

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

**BRIEF ON BEHALF OF
APPELLEE**

v.

Docket No. ARMY 20230234

Specialist (E-4)
NATHANIEL A. MARTIN,
United States Army,
Appellant

Tried at Fort Riley, Kansas, on 27
January 2023 and 28 April 2023,
before a general court-martial
convened by the Commander, 1st
Infantry Division and Fort Riley,
Colonel Steven C. Henricks, Military
Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignment of Error

**WHETHER THE MILITARY JUDGE ABUSED HIS
DISCRETION BY ADMITTING THE VICTIM'S
IMPACT STATEMENT WHERE THE RECORD
CONTAINS NO INDICATION OF VICTIM
PARTICIPATION.**

Statement of the Case

On 28 April 2023, a military judge sitting as a general court-martial
convicted appellant, in accordance with his pleas, of one specification of sexual
abuse of a child, in violation of Article 120b, Uniform Code of Military Justice, 10
U.S.C. §§ 920b [UCMJ]. (R. at 12, 72; Statement of Trial Results [STR]).¹ The

¹ Appellant was charged with an additional specification of sexual abuse of a child
in violation of Article 120b, UCMJ. (Charge Sheet; STR). In accordance with his

military judge sentenced appellant to be reduced to the grade of E1, to be confined for seventy-five days, and to be discharged from the service with a dishonorable discharge. (R. at 116; STR).

Statement of Facts

A. Appellant's Misconduct.

Appellant was stationed in Pabrade, Lithuania, on a rotational deployment from 8 August 2021 to 5 July 2022. (Pros. Ex. 1). On 2 March 2022, appellant used an application on his cellphone to send a friend request to a fifteen-year-old high school student in St. Louis, Missouri. (Pros. Ex. 1; R. at 24). The fifteen-year-old accepted his request and they began a conversation. (Pros. Ex. 1; R. at 24). During the conversation, appellant asked her how old she was, and she responded that she was fifteen. (Pros. Ex. 1; R. at 24). Appellant asked the victim if he could see her body, and she responded no. (Pros. Ex. 1). Appellant then sent her two photos of his erect penis and three photos of himself in his military uniform. (Pros. Ex. 1; R. at 24). The student blocked the appellant on the application and reported the incident to a teacher. (Pros. Ex. 1). Appellant admitted to law enforcement that he knowingly sent the photos to a fifteen-year-old. (Pros. Ex. 1).

plea agreement, appellant pleaded not guilty to this specification, and the government moved to dismiss it before the announcement of findings. (R. at 71; App. Ex. III; STR).

B. Victim's Unsworn Statement during Presentencing.

After the government rested during the presentencing phase of trial, the military judge asked if there was a crime victim present who desired to be heard. (R. at 74). The trial counsel responded, "There is, Your Honor. I have, with your permission to approach, the unsworn statement from the alleged victim offered through her mother, e-mailed to us last night, pursuant to the request for designee I sent you." (R. at 74). Defense counsel objected to the admissibility of the statement based on authentication. (R. at 74–75). The military judge noted that he could look at the contents of the email for foundational purposes. (R. at 75–76). Defense counsel agreed that he could but then objected under Rule for Court Martial [R.C.M.] 1001(c) because the crime victim was not present. (R. at 76). The defense's position was that if the crime victim exercises the right to be heard, they "shall be called by the court-martial." (R. at 76). The trial counsel argued that R.C.M. 1001(c)(5)(a) does not require presence, cited several cases, and stated that the "calling" by the court-martial is "a mandate for the court to read from [the] script." (R. at 77–78). Defense counsel countered that the cases cited by the government applied to affidavits. (R. at 78). The military judge delayed ruling on the matter. (R. at 78).

After both parties rested their presentencing cases, the military judge asked defense counsel if they had any objection to the contents of the victim's unsworn

statement contained in the email. (R. at 108). Defense counsel responded that they did not object to the content. (R. at 108). The military judge and defense counsel had a short colloquy regarding whether affidavits were required if the victim was not present. (R. at 109). The military judge then issued his ruling and said he would consider the victim's unsworn statement. (R. at 109).

Assignment of Error

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING THE VICTIM'S IMPACT STATEMENT WHERE THE RECORD CONTAINS NO INDICATION OF VICTIM PARTICIPATION.

Standard of Review

This court reviews "a military judge's decision to admit evidence for an abuse of discretion." *United States v. Hamilton*, 78 M.J. 335, 340 (C.A.A.F. 2019) (citing *United States v. Humpherys*, 57 M.J. 83, 90 (C.A.A.F. 2002)). "A military judge abuses his discretion when he admits evidence based on an erroneous view of the law." *Id.* (citations omitted). A military judge's interpretation of R.C.M. 1001 is reviewed de novo. *United States v. Edwards*, 82 M.J. 239, 243 (C.A.A.F. 2022).

Law and Argument

The military did not err in allowing admission of the victim's impact statement. Furthermore, the victim's impact statement had no substantial influence on the adjudged sentence.

A. Rights of the Victim.

A victim of an offense under the UCMJ has the right to be reasonably heard at a sentencing hearing related to the offense. Article 6b(a)(4)(B), UCMJ, 10 U.S.C. § 806b(a)(4)(B). Under R.C.M. 1001(c)(1), a crime victim has the right to be reasonably heard at the presentencing proceeding after presentation by trial counsel. The crime victim has the right to make an unsworn statement that may be oral, written, or both. R.C.M. 1001(c)(5)(A). "Upon good cause shown, the military judge may permit the crime victim's counsel, if any, to deliver all or part of the crime victim's unsworn statement." R.C.M. 1001(c)(5)(B).

B. The military judge did not err in admitting the victim's unsworn statement.

In *United States v. Harrington*, the Court of Appeals of the Armed Forces [C.A.A.F.] held that presentation of a victim's unsworn statement in a question-and-answer format with the trial counsel violated R.C.M. 1001(c) because "it contravene[d] the principle that an unsworn victim statement belongs solely to the victim or the victim's designee. 83 M.J. 409, 418 (C.A.A.F. 2023) (cleaned up). The C.A.A.F. emphasized that "[t]he President [through R.C.M. 1001(c)(5)(B)]

has expressly authorized the victim's counsel to deliver all or part of the victim's unsworn statement on behalf of the victim for good cause shown. *Id.* The Court held that the trial counsel in *Harrington* violated that principal by participating in the delivery of the victim's statement. *Id.*² While the Government argued that the court "should allow some level of trial counsel assistance," the C.A.A.F. declined to adopt that approach. *Id.* at 419.

[A]s the military justice system proceeds into a future where multiple entities participate in courts-martial proceedings—including the accused, the government, and the victim—we recognize the importance of maintaining the separate authorities of each as set out by Congress and the President . . . Trial counsel's participation in the presentation of the unsworn statement—especially in a question-and-answer format that closely resembles the presentation of actual evidence during every other phase of the trial—unnecessarily blurs the distinction between actual sentencing evidence and the unsworn victim statement.

Id. at 419–420.

In this case, the trial counsel did not participate in a question-and-answer format with the victim and did not present the unsworn statement during the government's presentencing case. (R. at 74). The trial counsel moved to admit Prosecution Exhibit 2 into evidence and rested after the military judge admitted the

² See also *United States v. Cornelison*, 78 M.J. 739, 743 (Army Ct. Crim. App. 2019) (noting that a victim's statement may only be given by the victim, a victim's designee, or the victim's own counsel).

exhibit. (R. at 74). The military judge then asked whether there was a crime victim present who desired to be heard, and the trial counsel responded that there was and offered the victim's unsworn statement that the government had received from the victim's mother, pursuant to a request for designee the government had sent to the military judge.³ (R. at 74). The trial counsel's delivery of the victim's written unsworn statement to the military judge on behalf of the victim's mother did not "unnecessarily blur[] the distinction between actual sentencing evidence and the unsworn victim statement." *Harrington*, 83 M.J. at 419–420. The trial counsel was merely a conduit for the victim to provide her unsworn statement to the court since she was not physically present.

Appellant argues that R.C.M. 1001(c)(1) requires physical presence and participation of the victim. (Appellant's Br. 7). In the present case, the victim's mother, acting on behalf of the victim, provided the victim impact statement to the government to present to the court-martial. (App. Ex. VI; R. at 74). The victim, nor her mother, were present for the court-martial. (R. at 74–78). In *Hamilton*, the C.A.A.F. held that the introduction of victim impact statements under R.C.M. 1001A (2016) is "prohibited without, at a minimum, either the presence or request

³ In a separate motion, dated 4 June 2024, the Government moved to admit Government Appellate Exhibit 1, an email from trial counsel to the military judge that included the Government's Request for Designee for Minor Victim under R.C.M. 801(a)(6).

of the victim . . . the special victim’s counsel or the victim’s representative[.]

Hamilton, 78 M.J. at 341. In *United States v. Clark-Bellamy*, the Air Force Court of Criminal Appeals (A.F.C.C.A.) held that “the plain language of R.C.M. 1001A(e) does not require the physical presence of a child pornography victim (or their representative) to present or offer a victim impact statement to the court, and that telephonic or other reliable means is sufficient to meet the intent of R.C.M. 1001A(e).”⁴ *United States v. Clark-Bellamy*, ACM 39709, 2020 CCA LEXIS 391, at *18 (A.F. Ct. Crim. App. 27 Oct. 2020). “The language ‘*shall be called* by the court-martial’ is not a mandate for presence at the court-martial. It means that a victim is not a prosecution or a defense witness (although the victim could be called as a witness); a victim is called by the court-martial.” *Id.* at *16. In *United States v. Daddario*, the A.F.C.C.A. noted that the C.A.A.F., in *Barker*, proposed two methods in interpreting the prerequisites for presenting victim impact statements: “either presence *or* the request of the victim.” *United States v. Daddario*, ACM 40351, 2023 CCA LEXIS 499, at *24 (A.F. Ct. Crim. App. 1 Dec. 2023). “The disjunctive ‘or’ is significant because it indicates that a ‘request’ need not involve physical presence.” *Id.*

⁴ See also *United States v. Schauer*, 83 M.J. 575, 577–578 (A.F. Ct. Crim. App. 2023) (at trial the Government produced victim’s impact statement that had been entered through her designee).

The Government asks this court to adopt the three foundational prerequisites that the A.F.C.C.A. noted in *Daddario*. *Id.* at *24-25. The A.F.C.C.A., in synthesizing the C.A.A.F.’s holdings in *Barker*, *Harrington*, and *Hamilton*, considered three foundational prerequisites for a victim’s unsworn impact statement: 1) the victim created it; 2) the victim had knowledge of the court-martial, and 3) the victim intended for their statement to be offered at the court-martial at the time the statement was offered. *Id.*

In this case, the victim’s mother, in an email, stated that the victim wrote the attached victim impact statement. (App. Ex. VI). The email was sent to the Fort Riley Special Victim Liaison who forwarded it to government counsel. (App. Ex. VI). In her statement, the victim concluded by saying “Thank you to the Army for letting me come here to say this.” (App. Ex. VI). Considering the email sent by the victim’s mother, the recipient of the email, and the contents of the victim’s statement, it is clear that the victim created it, had knowledge of this particular court-martial, and intended it to be offered at appellant’s court-martial. *Compare with Hamilton*, 78 M.J. 335, 338 (detective presented victim’s impact statement and said victim requested the statement be presented at sentencing in cases involving her image).

