at 17-22, 25-30.) Trial Counsel's involvement is the factual context informing what CE 4 is, how it came to be, and the dangers of pre-recorded videos as unsworn statements. To that extent, the involvement is more factually significant than legally determinative.

The *fact* that Trial Counsel actually produced the video matters to the analysis in a number of ways. It could very well be that Trial Counsel's involvement diminishes the personal ownership over the video the parents would otherwise have enjoyed had they produced it themselves, which could affect this Court's analysis regarding whether CE 4 is aligned with congressional or presidential intent. Additionally, if the video itself must be an oral statement to survive legal scrutiny and a statement must be made "by the witness," this particular Court Exhibit fails as the video was not made "by" the parents because Trial Counsel made it. *See* App. Br. at 23, n. 13. As such, CE 4 would even fail the rule proposed by the Government. (Gov't Br. at 9) ("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.") (emphasis added).)

Perhaps, though, Trial Counsel's involvement is a cautionary tale of the dangers that could ensue if a trial counsel plays an active role in creating victim unsworn statements when this Court has been clear the right belongs to the victim,

not trial counsel. *United States v. Barker*, 77 M.J. 377, 378 (C.A.A.F. 2018); *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019). For example, in a situation where a trial counsel created multiple versions of a video of a victim depending on the different possible findings of a court-martial, the declarations made within the alternative videos could generate discovery entitlements. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); R.C.M. 701(a)(6).

Finally, the issue with Trial Counsel's involvement is not that "the trial team in some way manipulated, produced, or engineered a victim impact statement with the intent of introducing more aggravation evidence." (Gov't Br. at 25-26.) A1C Edwards did not allege, at trial or on appeal, any impropriety on behalf of Trial Counsel. In this example of what could go wrong should a trial counsel be authorized to do this, an enterprising prosecutor could very well improperly usurp the victims' right of allocution.

4. Under Article 6b, UCMJ, R.H. was reasonably heard at sentencing through sworn testimony, a written unsworn statement, and an oral unsworn statement.

In A1C Edwards's initial brief, he inartfully phrased how R.H. provided sworn testimony in sentencing, and the Government aptly clarifies that R.H.'s sworn testimony occurred during the Government's case. (Gov't Br. at 37 n.13) (citing App. Br. at 34); *but see* App. Br. at 5 (noting that the Government rested its case after R.H. testified), *id*. at 29 (highlighting how Trial Counsel elicited R.H.'s discussion of

photographic evidence during sworn testimony). The point A1C Edwards was attempting to make was that for the purposes of Article 6b, UCMJ, R.H. was "reasonably heard" by the sentencing authority through his sworn testimony (provided during the Government's case), and his written unsworn statement which he also personally read aloud to the members (provided after the Government rested). Indeed, although the statute does not delineate how a victim may be "reasonably heard," R.C.M. 1001A(b)(4) does. Given that R.H. testified, provided a written unsworn statement, and read that statement to the members, the statutory requirement that he be reasonably heard was met. And to disallow CE 4 does not mean that R.H.'s right to reasonably heard was violated.

5. The inclusion of music and photographs within CE 4 was prejudicial error in and of itself.

While disputing A1C Edwards's contention that video recordings do not qualify as "oral statements" (Gov't Br. at 14-20), the Government acknowledges that it is a "closer question whether background music or photographs may be presented along with an oral unsworn statement." (*Id*. at 9; *see also id*. at 14, 31.) The Government then tellingly declines to argue that music and photographs are permissible within the confines of R.C.M. 1001A, and instead asks this Court to bypass the issue entirely by focusing on a purported lack of prejudice. *Id*. at 14, 32, 34. Advancing to a prejudice analysis does not help military justice practitioners in

the field understand whether it is permissible to include music or photographs in unsworn statements. For the reasons stated, this Court should find error. (App. Br. at 25-30.) But contrary to the Government's argument, the music and photographs in CE 4 were prejudicial.

The photographs were the visual focal point of the video, not R.H. (JA at 156.) R.H. appears in CE 4 for about 93 seconds of a video that lasts six minutes and 50 seconds; this equates to approximately 22.7% of the video. (*Id*.) When R.H. is not on the screen for the other 77.3%, the slide show controls the viewer experience. And the photos themselves—ones of A1C B.H. as a child—certainly are of the type to generate emotion in the members. The music also presents concerns, as its very purpose is to amplify the sensory experience of the members in such a way to as provoke the panel to make an emotional decision, not based on evidence or other permissible matters before it. The Military Judge made a clearly erroneous finding in this regard as the music invoked somberness and solemnity. (App. Br. at 28 (citing JA at 065)). This clearly erroneous factual finding is a separate and distinct abuse of discretion in addition to the erroneous interpretations of the law regarding videos, music, and photographs, respectively.