Appellant notes that the victim’s mother was not designated by the military judge as a designee under R.C.M. 801(a)(6). (Appellant’s Br. 5–6). The

government would argue that no designee was needed because the victim wrote and provided her unsworn statement. The victim's mother was just a conduit who emailed the statement to the Fort Riley Special Victim Liaison, who forwarded it to government counsel, who then provided it to the court. (App. Ex. VI; R. at 74). The contents of the unsworn statement and the email traffic support this position.

Should this court find that the victim's mother acted as a designee under R.C.M. 801(a)(6), the government argues that the victim's mother would have qualified as the "victim's designee" under R.C.M. 801(a)(6). In *Hamilton*, the C.A.A.F. noted that there was no indication that the victim was aware her statement was being offered at the appellant's trial or that the detective offering her statement was or could qualify as a "victim's designee." *Hamilton*, 78 M.J. at 338, 340. In this case, the victim's unsworn statement says she is seventeen years old. (App. Ex. VI). The Stipulation of Fact and appellant's testimony during his providence inquiry show that the victim was fifteen years old in March 2022. (Pros. Ex. 1; R. at 24). On 28 April 2023, the day the sentence was adjudged, the victim would have been under the age of eighteen. (STR; App. Ex. VI). Rule for Courts-Martial 801(a)(6) allows the military judge, at his discretion, to deem suitable a person to assume the rights of a victim under the age of eighteen.

In this case, the Government requested that the military judge designate the victim's adoptive mother as her designee under R.C.M. 801(a)(6). (R. at 74; Gov.

App. Ex. A). While there is nothing in the record that contains the military judge's approval of the request, the Government would argue that the military judge tacitly approved the request by admitting the unsworn statement. (R. at 74; 109).

Furthermore, while appellant objected to admission of the victim's unsworn statement on grounds of authentication and lack of victim's physical presence (R. at 74–79; 108–109), there is nothing in the record that indicates appellant objected to the designation of the victim's mother. In fact, when government counsel provided the military judge the unsworn statement, the government mentioned it was done pursuant to the request for designee. (R. at 74). At that time, the military judge asked defense counsel if they had a chance to review, and defense acknowledged that they had and objected to the unsworn statement on other grounds. Therefore, appellant has waived the issue of whether the victim's mother was an appropriate designee under R.C.M. 801(a)(6). *See United States v.*

McInnis, ACM 39576, 2020 CCA Lexis 194, at *36–44 (A.F. Ct. Crim. App. 29 May 2020).

C. Should the court find that the military judge erred in admitting the statement, the admission of the statement did not have a substantial influence on the adjudged sentence.

The test for prejudice when this Court finds error in the admission of sentencing evidence or matters is “whether the error substantially influenced the adjudged sentence.” *Edwards*, 82 M.J. at 246 (quoting *United States v. Barker*, 77

M.J. 377, 384 (C.A.A.F. 2018)). When deciding whether the error substantially influenced appellant's sentence, this Court should consider "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." *Barker*, 77 M.J. at 384. Furthermore, "an error is more likely to have prejudiced an appellant if the information conveyed as a result of the error was not already obvious from what was presented at trial." *Edwards*, 82 M.J. at 247 (citing *United States v. Harrow*, 65 M.J. 190, 200 (C.A.A.F. 2007)).

In *United States v. Jones*, the government entered a victim's email as a prosecution exhibit during the government's presentencing case. *United States v. Jones*, ARMY 20180189, 2019 CCA LEXIS 450, at *4 (Army Ct. Crim. App. 6 Nov. 2019) (summ. disp.). The court held that the military judge abused his discretion by admitting the victim's email as an unsworn statement during the government's case. *Id.* at *5. However, after evaluating for prejudice, the court found that the error did not substantially influence the sentence. *Id.* at *6-7. In testing for prejudice, the court found that the government's case was strong because the stipulation of fact explicitly detailed appellant's crimes. *Id.* at *6. The defense case consisted of appellant's unsworn statement and "Good Soldier Book" along with statements of support. *Id.* The court noted that the victim's email did introduce new information, but "[g]iven the nature of the crimes, her reaction

[was] neither surprising nor particularly prejudicial.” *Id.* Of note, the victim’s email did not blame the Army or think worse of it based on appellant’s misconduct. *Id.*

While it is “harder for the Government to meet its burden of showing that a sentencing error did not have a substantial influence on a sentence than it is to show that an error did not have a substantial influence on the findings,” the government has met its burden. *Edwards*, 82 M.J. at 247. In the present case, the government’s pre-sentencing case was strong. Appellant argues that the government’s “sole evidence in aggravation was this government proffered email[.]” (Appellant’s Br. 7). However, the stipulation of fact contains the following uncontroverted facts, which appellant agreed could be considered by the Military Judge in determining an appropriate sentence: 1) appellant was on a rotational deployment to Lithuania at the time of the offense; 2) appellant sent a “friend request” to the victim, a fifteen year old high school student; 3) appellant was aware that the victim was fifteen; 4) the victim made appellant aware that the age gap between them was “kinda” a problem; 5) the victim was at school during the conversation; 6) appellant asked if he could see the victim’s body and she responded “no”; 7) appellant then sent two photos of his erect penis; and 8) appellant sent three photos of himself wearing his military uniform. (Pros. Ex. 1).

The aforementioned evidence demonstrates the strength of the government's sentencing case.

Furthermore, appellant bargained for a sentence as part of his plea agreement that required the military judge to adjudge a dishonorable discharge and confinement between thirty and ninety days. (App. Ex. III). The Military Judge sentenced appellant to seventy-five days confinement and a dishonorable discharge. (STR).

Appellant's pre-sentencing case was weak. His pre-sentencing consisted of his unsworn statement and the testimony of appellant's spouse, three character witnesses, and a Special Agent who discussed appellant's cooperation in another case. (R. at 79–108).

Turning to the materiality and quality of the evidence in question, the victim's impact statement was not material to the sentence and the quality of the evidence was low. During its sentencing argument, the Government did not directly refer to the victim's impact statement and only stated that the accused should think about how his actions affected the victim. (R. at 111–112). This consideration is common in any case involving a victim and is not made more material by the victim's unsworn statement. The Government also mentioned during its argument that its three goals for punishing appellant consisted of 1) punishing him for his wrongful actions; 2) promoting an adequate deterrence; and

3) reflecting the seriousness of the offense. (R. at 110). The Government did not mention any evidence in aggravation related directly to the victim or refer to retribution for the victim as one of its goals in argument. (R. at 109–112). The quality of the victim’s written unsworn statement is low because “[g]iven the nature of the crime[], her reaction is neither surprising nor particularly prejudicial.” *Jones*, 2019 CCA LEXIS 450, at *6.

Unlike *Edwards*, where the evidence in question in that case consisted of a video that contained a slideshow of pictures of the victim throughout his life, including his gravestone, accompanied by background music, *Edwards* 82 M.J. at 247, the unsworn statement in this case consisted of two typed pages. (App. Ex. VI). It mostly contained thoughts and feelings that would not be uncommon for victims of similar crimes to express. (App. Ex. VI). The victim did present new information that was not in the stipulation of fact when she stated:

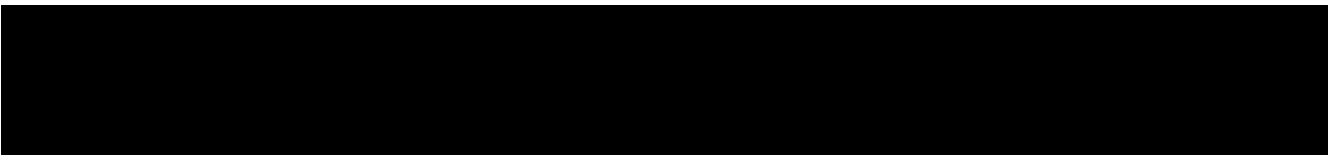
Of course you wouldn’t know, but I was already a child who suffered trauma. I was already suffering from low self-esteem and coping with the memories of being abandoned by my birth mother who chose drugs over me. So now the therapy I participate in is needed to process and deal with the added trauma you inflicted on me with your pictures.”

(App. Ex. VI). While this unique fact was not contained anywhere else in the record, the victim minimized any potential aggravation by caveating it with the fact that appellant wouldn’t have known she had previously suffered trauma. (App. Ex.

VI). Therefore, this court should find that “the facts surrounding appellant’s crimes . . . were what influenced the sentence” and not the victim’s unsworn statement. *Jones*, 2019 CCA LEXIS 450, at *6.

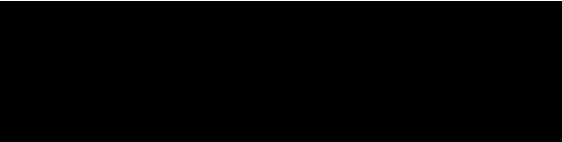
Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and sentence and deny relief.



CHASE C. CLEVELAND
MAJ, JA
Branch Chief, Government
Appellate Division

JACQUELINE J. DeGAINE
COL, JA
Deputy Chief, Government Appellate
Division



CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate
Division

APPENDIX



Positive

As of: May 22, 2024 7:58 PM Z

United States v. Clark-Bellamy

United States Air Force Court of Criminal Appeals

October 27, 2020, Decided

No. ACM 39709

Reporter

2020 CCA LEXIS 391 *; 2020 WL 6301347

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

LexisNexis® Headnotes

Notice: NOT FOR PUBLICATION

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

Case Summary

Overview

HOLDINGS: [1]-Regarding the authenticity of Ms. CLH's written statement, Mil. R. Evid. 901, Manual Courts-Martial (2016 ed.), was inapplicable. Even assuming arguendo that Mil. R. Evid. 901 applied, Ms. CLH's letter was authenticated through her testimony; [2]-The plain language of R.C.M. 1001A(e), Manual Courts-Martial (2016 ed.), does not require the physical presence of a child pornography victim (or their representative) to present or offer a victim impact statement to the court, and telephonic or other reliable means is sufficient to meet the intent of R.C.M. 1001A(e); [3]-The military judge sentenced appellant based on the appropriate victim-impact matters and evidence, and as such, did not abuse his discretion; [4]-From the conclusion of trial to the docketing of appellant's case with this court, 81 days passed. The court found no violation of appellant's due process rights.

Outcome

The findings and sentence were affirmed.

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Victim Statements

Military & Veterans Law > ... > Courts
Martial > Sentences > Deliberations, Instructions &
Voting


Military & Veterans Law > Military Justice > Judicial
Review > Standards of Review

Military & Veterans Law > ... > Courts
Martial > Evidence > Evidentiary Rulings

Military & Veterans
Law > ... > Evidence > Admissibility of
Evidence > Real Evidence & Writings

HN1 **Imposition of Sentence, Victim Statements**

A military judge's interpretation of R.C.M. 1001A, Manual Courts-Martial (2016 ed.), is a question of law the court reviews de novo. However, the court reviews a military judge's decision to accept a victim impact statement offered pursuant to R.C.M. 1001A for an abuse of discretion. The judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.

HN2  Issues of statutory interpretation are reviewed de novo. Courts first look to the text of the statute. When the statute's language is plain, the sole function of the courts--at least where the disposition required by the

text is not absurd--is to enforce it according to its terms. When statutory language is unambiguous, the statute's plain language will control.

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

[HN3](#) **Sentences, Presentencing Proceedings**

R.C.M. 1001A(b)(1), Manual Courts-Martial (2016 ed.), defines a crime victim as an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty.

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Victim Statements

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

[HN4](#) **Imposition of Sentence, Victim Statements**

A victim has a right to be reasonably heard in a sentencing hearing. Unif. Code Mil. Justice art. 6b(a)(4)(B), [10 U.S.C.S. § 806b\(a\)\(4\)\(B\)](#). At the beginning of the presentencing proceeding, the military judge shall announce that any crime victim who is present at the presentencing proceeding has the right to be reasonably heard, including the right to make a sworn statement, unsworn statement, or both. Prior to the conclusion of the presentencing proceeding, the military judge shall ensure that any such crime victim was afforded the opportunity to be reasonably heard. R.C.M. 1001A(a), Manual Courts-Martial (2016 ed.).

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Victim Statements

Military & Veterans Law > ... > Courts
 Martial > Sentences > Capital Punishment

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts
 Martial > Posttrial Procedure > Judge Advocate

Review

[HN5](#) **Imposition of Sentence, Victim Statements**

The right to be reasonably heard requires that the victims be contacted, given the choice to participate in a particular case, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a victim's designee where appropriate. A victim may make a sworn or unsworn statement during sentencing in a non-capital case. R.C.M. 1001A(b)(4), Manual Courts-Martial (2016 ed.). An unsworn statement may be oral, written, or both. R.C.M. 1001A(e). Statements offered under R.C.M. 1001A(b) may include victim impact or matters in mitigation. Victim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty. R.C.M. 1001A(b)(2).

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Victim Statements

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions &
 Voting

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

[HN6](#) **Imposition of Sentence, Victim Statements**

The rights vindicated by R.C.M. 1001A, Manual Courts-Martial (2016 ed.), are personal to the victim in each individual case. Therefore, the introduction of statements under this rule is prohibited without, at a minimum, either the presence or request of the victim, R.C.M. 1001A(a), the special victim's counsel or the victim's representative, R.C.M. 1001A(d)-(e). The military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement. R.C.M. 1001A(e)(2). A reasonable opportunity to be heard at a hearing includes that a victim who is represented by counsel be heard through counsel. During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. R.C.M. 1001(f)(1), Manual Courts-Martial (2016 ed.).

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Victim Statements

Military & Veterans
 Law > ... > Evidence > Relevance > Confusion,
 Prejudice & Waste of Time

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions &
 Voting

Military & Veterans
 Law > ... > Evidence > Admissibility of
 Evidence > Real Evidence & Writings

[HN7](#) **Imposition of Sentence, Victim Statements**

Victim impact statements offered under R.C.M. 1001A, Manual Courts-Martial (2016 ed.), are not evidence, and thus the balancing test in Mil. R. Evid. 403, Manual Courts-Martial (2016 ed.), is inapplicable to assessing the reasonable constraints that may be placed upon such statements. As this court explained in *Hamilton*, Mil. R. Evid. 403 addresses legal relevance and provides that evidence may be excluded notwithstanding its logical relevance. In the decision to allow a victim to exercise their right to be heard on sentencing, a military judge is neither making a relevance determination nor ruling on the admissibility of otherwise relevant evidence. Instead, the military judge assesses the content of a victim's unsworn statement not for relevance, but for scope.

Criminal Law &
 Procedure > Sentencing > Imposition of
 Sentence > Victim Statements

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions &
 Voting

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts Martial > Trial
 Procedures > Judicial Discretion

[HN8](#) **Imposition of Sentence, Victim Statements**

In *Hamilton*, this court acknowledged the military judge has an obligation to ensure the content of a victim's unsworn statement comports with the defined parameters of victim impact or mitigation as defined by the statute and R.C.M. 1001A, Manual Courts-Martial (2016 ed.). Also, refer to R.C.M. 1001A, Discussion, Manual Courts-Martial (2016 ed.) (A victim's unsworn statement should not exceed what is permitted under R.C.M. 1001A(c). Upon objection or sua sponte, a military judge may stop or interrupt a victim's unsworn statement that includes matters outside the scope of R.C.M. 1001A).

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions &
 Voting

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts
 Martial > Posttrial Procedure > Judge Advocate
 Review

[HN9](#) **Sentences, Deliberations, Instructions & Voting**

When there is error regarding the presentation of victim statements under R.C.M. 1001A, Manual Courts-Martial (2016 ed.), the test for prejudice is whether the error substantially influenced the adjudged sentence. When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant.

Military & Veterans Law > ... > Courts
 Martial > Evidence > Preliminary Questions

Military & Veterans
 Law > ... > Evidence > Admissibility of
 Evidence > Real Evidence & Writings

[HN10](#) **Evidence, Preliminary Questions**

Mil. R. Evid. 901, Manual Courts-Martial (2016 ed.), states that to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

Criminal Law & Procedure > Trials > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

[HN11](#) **Trials, Judicial Discretion**

Military judges are expected to exercise sound discretion when it comes to a victim being reasonably heard.

Evidence > Authentication

[HN12](#) **Evidence, Authentication**

Authentication simply requires establishing that the evidence is what the proponent claims it to be.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

[HN13](#) **Sentences, Deliberations, Instructions & Voting**

The language "shall be called by the court-martial" is not a mandate for presence at the court-martial. It means that a victim is not a prosecution or a defense witness (although the victim could be called as a witness); a victim is called by the court-martial.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

[HN14](#) **Sentences, Deliberations, Instructions & Voting**

R.C.M. 1001A, Manual Courts-Martial (2016 ed.), conveys a personal right to the victim and does not expressly mandate physical presence. R.C.M. 1001A(a) merely states that a victim has the right to be reasonably heard.

Computer & Internet Law > Criminal Offenses > Crimes Involving Minors > Child Pornography

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

[HN15](#) **Crimes Involving Minors, Child Pornography**

In continuing crime cases, such as possession and viewing of child pornography, there is no requirement that a victim prepare a separate statement for each individual case.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

Military & Veterans Law > ... > Courts Martial > Sentences > Capital Punishment

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

[HN16](#) **Imposition of Sentence, Victim Statements**

The plain language of R.C.M. 1001A(e), Manual Courts-Martial (2016 ed.), does not require the physical presence of a child pornography victim (or their representative) to present or offer a victim impact statement to the court, and telephonic or other reliable means is sufficient to meet the intent of R.C.M. 1001A(e).

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

[HN17](#) **Sentences, Presentencing Proceedings**

The military judge assesses the content of a victim's unsworn statement not for relevance, but for scope.

Military & Veterans Law > ... > Courts
 Martial > Judges > Challenges to Judges

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts
 Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

[HN18](#) **Judges, Challenges to Judges**

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary. As part of this presumption the court further presumes that the military judge is able to distinguish between proper and improper sentencing arguments. This presumption holds regardless of whether the military judge notes the improper portions or states what portions he will consider.

Military & Veterans Law > ... > Courts
 Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > ... > Courts
 Martial > Posttrial Procedure > Posttrial Sessions

Military & Veterans Law > Military Justice > Courts
 Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

[HN19](#) **Posttrial Procedure, Actions by Convening Authority**

In *Moreno*, the U.S. Court of Appeals for the Armed Forces (CAAF) identified thresholds for facially unreasonable delay for particular segments of the post-trial and appellate process. Specifically, the CAAF established a presumption of facially unreasonable delay where the convening authority did not take action within 120 days of the completion of trial, where the record was not docketed with the Court of Criminal Appeals within 30 days of the convening authority's action, or where the Court of Criminal Appeals did not render a decision within 18 months of docketing.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > ... > Courts
 Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Courts
 Martial > Convening Authority

Military & Veterans Law > Military Justice > Judicial Review > US Court of Appeals for the Armed Forces

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

[HN20](#) **Procedural Due Process, Scope of Protection**

As the court recently noted in *Livak*, depending on the length and complexity of the record involved, the court can envision cases in which the court reporter is still transcribing the proceedings after the convening authority's decision. As such, the prior 30-day period from action to docketing, which primarily involved transmitting an already-completed record of trial to the Court of Criminal Appeals, now overlays substantive actions such as completing the preparation of the record. This court held that: The specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps the court determine an unreasonable delay under the new procedural rules. However, the court can apply the aggregate standard threshold the majority established in *Moreno*: 150 days

from the day appellant was sentenced to docketing with this court. This 150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with the U.S. Court of Appeals for the Armed Forces' holding in *Moreno*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

[HN21](#) **Procedural Due Process, Scope of Protection**

Assuming *arguendo* that there was a facially unreasonable delay, the court assesses whether there was a due process violation by considering the four factors identified in *Moreno*: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review and appeal; and (4) prejudice to the appellant. The court also considers that where an appellant has not shown prejudice from the delay, there is no due process violation unless the delay is so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Actions by Convening Authority

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Speedy Trial

Military & Veterans Law > ... > Courts Martial > Sentences > Cruel & Unusual Punishment

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Posttrial Sessions

[HN22](#) **Posttrial Procedure, Actions by Convening Authority**

In the absence of a due process violation, this court considers whether relief for excessive post-trial delay is warranted consistent with this court's authority under *Unif. Code Mil. Justice* art. 66(d), [10 U.S.C.S. § 866\(d\)](#).

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

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

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

Opinion by: MEGINLEY

Opinion

MEGINLEY, Judge:

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

On appeal, Appellant raises three issues: (1) whether the military judge abused his discretion when he considered a victim impact statement; (2) whether Appellant is entitled to sentence relief because his case was not docketed with this court within 30 days of action by the convening authority; and (3) whether Appellant is

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

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

entitled to sentence relief because the record of trial is defective and incomplete. Regarding Appellant's third assertion, given that the defects were either resolved or waived, we find this assertion does not require further discussion or warrant relief. See [*United States v. Matias*, 25 M.J. 356, 361 \(C.M.A. 1987\)](#). Finding no prejudicial error, we affirm the findings and sentence.

I. BACKGROUND

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

On 5 April 2018, an AFOSI agent obtained a search authorization from a Holloman AFB military magistrate to search Appellant's electronic devices for child pornography. Subsequently, AFOSI agents seized Appellant's hard drive and cellular phone. On 6 April 2018, Appellant was interviewed by AFOSI agents. Following a rights advisement, Appellant declined counsel and answered questions. During this interview, Appellant denied sending the image but also stated his fiancée had access to his phone, although but he did not think she would have uploaded the image.

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

Trial counsel reached out to KF, a known child pornography victim from the series known as "Vicky,"

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

Trial defense counsel objected to the content of KF's victim impact statements, arguing that KF's statement made reference to evidence or facts that were not at issue in the case, including KF's statement related to other intervening actors, "like people who have stalked her." Trial defense counsel also objected to Ms. CLH's letter, Appellate Exhibit V, for lack of authenticity. The military judge acknowledged the authentication issues, noting Ms. CLH's letter was neither notarized nor certified, and that it "is just a memorandum." The military judge considered the issue of Ms. CLH's statement and

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

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

believed it "an interlocutory question that could be resolved by her testifying on the telephone to [the trial court] and allowing both sides the opportunity to question her and to cross-examine [*6] her to establish the authenticity of Appellate Exhibit V." Trial counsel argued that under Mil. R. Evid. 901, he did not believe there was an authenticity argument, in that a judge's discretion to exclude evidence on authenticity grounds is "limited to deciding whether sufficient proof exists for a reasonable juror to determine the authenticity of the document." Trial counsel later again argued, after Ms. CLH testified telephonically, the "government does not believe there is an authenticity requirement under M[il]. R. E[vid]. 901 as to an Appellate Exhibit."