6. The Military Judge's abuse of discretion prejudiced A1C Edwards.

Harmless beyond a reasonable doubt is the appropriate standard against which prejudice should be measured. (*See* App. Br. 35-37.) It is unsurprising that A1C

Edwards's initial brief did not cite to a case establishing that prejudice standard for R.C.M. 1001A errors because that question has never been decided by this Court. Therefore, the best case law that exists looks to whether the admission or exclusion of evidence in either party's presentencing case ought to be measured for harmless error or harmlessness beyond a reasonable doubt. The clear rule from those cases looks to the constitutional dimension of the error. *United States v. Jerkins*, 77 M.J. 225, 228 (C.A.A.F. 2018) ("The standard for determining prejudice in cases in which the military judge has abused her discretion by admitting or excluding sentencing evidence appears to be linked to whether the evidence has constitutional implications."). That *Jerkins* is a case of unlawful command influence is insignificant; the key is that impermissible information was brought before the sentencing authority that should not have.

The reason why R.C.M. 1001A errors invoke constitutional concern is precisely because unsworn statements are not evidence. *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F. 2021). What this means is an accused has no right to object to the information under any prescribed rule of evidence, including Mil. R. Evid. 403—the final defense against the admission of impermissibly inflammatory evidence. An accused is left with little recourse when the scope of the process due is reduced to a single objection under R.C.M. 1001A.

No matter the standard, A1C Edwards was prejudiced. The Government has

not proven the errors (the video itself and its contents) were either harmless or harmless beyond a reasonable doubt. The video was material to the Government's sentencing case. Trial Counsel made it that way when he leveraged CE 4—played near the conclusion of his sentencing argument—as justification for sentencing A1C Edwards to life in prison without the possibility of parole. (JA at 130.) It was not some aggravating fact from the findings or presentencing case that Trial Counsel elected to conclude with; Trial Counsel chose to replay an erroneously accepted unsworn statement, not subject to the rules of evidence, to then request the members adjudge a life sentence.

To its credit, the Government concedes that Trial Counsel's argument "is some measure of the materiality of the video." (Gov't Br. at 40.) But this was more than a mere reference. Trial Counsel played it, highlighted it, argued it, and converted it into his sentence recommendation—effectively ensuring it was the last thing the members heard and thereby demonstrating its importance to the Government's argument.[8] And the Government is incorrect that R.H. could have brought his son's Airman Battle Uniform with him "while on the stand" in order to have an emotional

---

[8] *See* Jessica L. Bregant, *Let's Give Them Something to Talk About: An Empirical Evaluation of Predeliberation Discussions*, 2009 U. Ill. L. Rev. 1213, 1232 (2009) (discussing how the advocacy concepts of primacy and recency effectively persuade juries, as arguments presented early and last tend to be remembered best) (citations omitted).

moment with it before the members. (Gov. Ex. at 40.) A1C Edwards is unaware of any provision in the *MCM* that would allow such a presentation "on the stand," and surely none would permit R.H. to accompany Trial Counsel for such a demonstration during argument.

The quality of the video in question—another aspect of the Article 59(a), UCMJ, prejudice assessment—also contributes to the Government's failure to prove harmlessness. A1C Edwards is not arguing that allowing a video to go back to deliberations[9] is "inherently prejudicial." (Gov't Br. at 27, n. 7.) The argument is that the form of the video—an infinitely re-playable digital file—that does indeed go with the members to deliberate, is of a *quality* that makes its prejudicial impact more significant. By contrast, if a victim made a one-sentence erroneous oral statement when being properly heard under R.C.M. 1001A, it would be unlikely to have the same prejudicial effect on deliberations as this video does. Reasonably assuming the members reacquainted themselves with all evidence and matters before them during deliberations, as was their duty, the father of the deceased was effectively talking to them in deliberation room. That is an error of significant quality. And when that is combined with the materiality of the substance of the video—that which Trial Counsel justified as life in prison without the possibility of parole—this error cannot

[9] Def. Ex. M was evidence, subject to the full scope of objection under the Military Rules of Evidence. It is unremarkable that it went to the members to consult.

be deemed harmless, much less harmless beyond a reasonable doubt.

CONCLUSION

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

Respectfully Submitted,

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 37389
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
david.bosner.1@us.af.mil

Counsel for Appellant

MARK C. BRUEGGER
Senior Counsel
U.S.C.A.A.F. Bar No. 34247
Air Force Appellate Defense Division
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
mark.bruegger.1@us.af.mil

Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on September 23, 2021.

Respectfully Submitted,

DAVID L. BOSNER, Capt, USAF
U.S.C.A.A.F. Bar No. 37389
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
David.bosner.1@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 4,849 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,

DAVID L. BOSNER, Capt, USAF
U.S.C.A.A.F. Bar No. 37389
1500 Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762
(240) 612-4770
David.bosner.1@us.af.mil

Counsel for Appellant