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

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

[T]he Court is considering the testimony of Ms. [CLH] as testimony [*7] on an interlocutory question. Understanding, defense, you're not consenting to this. But looking at the factors under the rule, these are factors to be considered but are not limited to the cost of producing the witness, the timing of the request for the production of [sic] witness, potential delay, and the interlocutory proceeding that may be caused by the production of the witness, the willingness of the witness to testify in person, the likelihood of significant interference with military operational deployments, mission accomplishment, or essential training and/or child witness traumatic effects of providing the in-court testimony.

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

as follows:

Q [Trial Defense Counsel]. Could you explain a little bit what your knowledge of this case is?

A [Ms. CLH]. I don't know [*8] much beyond that. As I explained before, I'm not at my office. . . . I had left the office by the time I learned that my testimony was needed.

Q. Were you at any time made aware of what the evidence in this case was?

A. I couldn't say that I was aware of the specific evidence in detail. And I'm actually never advised of that in either civilian prosecutions or the military prosecutions that I speak to prosecutors about, other than the fact that my client's images are in a particular defendant's collection and what he or she may have done with them.

Q. And was that in this case that you were advised of that?

A. I was advised that my client's sexual assault images in this case were in [Appellant's] collection, yes.

Q. Were you told anything about videos?

A. I may have been told about it. In fact, it's my understanding that primarily the Vicky series is made up of videos.

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

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

I still have nightmares that come from knowing the pictures of me are spread around on the internet by people with perverted interests in my pain. I have panic attacks and flashbacks, I can't sleep a lot of

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

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

II. DISCUSSION

A. Victim's Impact Statement

1. Law

[HN1](#)[↑] A military judge's interpretation of R.C.M. 1001A is a question of law we review de novo. See [United States v. Barker, 77 M.J. 377, 382 \(C.A.A.F. 2018\)](#) (citations omitted). However, we review a military judge's decision to accept a victim impact statement offered pursuant to R.C.M. 1001A for an abuse of discretion. See [id. at 383](#) (citing [United States v. Humpherys, 57 M.J. 83, 90 \(C.A.A.F. 2002\)](#) (reviewing a military judge's application of R.C.M. 1001A (2016 MCM) for an abuse of discretion)). "The 'judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.'" [Humpherys, 57 M.J. at 90](#) (quoting [United States v. Ayala, 43 M.J. 296, 298 \(C.A.A.F. 1995\)](#)).

[HN2](#)[↑] Issues of statutory interpretation are reviewed de novo. [United States v. Jacobsen, 77 M.J. 81, 84 \(C.A.A.F. 2017\)](#) (citing [United States v. Vargas, 74 M.J. 1, 5 \(C.A.A.F. 2014\)](#)). Courts first look to the text of the statute. *Id.* (citing [United States v. Tucker, 76 M.J. 257, 258 \(C.A.A.F. 2017\)](#); [Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 \(2000\)](#) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." (internal

quotation marks and citation omitted))). "When statutory language is unambiguous, the statute's plain language will control." [United States v. Jacobsen, 77 M.J. 81, 84 \(C.A.A.F. 2017\)](#) (citing [United States v. Schell, 72 M.J. 339, 343 \(C.A.A.F. 2013\)](#)).

[HN3](#)[↑] R.C.M. 1001A(b)(1) defines [*11] a "crime victim" as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." Child pornography is a continuing crime and a child depicted in the images is victimized each time the images are downloaded and viewed. [Paroline v. United States, 572 U.S. 434, 439, 134 S. Ct. 1710, 188 L. Ed. 2d 714 \(2014\)](#) (citation omitted).


[HN4](#)[↑] A victim has a right to be reasonably heard in a sentencing hearing. [Article 6b\(a\)\(4\)\(B\), UCMJ, 10 U.S.C. § 806b\(a\)\(4\)\(B\)](#).

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

R.C.M. 1001A(a). [HN5](#)[↑] "[T]he right to be reasonably heard requires that the victims be contacted, given the choice to participate in a particular case, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a 'victim's designee' where appropriate." [United States v. Hamilton, 78 M.J. 335, 340-41 \(C.A.A.F. 2019\)](#) (citations omitted). A victim may make a sworn or unsworn [*12] statement during sentencing in a non-capital case. R.C.M. 1001A(b)(4). An unsworn statement may be oral, written, or both. R.C.M. 1001A(e). Statements offered under R.C.M. 1001A(b) may include victim impact or matters in mitigation. "[V]ictim impact includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001A(b)(2).


[HN6](#)[↑] However, "the rights vindicated by R.C.M. 1001A [(2016 MCM)] are personal to the victim in each individual case. Therefore, the introduction of statements under this rule is prohibited without, at a minimum, either the presence or request of the victim, R.C.M. 1001A(a), the special victim's counsel or the

victim's representative, R.C.M. 1001A(d)-(e).⁶ [Barker, 77 M.J. at 382](#). The military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement. R.C.M. 1001A(e)(2); see also [LRM v. Kastenber, 72 M.J. 364, 370 \(C.A.A.F. 2013\)](#) ("A reasonable opportunity to be heard at a hearing includes . . . that a victim . . . who is represented by counsel be heard through counsel.") "During the presentencing proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses." R.C.M. 1001(f)(1).

[HN7](#)  Victim impact statements offered under [*13] R.C.M. 1001A are not "evidence," and thus "the balancing test in Mil. R. Evid. 403 is inapplicable to assessing the reasonable constraints that may be placed upon such statements." [United States v. Hamilton, 77 M.J. 579, 586 \(A.F. Ct. Crim. App. 2017\)](#) (en banc), *aff'd*, [78 M.J. 335 \(C.A.A.F. 2019\)](#). As this court explained in *Hamilton*,

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

Id.


[HN8](#)  In *Hamilton*, this court acknowledged the military judge has an "obligation to ensure the content of a victim's unsworn statement comports with the defined parameters of victim impact or mitigation as defined by the statute and R.C.M. 1001A."⁶ *Id. at 585-86* (citing R.C.M. 1001A, Discussion ("A victim's unsworn statement should not exceed what is permitted under R.C.M. 1001A(c) Upon objection or *sua sponte*, a military judge may stop or interrupt a victim's unsworn

statement that includes matters outside the scope of R.C.M. 1001A.")).

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

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

Id.

[HN9](#)  When there is error regarding the presentation of victim statements under R.C.M. 1001A, the test for prejudice "is whether the error substantially influenced the adjudged sentence." [Barker, 77 M.J. at 384](#) (citation omitted). When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: "(1) [*15] the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." [United States v. Bowen, 76 M.J. 83, 89 \(C.A.A.F. 2017\)](#). "An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." [United States v. Machen, No. ACM 39295, 2018 CCA LEXIS 419, *12 \(A.F. Ct. Crim. App. 29 Aug. 2018\)](#) (unpub. op.) (citing [United States v. Harrow, 65 M.J. 190, 200 \(C.A.A.F. 2007\)](#)).

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

2. Analysis

Appellant challenges the authenticity of Ms. CLH's written statement, her telephonic testimony regarding KF's (video) victim impact statement, and the overall admissibility of KF's statement. Regarding the authenticity of Ms. CLH's written statement, we find that

Mil. R. Evid. 901 is inapplicable. [HN10](#)^[↑] Mil. R. Evid. 901 states that "[t]o satisfy the requirement of authenticating or identifying an *item of evidence*, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." (Emphasis added). Ms. CLH's written statement was not being offered into evidence. [HN11](#)^[↑] Nevertheless, as the CAAF indicated in *Barker*, military judges are expected to exercise sound discretion when it comes to a victim being reasonably heard, and in this case, we find the military [*16] judge exercised sound discretion in ensuring that Ms. CLH was KF's representative and that she accurately disclosed her client's views of the case. See *Barker*, 77 M.J. at 382-83. Even assuming *arguendo* that Mil. R. Evid. 901 applies, Ms. CLH's letter was authenticated through her testimony. See Mil. R. Evid. 901(b)(1). [HN12](#)^[↑] "Authentication simply requires establishing that the evidence is what the proponent claims it to be." *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013) (citation omitted).

We now turn to Appellant's argument that the plain language of the law *unambiguously* requires a victim (or representative) to be physically present when presenting matters at sentencing proceedings. [HN13](#)^[↑] The language "*shall be called* by the court-martial" is not a mandate for presence at the court-martial. It means that a victim is not a prosecution or a defense witness (although the victim could be called as a witness); a victim is called by the court-martial. Additionally, Appellant appears to conflate the duty of the military judge under R.C.M. 1001(a)(3)(A) to *notify victims who are present* of their right to be heard, with the *right of any victim* to be reasonably heard under R.C.M. 1001A(a).

Thus, we disagree with Appellant's proposition that a victim (or representative) who is not *physically* present at the sentencing hearing forfeits his or her [*17] right to make a statement. [HN14](#)^[↑] R.C.M. 1001A conveys a personal right to the victim and does not expressly mandate physical presence. R.C.M. 1001A(a) merely states that a victim has the right to be "reasonably heard." In cases involving child pornography, a recognized continuing offense, we reject the argument that Congress, in providing rights for victims, also meant to add to their emotional, psychological, and potentially financial burden by requiring their physical presence in every case, where re-victimization has no limitation geographically or temporally, and a victim's right to make a statement would be hidden behind an impractical barrier of constantly being at the beck and call of prosecutors, rendering inconsequential the

statutes and rules that are specifically designed to give them a voice.

Appellant argues "[t]he requirement that a victim (or her representative) be present is made even more necessary to ensure that a victim is actually aware of an accused's offenses," and that the victim's (or representative's) opinion could change by knowing the evidence in a case or "by hearing more about an accused's background." Again, we disagree. While it may be true that child pornography victims, such as KF, [*18] could change their opinion about their victimization based on the particular accused, it is unlikely. Further, we see no confrontation issue; KF was making an unsworn statement and Appellant had no right to cross-examine her. R.C.M. 1001A(e). Additionally, this court has no expectation that KF would prepare a separate statement for every case where she was re-victimized by a stranger possessing or watching an image or video of her sexual abuse. [HN15](#)^[↑] As we stated in *United States v. Barker*, "[i]n continuing crime cases, such as possession and viewing of child pornography, there is no requirement that a victim prepare a separate statement for each individual case." *76 M.J. 748, 754 (A.F. Ct. Crim. App. 2017)*, *aff'd on other grounds by Barker*, 77 M.J. at 378; *overruled on other grounds by Hamilton*, 77 M.J. at 586. [HN16](#)^[↑] We hold that the plain language of R.C.M. 1001A(e) does not require the physical presence of a child pornography victim (or their representative) to present or offer a victim impact statement to the court, and that telephonic or other reliable means is sufficient to meet the intent of R.C.M. 1001A(e).⁷

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

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

Lastly, we look at trial defense counsel's objection to considering KF's statement. [HN17](#)⁸ As stated in *Hamilton*, "the military judge assesses the content of a victim's unsworn statement not for relevance, but for scope." [77 M.J. at 586](#). The facts surrounding Appellant's possession of child pornography were established through his providence inquiry and the stipulation of fact and its attachments. As noted, child pornography is a continuing offense. KF's video statement, made without showing her face, describes the lifelong social, emotional, and psychological toll her constant re-victimization has on her well-being. Many of the themes and harms contained in her statement [*20] are well known to the law and thus are presumed to have been known by the military judge. See [Barker, 77 M.J. at 384](#). The military judge advised the parties he would consider KF's video statement, but not her written statement (Court Exhibit 1). The military judge said he would give KF's statement the weight it deserved.

[HN18](#)⁹ Although the military judge did not provide comment on KF's statement,⁸ "[m]ilitary judges are presumed to know the law and to follow it absent clear evidence to the contrary. . . . As part of this presumption we further presume that the military judge is able to distinguish between proper and improper sentencing arguments." [United States v. Erickson, 65 M.J. 221, 225 \(C.A.A.F. 2007\)](#) (citation omitted). This presumption holds regardless of whether the military judge notes the improper portions or states what portions he will consider. *Id.* Reviewing the record, there is no evidence to rebut this presumption and we are confident the military judge sentenced Appellant based on the appropriate victim-impact matters and evidence, and as such, did not abuse his discretion.

B. Post-Trial Docketing

Appellant argues he is entitled to relief because his case was not docketed with this court within 30 days of action by the convening authority. In [United States v. Moody-Neukom, No. ACM S32594, 2019 CCA LEXIS 521 \[*21\]](#) (A.F. Ct. Crim. App. 16 Dec. 2019) (per curiam) (unpub. op.), this court addressed issues regarding entries of judgment in place of convening

authority action⁹ and how future post-trial processing will be analyzed under [United States v. Moreno, 63 M.J. 129, 142 \(C.A.A.F. 2006\)](#):

[HN19](#)¹⁰ In *Moreno*, the CAAF identified thresholds for facially unreasonable delay for particular segments of the post-trial and appellate process. *Id.* at 141-43. Specifically, the CAAF established a presumption of facially unreasonable delay where the convening authority did not take action within 120 days of the completion of trial, where the record was not docketed with the Court of Criminal Appeals within 30 days of the convening authority's action, or where the Court of Criminal Appeals did not render a decision within 18 months of docketing.

[Moody-Neukom, 2019 CCA LEXIS 521 at *4.](#)

However, [HN20](#)¹¹ as we recently noted in *United States v. Livak*,

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

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

[T]he specific requirement in *Moreno* which called for docketing to occur within 30 days of action no longer helps us determine an unreasonable delay under the new procedural rules. However, we can apply the aggregate standard threshold the majority

[Id.](#) at *11.

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


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


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

established in *Moreno*: 150 days from the day Appellant was sentenced to docketing with this court. See [Moreno, 63 M.J. at 142](#). This 150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*.

[Id. at *6-7](#).

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

[HN21](#) Assuming *arguendo* that there was a facially unreasonable delay, we have assessed whether there was a due process violation by considering the four factors the CAAF identified in *Moreno*: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of his right to a timely review and appeal; and (4) prejudice [to the appellant]." [Moreno, 63 M.J. at 135](#) (citations omitted). We have also considered that where an appellant has not shown prejudice from the delay, there is no [*24] due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." [United States v. Toohey, 63 M.J. 353, 362 \(C.A.A.F. 2006\)](#). We discern no prejudice, and we find no violation of Appellant's due process rights.

[HN22](#) In the absence of a due process violation, this court considers whether relief for excessive post-trial delay is warranted consistent with this court's authority under [Article 66\(d\), UCMJ, 10 U.S.C. § 866\(d\)](#). See [United States v. Gay, 74 M.J. 736, 744 \(A.F. Ct. Crim. App. 2015\)](#), *aff'd*, [75 M.J. 264 \(C.A.A.F. 2016\)](#); [United States v. Tardif, 57 M.J. 219, 224 \(C.A.A.F. 2002\)](#). Having considered the entire record and the particular facts and circumstances of this case, we find Appellant is not entitled to any relief on this issue.

III. CONCLUSION

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

End of Document

United States v. Daddario

United States Air Force Court of Criminal Appeals

December 1, 2023, Decided

No. ACM 40351

Reporter

2023 CCA LEXIS 499 *

UNITED STATES, Appellee v. Andrew M. DADDARIO,
Staff Sergeant (E-5), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Matthew P. Stoffel. Sentence: Sentence adjudged 24 May 2022 by GCM convened at Hill Air Force Base, Utah. Sentence entered by military judge on 18 August 2022: Dishonorable discharge, confinement for 24 months, reduction to E-1, and a reprimand.

Case Summary

Overview

HOLDINGS: [1]-Trial defense counsel was not deficient for deciding not to object to trial counsel's physical delivery of the written victim unsworn statement at trial because trial counsel was acting as a mere instrumentality of the victim's independent exercise of her right to be reasonably heard at sentencing under R.C.M. 1001, Manual Courts-Martial; [2]-Appellant failed to demonstrate prejudice resulting from defense counsel's purportedly deficient performance in seeking clemency because appellant did not identify what he would have changed in his clemency submission but for counsel's misstatement of the law.

Outcome

Findings and sentence affirmed.

LexisNexis® Headnotes

Criminal Law &
Procedure > ... > Reviewability > Waiver > Admissio

n of Evidence

Military & Veterans Law > ... > Courts
Martial > Evidence > Objections & Offers of Proof

Military & Veterans Law > ... > Courts
Martial > Motions > Procedures

Criminal Law &
Procedure > Appeals > Reviewability > Forfeitures

Military & Veterans Law > ... > Courts
Martial > Posttrial Procedure > Waivers &
Withdrawals of Appeals

HN1 [📄] **Waiver, Admission of Evidence**

When an appellant does not raise an objection to the admission of evidence at trial, we first must determine whether the appellant waived or forfeited the objection. Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. While appellate courts ordinarily do not ascribe waiver based upon mere failure to object, a purposeful decision not to object, when cognizant of the underlying issue, may constitute waiver. Where an appellant does not just fail to object but rather affirmatively declines to object to the military judge's instructions, and offers no additional instructions, despite counsel's knowledge of applicable precedents, the appellant waives all objections to the instructions.

Military & Veterans Law > Military Justice > Judicial
Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts
Martial > Posttrial Procedure > Waivers &
Withdrawals of Appeals

Military & Veterans Law > Military Justice > Judicial

Review > US Court of Appeals for the Armed Forces

[HN2](#) **Judicial Review, Courts of Criminal Appeals**

If the appellant waives an objection, then the appellant is precluded from raising the issue before either the Court of Criminal Appeals or the United States Court of Appeals for the Armed Forces (CAAF); however, the court still has an affirmative obligation under Unif. Code Mil. Justice art. 66(d), [10 U.S.C.S. § 866\(d\)](#), to examine the entire record to determine whether to leave an appellant's waiver intact or to correct the error. That said, despite this authority the court will only ignore waiver in the most deserving cases.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

Military & Veterans Law > ... > Evidence > Admissibility of Evidence > Admissions & Confessions

Military & Veterans Law > ... > Courts Martial > Sentences > Sentencing Proceedings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

[HN3](#) **Plain Error, Evidence**

Where a discrete objection was not waived, but rather merely forfeited, then a plain error standard of review applies. While the military judge is the gatekeeper for unsworn victim statements, an accused nonetheless has a duty to state the specific ground for objection in order to preserve a claim of error on appeal. Thus, for forfeited objections at trial, the court reviews claims of erroneous admission of a victim unsworn statement for plain error. Under the plain error standard, an appellant must show (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.

Military & Veterans Law > ... > Courts

Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > ... > Courts Martial > Sentences > Sentencing Proceedings

[HN4](#) **Sentences, Deliberations, Instructions & Voting**

In assessing for possible error, the court reviews de novo a military judge's interpretation of R.C.M. 1001(c), Manual Courts-Martial, as a question of law. If there is plain error in the admission of a victim statement under R.C.M. 1001, the test for prejudice is whether the error substantially influenced the adjudged sentence. When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: (1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question. An error is less likely to be prejudicial if the fact was already obvious from the other evidence presented at trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Ineffective Assistance of Counsel

Military & Veterans Law > Military Justice > Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN5](#) **Criminal Process, Assistance of Counsel**

[U.S. Const. amend. VI](#) guarantees an accused the right to effective assistance of counsel at all phases of trial and post-trial processing. In assessing the effectiveness of counsel, the court applies the standard set forth in and begin with the presumption of competence announced in *To prevail on an ineffective assistance of counsel claim, an appellant bears the burden of*

demonstrating both deficient performance from defense counsel, and prejudice. Ultimately, the court conducts de novo review for ineffective assistance of counsel claims. If an appellant's factual allegations, even if true, do not constitute prejudicial ineffective assistance of counsel, the court need not resolve those issues of fact and instead may resolve the issue based solely upon prejudice. Indeed, if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN6](#) **Effective Assistance of Counsel, Tests for Ineffective Assistance of Counsel**

An appellate court's evaluation of attorney performance is made from counsel's perspective at the time of the conduct in question.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN7](#) **Criminal Process, Assistance of Counsel**

The burden is on the appellant to demonstrate deficient performance. Courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The court considers the following questions to determine whether the presumption of competence has been overcome: (1) whether the appellant's allegations are true, and if so, is there a reasonable explanation for counsel's actions; (2) whether defense counsel's level of advocacy falls measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel were ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. When considering the last question, some conceivable effect on the outcome is not enough; instead, an appellant must show a probability sufficient to undermine confidence in the outcome.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

[HN8](#) **Criminal Process, Assistance of Counsel**

In assessing claims of ineffective assistance of counsel, the court does not look at the success of the defense attorney's strategy but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time. In making this determination, courts must be highly deferential to trial defense counsel and make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. This specifically applies to sentencing.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Trials

[HN9](#) **Criminal Process, Assistance of Counsel**

When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion, an appellant must show that there is a reasonable probability that such a motion would have been meritorious. Relatedly, defense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so. In reviewing the decisions and actions of trial defense counsel, the court does not second-guess strategic or tactical decisions. It is only in those limited circumstances where a purported strategic or deliberate decision is unreasonable or based on inadequate investigation that it can provide

the foundation for a finding of ineffective assistance. For this reason, defense counsel receive wide latitude in making tactical decisions.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Sentencing

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Criminal Law & Procedure > Counsel > Effective Assistance of Counsel > Tests for Ineffective Assistance of Counsel

[HN10](#) **Criminal Process, Assistance of Counsel**

Military appellate courts apply the same prejudice standard as defined by The United States Supreme Court when assessing claims of ineffective assistance of counsel. To establish prejudice, an appellant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Once again, it is an appellant who bears the burden to demonstrate prejudice. This general analytical framework for prejudice is then calibrated to the particular trial phase at issue. Prejudice for ineffective assistance in the sentencing phase of the court-martial requires the court to look to see whether there is a reasonable probability that, but for counsel's error, there would have been a different result.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions & Voting

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

[HN11](#) **Imposition of Sentence, Victim Statements**

In analyzing how a crime victim may exercise their statutory and regulatory right to be reasonably heard in sentencing, the introduction of statements under R.C.M. 1001(c), Manual Courts-Martial is prohibited without, at a minimum, either the presence or request of the victim. The right to be reasonably heard requires that the victims be contacted, given the choice to participate in a particular case, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a victim's designee where appropriate. Two prerequisites are required to admit an absent crime victim's unsworn statement under R.C.M. 1001(c): (1) the crime victim's knowledge of the court-martial; and (2) the crime victim's intent for the statement to be offered for sentencing consideration at the court-martial at the time the statement is offered.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

Military & Veterans Law > Military Justice > Disclosure & Discovery > Discovery by Defense

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

[HN12](#) **Imposition of Sentence, Victim Statements**

R.C.M. 1001(a)(3), Manual Courts-Martial does not restrict a crime victim's right to be reasonably heard; it merely provides an additional mechanism by which the President sought to ensure that crime victims have actual notice of their right to be reasonably heard. By contrast, R.C.M. 1001(c) deals with the substantive aspects of admissible forms and content for victim unsworn statements.

Criminal Law &

Procedure > Sentencing > Imposition of Sentence > Victim Statements

[HN13](#) **Imposition of Sentence, Victim Statements**

R.C.M. 1001A, Manual Courts-Martial conveys a personal right to the victim and does not expressly mandate physical presence.

Counsel: For Appellant: Major David L. Bosner, USAF.

For Appellee: Colonel Naomi P. Dennis, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Captain Olivia B. Hoff, USAF; Captain Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

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

Opinion by: WARREN

Opinion

WARREN, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of two specifications of assault consummated by a battery (one against his spouse SD and one against his intimate partner KR) and two specifications of domestic violence (one against his spouse SD and one against another intimate partner TD), in violation of [Articles 128](#) and [128b](#), [128b, Uniform Code of Military Justice \(UCMJ\)](#), [10 U.S.C. §§ 928, 928b](#).^{1,2} The military judge sentenced Appellant, within the agreed-upon **[*2]** sentencing parameters

¹ The charged time frame for the assault consummated by a battery against SD was "on or about 14 January 2018." As such, the applicable punitive article is found in the *Manual for Courts-Martial, United States* (2016 ed.) (2016 MCM). Unless indicated otherwise, all other references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM).

² The charged time frame for both domestic violence convictions occurred after 1 January 2019; as such, [Article 128b, UCMJ](#), to the 2019 MCM, applies. See **National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 532(a)—(b), 132 Stat. 1636, 1759-60 (2018)**.

established in Appellant's plea agreement, to a dishonorable discharge, confinement for 24 months, reduction to the grade of E-1, and a reprimand.³ The convening authority took no action on the findings or sentence.

Appellant raises three issues on appeal, which we have consolidated as follows: (1) whether the military judge erred when he admitted a written victim unsworn statement from KR during the sentencing hearing; and (2) whether trial defense counsel was ineffective by (a) failing to object to the admission of that statement when KR was not physically present to offer it at the court-martial, (b) referencing the wrong law in his clemency memorandum to the convening authority, and (c) advising Appellant, after sentence was adjudged in his court-martial, that Appellant would "automatically" earn two-for-one post-trial confinement credit for each day spent in the Weber County Jail.⁴

Finding no error that materially prejudiced a substantial right of Appellant, we affirm the findings and sentence.

I. BACKGROUND

Appellant physically assaulted his spouse and two intimate partners **[*3]** on three separate occasions between January 2018 and August 2020. First, Appellant kicked his then wife SD in the face in January 2018 (Specification 1 of Charge IV) and pointed a firearm at her head while he held his finger on the trigger for 15 seconds in December 2019 (Specification 1 of Charge V)—the latter incident causing her to have a panic attack. On or about 5 April 2020, Appellant strangled his then ex-girlfriend TD after Appellant invited TD to his house claiming he was having suicidal ideations (Specification 3 of Charge V).⁵ Once TD arrived, Appellant sought to reinitiate their brief dating relationship. When she declined, Appellant strangled her with a force of "7" on a 1-to-10 scale and with such force that she struggled to get free of his choke hold. As

³ A total of six charges consisting of 11 specifications were referred against Appellant. Pursuant to the plea agreement, the convening authority dismissed all remaining charges and specifications with prejudice after the entry of sentence for the offenses to which Appellant pleaded guilty.

⁴ Issue (3) was raised pursuant to [United States v. Grostefon, 12 M.J. 431 \(C.M.A. 1982\)](#).

⁵ TD was an active-duty military servicemember at the time of this incident.

she struggled to break free, TD heard a "popping noise" in her left ear followed by pain that persisted for three to four weeks. Finally, over the course of one evening in August 2020, Appellant forcefully grabbed and held his then girlfriend KR (a civilian) by the wrists four separate times after an argument where she informed Appellant that she wanted to end their three-month-long dating relationship. The wrist grabbing [*4] occurred in conjunction with Appellant repeatedly holding KR on his bed as she attempted to leave the house (Specification 3 of Charge IV).

On 18 May 2022, Appellant entered into a plea agreement and agreed to plead guilty to Specifications 1 and 3 of Charge IV and Specifications 1 and 3 of Charge V. In exchange for his guilty pleas to the four specifications, the convening authority and Appellant agreed to a dishonorable discharge and agreed to confinement limitations. The plea agreement specified a sentence limitation of no less than 4 months and no more than 6 months for Specification 1 of Charge IV, and no less than 12 months and no more than 24 months for each of the remaining guilty-plea offenses, with all terms of confinement to run concurrently. There were no other limitations on the sentence.

II. DISCUSSION

A. Victim Impact Statement

Appellant contends that the military judge committed plain error when he did not *sua sponte* exclude KR's entire written victim unsworn statement because neither KR nor an "authorized representative" was physically present at the court-martial to deliver her statement during presentencing proceedings. For the first time on appeal, Appellant argues [*5] that a victim's right to be reasonably heard is tethered to the physical presence of the crime victim or designee at the presentencing proceeding pursuant to Rule for Courts-Martial (R.C.M.) 1001(a)(3)(A). Appellant further argues that even if physical presence of the victim was not required, the military judge ought still to have refused admission of KR's victim unsworn statement at sentencing because surrounding circumstances adduced at trial failed to evince KR's clear intent to have it offered at Appellant's court-martial. We disagree. Instead, we hold that Appellant waived this issue when his trial defense counsel made a knowing and tactical decision *not* to object upon these grounds at trial when given an opportunity to do so. Further, we choose not to pierce

that waiver.

1. Additional Background

The military judge received a total of three victim unsworn statements at trial, one each from SD, TD, and KR. But whereas both SD and TD were represented by victims' counsel, KR was not. SD's counsel offered SD's written victim impact statement as a court exhibit on her behalf and SD read it verbatim for the court. TD's counsel admitted TD's written victim impact statement as a court exhibit on her behalf, but neither she nor her [*6] counsel read it verbatim for the court. Trial counsel offered KR's four-page, signed and dated victim impact statement to the court-martial. Given the physical absence of KR, prior to admitting KR's victim unsworn statement, the military judge asked if there was "something that would reflect a desire that [KR] be heard in this proceeding through this written statement[.]" Trial counsel then provided Appellate Exhibit III: an email correspondence between trial counsel and KR on 6 May 2022 containing KR's submission of her typed, four-page, unsworn statement as an attachment. That email correspondence reflected trial counsel expressly advising KR of the trial date, plea negotiations, and of KR's right to submit a victim unsworn statement.

In transmitting her written victim unsworn statement to trial counsel, KR relayed both her determination to write it and her fear in submitting it. The entirety of KR's brief email transmittal to trial counsel reads:

Hello [trial counsel],

Here is the statement for this case. Let me know if you could access the document.

Would [Appellant] read my statement? I would be extremely uncomfortable if he can. I just don't want him to come for me. I [had] been [*7] putting this off when we first talk[ed] about it because of my experiences I have with him. We left [o]n really horrible terms. *I knocked it out to rip off the band-aide* [sic]. I know there is stuff in place for that not to happen but it scares me to the core to [sic] the possibility.
(Emphasis added).

Trial defense counsel raised no objection to how KR's statement was provided to the court (*i.e.*, trial counsel physically delivering it), nor any objection based on KR's absence in the courtroom. In his post-trial affidavit concerning this issue, Appellant's circuit defense

counsel, Major (Maj) AB, explains:

If I were to object, I believed that the legal office could and would find a way to correct the foundational defects mentioned by appellate defense counsel. If the legal office were to in fact provide live testimony or additional foundation, such testimony would be more impactful than the unsworn statement as provided.

Instead, the only objections to KR's written victim unsworn statement at trial concerned some discrete objections to the substance of the statement. To resolve those objections, trial counsel and trial defense counsel agreed to redact some portions of the unsworn statement. [*8] After noting the resolution of those objections on the record and without further objection, the military judge admitted KR's victim unsworn statement. Trial counsel did not read KR's written victim unsworn statement into the record.

Sentencing arguments by both trial counsel and trial defense counsel focused primarily on the stipulated facts and Appellant's statements during his guilty plea inquiry. Trial counsel made little use of KR's victim impact statement—it received a passing mention consisting of only three transcribed lines of trial counsel's sentencing argument that spanned 111 lines total.⁶ In the end, the military judge sentenced Appellant to the minimum period of confinement permitted under the plea agreement for the offense against KR: 12 months.

2. Law

a. Waiver

HN1 [↑] When an appellant does not raise an objection to the admission of evidence at trial, we first must determine whether the appellant waived or forfeited the objection. See [United States v. Sweeney, 70 M.J. 296, 303-04 \(C.A.A.F. 2011\)](#). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" [United States v. Gladue, 67 M.J. 311, 313 \(C.A.A.F. 2009\)](#) (quoting [United States v. Olano, 507 U.S. 725,](#)

[733, 113 S. Ct. 1770, 123 L. Ed. 2d 508 \(1993\)](#) (additional citation omitted)). While appellate [*9] courts ordinarily do not ascribe waiver based upon mere failure to object, a *purposeful decision* not to object, when cognizant of the underlying issue, may constitute waiver. [United States v. Davis, 79 M.J. 329, 331-32 \(C.A.A.F. 2020\)](#) (holding where appellant does not just fail to object but rather affirmatively declines to object to the military judge's instructions, and offers no additional instructions, despite counsel's knowledge of applicable precedents, appellant waives all objections to the instructions); [United States v. Swift, 76 M.J. 210, 217 \(C.A.A.F. 2017\)](#) (holding that appellant's failure to object to admission of his confession constituted waiver); [United States v. Campos, 67 M.J. 330, 332 \(C.A.A.F. 2009\)](#) (holding that appellant's entry into a stipulation of expected testimony at trial expressly waived objection that witness be physically produced for trial, and to the substance of the stipulation).


HN2 [↑] If the appellant waived the objection, then the appellant is "preclude[d] . . . from raising the issue before either the Court of Criminal Appeals or [the United States Court of Appeals for the Armed Forces (CAAF)];" however, we still have an affirmative obligation under [Article 66\(d\), UCMJ, 10 U.S.C. § 866\(d\)](#), to examine the entire record to determine whether "to leave an [appellant's] waiver intact or to correct the error." [United States v. Chin, 75 M.J. 220, 223 \(C.A.A.F. 2016\)](#). That said, despite this authority "we will only ignore [*10] waiver in the most deserving cases." [United States v. Blanks, No. ACM 38891, 2017 CCA LEXIS 186, at *22 n.11 \(A.F. Ct. Crim. App. 17 Mar. 2017\) \(unpub. op.\)](#), *aff'd*, [77 M.J. 239 \(C.A.A.F. 2018\)](#).

b. Plain Error

HN3 [↑] Where a discrete objection was not waived, but rather merely forfeited, then a plain error standard of review applies. See [United States v. Tyler, 81 M.J. 108, 113 \(C.A.A.F. 2021\)](#) ("While the military judge is the gatekeeper for unsworn victim statements, an accused nonetheless has a duty to state the specific ground for objection in order to preserve a claim of error on appeal."). Thus, for forfeited objections at trial, we review claims of erroneous admission of a victim unsworn statement for plain error. [United States v. Halter, No. ACM S32666 \(f rev\), 2022 CCA LEXIS 254, at *10-11 \(\(A.F. Ct. Crim. App. 4 May 2022\) \(unpub. op.\)](#). Under the plain error standard, an appellant must show "(1) there was an error; (2) it was plain or obvious;

⁶The three lines read: "Your Honor, in her statement, [KR] again talks about the small amount of physical pain of her wrists being held and how it left red marks, but she goes much deeper into the mental anguish that this caused, how to this day she's still terrified of [Appellant]."

and (3) the error materially prejudiced a substantial right." [2022 CCA LEXIS 254, \[WL\] at *11](#) (quoting [United States v. Erickson, 65 M.J. 221, 223 \(C.A.A.F. 2007\)](#)).

HN4  In assessing for possible error, we review de novo a military judge's interpretation of R.C.M. 1001(c) as a question of law. [United States v. Barker, 77 M.J. 377, 382 \(C.A.A.F. 2018\)](#) (citation omitted). If there is plain error in the admission of a victim statement under R.C.M. 1001, the test for prejudice "is whether the error substantially influenced the adjudged sentence." [Id. at 384](#) (citation omitted). When determining whether an error had a substantial influence on a sentence, this court considers the following four factors: "(1) the strength of the Government's [*11] case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." [United States v. Bowen, 76 M.J. 83, 89 \(C.A.A.F. 2017\)](#). An error is less likely to be prejudicial if the fact was already obvious from the other evidence presented at trial. See [United States v. Cunningham, 83 M.J. 367, 372 \(C.A.A.F. 2023\)](#) (first citing [United States v. Edwards, 82 M.J. 239, 241 \(C.A.A.F. 2022\)](#), and then citing [United States v. Harrow, 65 M.J. 190, 200 \(C.A.A.F. 2007\)](#) (quoting [United States v. Cano, 61 M.J. 74, 77-78 \(C.A.A.F. 2005\)](#) (noting error likely to be harmless where evidence concerned "would not have provided any new ammunition"))) (affirming a finding of no prejudice where vast majority of contents of improperly admitted victim impact statement were already presented through admissible trial and presentencing evidence).

3. Analysis

This case initially calls upon us to first determine if Appellant waived his objections to the admission of KR's unsworn statement. Second, assuming we were to reach the merits of the issue, Appellant's assignment of error presents two discrete inquiries: (1) whether [Article 6b, UCMJ, 10 U.S.C. § 806b](#), or R.C.M. 1001(c), requires a victim to be physically present at a court-martial in order to exercise the reasonable right to be heard, and (2) whether it was error for trial counsel to physically deliver KR's independently drafted victim unsworn statement.

We conclude that Appellant waived the issue he now wishes to assert [*12] for the first time on appeal, namely: whether there was inadequate foundation for KR's unsworn statement because she was not

physically present. Trial defense counsel affirmed under oath in their post-trial declarations that they made a purposeful and tactical decision not to object to KR's absence from the court-martial to avoid a more compelling form of her statement from being offered, namely: KR potentially delivering the statement telephonically where the emotional impact of the statement would likely be enhanced. Whatever the tactical merits of that decision (discussed at Section II.B, *infra*), that was not a failure to recognize the issue by trial defense counsel—it was an affirmative decision not to object.

Our conclusion is the same whether Appellant's counsel correctly understood the applicable law or not. Circuit defense counsel's declaration demonstrates that both he and appellate defense counsel believed that a crime victim must be physically present to exercise her right to be reasonably heard: "I believed that the legal office could and would find a way to correct the *foundational defects* mentioned by appellate defense counsel." (Emphasis added). Even assuming Appellant's [*13] counsel are incorrect (see analysis at Section II(B)(3), *infra*), that does not change the fact that Appellant's trial defense counsel "intentionally relinquished" what they perceived to be a "known right." When specifically queried by the military judge as to whether the Defense had any objections to KR's written victim unsworn statement, trial defense counsel made a tactical decision not to object based on KR's absence at trial or any purported lack of clear intent by KR to submit her written unsworn statement for consideration at trial. Trial defense counsel raised only substantive objections to KR's unsworn statement with the military judge, and informed the judge that the parties had come to an agreement to overcome those substantive objections. In so doing, trial defense counsel waived the issue now raised on appeal as to the foundational requirements of KR's victim unsworn statement because "under the particular facts of this case, . . . 'counsel consciously and intentionally failed to save the point and led the trial judge to understand that counsel was satisfied.'" [United States v. Elespuru, 73 M.J. 326, 329 \(C.A.A.F. 2014\)](#) (quoting [United States v. Mundy, 2 C.M.A. 500, 503, 9 C.M.R. 130 \(C.M.A. 1953\)](#)).

Finally, we have also evaluated whether to exercise our authority under [Article 66\(d\), UCMJ](#), to act despite Appellant's [*14] waiver ([Chin, 75 M.J. at 223](#)). We decline to do so.⁷

⁷For the reasons set forth in our analysis of Appellant's

B. Ineffective Assistance of Counsel

Notwithstanding Appellant's waiver as to the substantive admissibility of KR's written victim impact statement, Appellant endeavors to attack that decision by his trial defense counsel, asserting that his counsel were ineffective by "failing" to object when the victim herself did not physically offer the victim impact statement at the court-martial. He also makes a separate claim of ineffective assistance of counsel relating to clemency, asserting that his trial defense counsel referenced the wrong law in his clemency memorandum to the convening authority submitted on Appellant's behalf, wherein counsel requested relief the convening authority had no power to grant. Finally, Appellant personally asserts one of his trial defense counsel was ineffective by advising him, after sentence was adjudged in his court-martial, that Appellant would "automatically" earn two-for-one post-trial confinement credit for each day spent in the Weber County Jail.

1. Additional Background

This court received post-trial declarations from both Appellant and his trial defense counsel in regards to the factual predicate for Appellant's claims [*15] that his counsel were ineffective at trial.⁸ We will summarize these declarations in turn as they bear on each of Appellant's claims: (a) trial defense counsel's decision not to further object to KR's unsworn statement; (b) trial defense counsel's clemency submission; and (c) trial defense counsel's post-trial discussions with Appellant regarding confinement credit.

a. Decision Not to Further Object to KR's Written Victim Unsworn Statement

Appellant's post-trial declaration provides no additional facts on this assignment of error.

The circuit defense counsel, Major (Maj) AB, explained

ineffective assistance of counsel claims, *infra*, we conclude that piercing Appellant's waiver is unnecessary as there was no error, plain or otherwise, in permitting a crime victim to submit her independently drafted written unsworn statement through the instrumentality of trial counsel.

⁸Both of Appellant's trial defense counsel provided declarations in response to an order of this court regarding Appellant's allegations that his counsel were ineffective in their representation of him at trial.

his tactical decision to forego objecting to KR's victim unsworn statement on the grounds that KR was not present at trial. Maj AB explained that the Defense made a calculated judgment to forego objecting to prevent a potentially more effective form of the statement (see Section II.A.1, Additional Background, *supra*).

b. Clemency Submission

Appellant's post-trial declaration did not address Captain (Capt) NW's alleged ineffective representation concerning clemency. That is, Appellant provided no indication in his declaration as to what, if any, different clemency request he would have made but for Capt NW's [*16] erroneous citation of law in his clemency memorandum submitted on Appellant's behalf.

Capt NW conceded in his post-trial declaration that he cited the wrong version of [Article 60, UCMJ, 10 U.S.C. § 860](#), in his clemency memorandum to the convening authority.

c. Post-trial Discussions of Confinement Credit

In his post-trial declaration, Appellant alleges that in a meeting after the conclusion of his court-martial, his defense counsel told him that "all Air Force inmates who spend time at Weber County get 2:1 credit for each day at the facility" given the substandard conditions typically encountered by Air Force inmates there. Appellant attached a declaration from his fiancée, who also attended this meeting; her declaration echoes Appellant's recitation of events. Capt NW disputes, in part, Appellant's version of their post-trial discussion on confinement credit. According to Capt NW, all his communications concerning post-trial confinement credit were highly conditional, emphasizing that *if* conditions were sufficiently substandard *then* Appellant could petition for additional confinement credit. He stated:

During my representation of [Appellant], we had many discussions about confinement and the calculation of time. Largely [*17] these conversations took place inside the confines of the attorney-client relationship. We discussed numerous ways in which he *might* receive additional credit for his time in confinement. We discussed the credit he would receive for "good behavior" and my understanding that for every eight days he served in confinement he would receive

one day of credit as long he did not have any misconduct or behavioral issues.

....

I believe I did advise [Appellant] that *if* his condition[s] were bad enough, he *could potentially* receive additional confinement credit for time served, and I believe I did use 2-for-1 credit as an example. I explained my understanding of 2-for-1 credit meant that for every 1 day of confinement he *could* get 2 days of credit *if* his conditions at Weber County were bad enough or in violation of Air Force or Department of Defense Standards.

(Emphasis added).

2. Law

HN5⁹ The Sixth Amendment⁹ guarantees an accused the right to effective assistance of counsel at all phases of trial and post-trial processing. See United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (trial); United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001) (post-trial processing). In assessing the effectiveness of counsel, we apply the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and begin with the presumption of competence announced in United States v. Cronin, 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). See Gilley, 56 M.J. at 124 (citing [*18] United States v. Grigoruk, 52 M.J. 312, 315 (C.A.A.F. 2000)). To prevail on an ineffective assistance of counsel claim, an appellant bears the burden of demonstrating both deficient performance from defense counsel, and prejudice. Datavs, 71 M.J. at 424 (citation omitted). Ultimately, we conduct de novo review for ineffective assistance of counsel claims. *Id.* (citation omitted). If an appellant's factual allegations, even if true, do not constitute prejudicial ineffective assistance of counsel, we need not resolve those issues of fact and instead may resolve the issue based solely upon prejudice. *Id.*¹⁰

⁹ U.S. Const. amend. VI.

¹⁰ We are cognizant that Courts of Criminal Appeals do not "decide disputed questions of fact pertaining to a post-trial claim, solely or in part on the basis of conflicting affidavits submitted by the parties." United States v. Ginn, 47 M.J. 236, 243 (C.A.A.F. 1997). Instead, we review the six principles for determining whether a hearing pursuant to United States v. DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (C.M.A. 1967) (per curiam), is appropriate under Ginn. *Id.* at 248. Here we determine that the first Ginn factor is applicable: "if the facts

Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." United States v. Captain, 75 M.J. 99, 103 (C.A.A.F. 2016) (alteration and omission in original) (quoting Strickland, 466 U.S. at 697; and then citing Datavs, 71 M.J. 424-25).

a. Deficient Performance

HN6¹¹ "An appellate court's evaluation of attorney performance is made from counsel's perspective at the time of the conduct in question." United States v. Marshall, 45 M.J. 268, 270 (C.A.A.F. 1996) (citing Strickland, 466 U.S. at 689).

HN7¹² The burden is on the appellant to demonstrate deficient performance. Datavs, 71 M.J. at 424 (citation omitted). "[C]ourts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* (quoting Strickland, 466 U.S. at 689) (additional citation omitted). We [*19] consider the following questions to determine whether the presumption of competence has been overcome: (1) whether appellant's allegations are true, and *if so*, is there a reasonable explanation for counsel's actions; (2) whether defense counsel's level of advocacy falls measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel were ineffective, whether there is a reasonable probability that, absent the errors, there would have been a different result. See United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)); see also United States v. Akbar, 74 M.J. 364, 386 (C.A.A.F. 2015) (applying same standard for defense counsel's performance during sentencing proceedings). When considering the last question, "some conceivable effect on the outcome" is not enough; instead, an appellant must show a "probability sufficient to undermine confidence in the outcome." Datavs, 71 M.J. at 424 (internal quotation marks and citations omitted).

HN8¹³ In assessing claims of ineffective assistance of counsel, we do not look at the success of the defense attorney's strategy "but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Dewrell, 55 M.J. 131, 136 (C.A.A.F. 2001) (citation

alleged in the affidavit allege an error that would not result in relief even if any factual dispute were resolved in [the] appellant's favor, the claim may be rejected on that basis." *Id.*

omitted). In making this determination, courts must be "highly deferential" to trial defense [*20] counsel and make every effort "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." [Strickland, 466 U.S. at 689](#). This specifically applies to sentencing. See [United States v. Stephenson, 33 M.J. 79, 80 \(C.M.A. 1991\)](#) (concluding that it was not deficient performance to decline to call a character witness at a sentencing hearing to avoid harmful rebuttal evidence).

HN9 [↑] "When a claim of ineffective assistance of counsel is premised on counsel's failure to make a motion . . . , an appellant must show that there is a reasonable probability that such a motion would have been meritorious." [United States v. Beauge, 82 M.J. 157, 167 \(C.A.A.F. 2022\)](#) (omission in original) (quoting [United States v. Harpole, 77 M.J. 231, 236 \(C.A.A.F. 2018\)](#)). Relatedly, "[d]efense counsel do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." [Datavs, 71 M.J. at 424](#) (first citing [Gooch, 69 M.J. at 362-63](#) (holding a decision not to risk a mistrial where counsel had strategic reasons for keeping the assembled panel was not deficient performance); and then citing [Stephenson, 33 M.J. at 80](#) (holding to decline to call a witness during sentencing hearing in order to avoid rebuttal evidence is not deficient performance)). In reviewing the decisions and actions [*21] of trial defense counsel, this court does not second-guess strategic or tactical decisions. See [United States v. Morgan, 37 M.J. 407, 410 \(C.M.A. 1993\)](#) (citations omitted). It is only in those limited circumstances where a purported "strategic" or "deliberate" decision is unreasonable or based on inadequate investigation that it can provide the foundation for a finding of ineffective assistance. See [United States v. Davis, 60 M.J. 469, 474 \(C.A.A.F. 2005\)](#). For this reason, defense counsel receive wide latitude in making tactical decisions. [Cullen v. Pinholster, 563 U.S. 170, 195, 131 S. Ct. 1388, 179 L. Ed. 2d 557 \(2011\)](#) (citing [Strickland, 466 U.S. at 689](#)).

b. Prejudice

HN10 [↑] Military appellate courts apply the same prejudice standard as defined by The United States Supreme Court when assessing claims of ineffective assistance of counsel. To establish prejudice, an appellant must:

demonstrate a *reasonable probability* that, but for counsel's unprofessional errors, *the result of the proceeding would have been different*. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

[Harrington v. Richter, 562 U.S. 86, 104, 131 S. Ct. 770, 178 L. Ed. 2d 624 \(2011\)](#) (emphasis added) (internal quotation marks and citations omitted); *cited with approval*, [*22] [Datavs, 71 M.J. at 424](#). Once again, it is an appellant who bears the burden to demonstrate prejudice. *Id.* This general analytical framework for prejudice is then calibrated to the particular trial phase at issue. Pertinent to this case, "prejudice" for ineffective assistance in the sentencing phase of the court-martial requires us to "look to see 'whether there is a reasonable probability that, but for counsel's error, there would have been a different result.'" [Captain, 75 M.J. at 103](#) (citation omitted).

3. Analysis

a. Admissibility of Victim Unsworn Statement

Analyzing deficient performance in this case requires considering the underlying substantive law concerning victim unsworn statements, because, if there was no support in law for defense counsel to raise an issue at trial, there could be no "deficient performance" as a consequence. See [Beauge, 82 M.J. at 167](#).

HN11 [↑] In analyzing how a crime victim may exercise their statutory and regulatory right to be reasonably heard in sentencing, the CAAF held in [Barker](#) that "the introduction of statements under this rule is prohibited without, at a minimum, either the presence *or request of the victim*." [Barker, 77 M.J. at 382](#) (emphasis added) (footnote and citations omitted). The CAAF then elaborated on the importance of the independent decision [*23] of crime victims to exercise their rights in [United States v. Hamilton](#), reasoning: "the right to be reasonably heard requires that the victims be contacted, *given the choice to participate in a particular case*, and, if they choose to make a statement, offer the statement themselves, through counsel, or through a 'victim's designee' where appropriate." [78 M.J. 335, 339-40](#)

([C.A.A.F. 2019](#)) (emphasis added) (citations omitted). Read together, [Barker](#) and [Hamilton](#) essentially require two prerequisites to admit an absent crime victim's unsworn statement under R.C.M. 1001A (now R.C.M. 1001(c)): (1) the crime victim's knowledge of the court-martial; and (2) the crime victim's intent for the statement to be offered for sentencing consideration at the court-martial at the time the statement is offered. See [Hamilton, 78 M.J. at 341](#); [Barker, 77 M.J. at 383](#).

Applying these principles, we find no deficient performance in this case because neither [Article 6b, UCMJ](#), nor R.C.M. 1001 require the physical presence of an unrepresented crime victim at court-martial to be "reasonably heard." We find nothing in the plain language of the substantive provisions of law dealing with admissibility of victim unsworn statements at sentencing (i.e., [Article 6b, UCMJ](#), and R.C.M. 1001(c)) that requires a victim to personally enter the courtroom and present their statement to the military [*24] judge.¹¹ Those provisions of law merely state that a victim has the right to be reasonably heard.

Our holding is not novel. This court found no error in a crime victim providing their oral victim unsworn statement telephonically in [United States v. Clark-Bellamy, No. ACM 39709, 2020 CCA LEXIS 391, at *16-17 \(A.F. Ct. Crim. App. 27 Oct. 2020\)](#) (unpub. op.). This court reasoned that physical presence of the victim at trial is *not* a prerequisite to admissibility of that victim's unsworn statement at sentencing stating: "[W]e disagree with Appellant's proposition that a victim (or representative) who is not *physically* present at the sentencing hearing forfeits his or her right to make a statement. [HN13](#) [↑] R.C.M. 1001A conveys a personal right to the victim and does not expressly mandate physical presence." *Id.*

Indeed, our approach is consistent with that of our superior court. In interpreting the prerequisites for

presenting a victim unsworn statement at court-martial, the CAAF proposed two methods: "either presence or the request of the victim." [Barker, 77 M.J. at 382](#) (emphasis added). The disjunctive "or" is significant because it indicates that a "request" need not involve physical presence.

Synthesizing CAAF's reasoning in [Barker](#) and the accompanying line of cases, we see three foundational prerequisites were met for consideration [*25] of KR's unsworn victim statement in this case: (1) KR created it; (2) KR had *knowledge* of Appellant's court-martial; and (3) KR *intended* for the statement to be offered at Appellant's court-martial at the time the statement was offered. See [United States v. Harrington, 83 M.J. 408, No. 22-0100, 2023 CAAF LEXIS 577, at *20 \(C.A.A.F. 10 Aug. 2023\)](#); [Hamilton, 78 M.J. at 341](#); [Barker, 77 M.J. at 383](#). Accordingly, any objection by trial defense counsel would have been futile.

Relatedly, there was no deficient performance in trial defense counsel's decision not to object to trial counsel's physical "delivery" of the written victim unsworn statement at trial. Trial counsel was acting as a mere *instrumentality* of KR's independent exercise of her right to be reasonably heard at sentencing via submitting a written victim unsworn statement under R.C.M. 1001.¹² This is wholly distinguishable from the situation in [United States v. Edwards](#), where the CAAF found reversible error in trial counsel's assistance in assembling and creating the unsworn statement in the format of a video, and from the facts in [Harrington](#) where the CAAF found non-reversible error where trial counsel "assisted" victims in delivering their oral unsworn statements via a question-and-answer format. See [Harrington, 83 M.J. 408, 2023 CAAF LEXIS 577, at *26](#); [United States v. Edwards, 82 M.J. 239, 241 \(C.A.A.F. 2022\)](#). Each of those cases turned upon a determination that trial counsel's substantive involvement [*26] in producing the unsworn statement ran afoul of "the principle that an unsworn victim statement belongs solely to the victim or the victim's designee." [Harrington, 83 M.J. 408, 2023 CAAF LEXIS](#)

¹¹ Appellant effectively would have us disregard the CAAF's construction of R.C.M. 1001(c) in [Barker](#) in deference to a related but *distinct* provision in R.C.M. 1001(a)(3), to wit: that a military judge has a duty to advise any crime victim "who is present" that they have a right to be reasonably heard at sentencing. We decline to do so. [HN12](#) [↑] R.C.M. 1001(a)(3) does not restrict a crime victim's right to be reasonably heard; it merely provides an additional mechanism by which the President sought to ensure that crime victims have *actual notice* of their right to be reasonably heard. By contrast, R.C.M. 1001(c) deals with the substantive aspects of admissible forms and content for victim unsworn statements.

¹² We do *not* hold that all trial counsel "solicitations" of victim unsworn statements from unrepresented victims would satisfy what may be identified as the "independent decision doctrine" of [Barker](#) and [Hamilton](#). These cases are highly fact-dependent and require a case-by-case analysis to determine whether under the circumstances a crime victim made a knowing and independent decision to submit an unsworn statement.

[577, at *20](#) (citing [Edwards, 82 M.J. at 241](#)). As none of those predicate circumstances were present here, there was no deficient performance in not raising a futile objection.¹³

Second, even assuming R.C.M. 1001(c) did not permit admission of a written victim unsworn statement from an absent crime victim at pre-sentencing proceedings we find that trial defense counsel's strategic decision not to object to KR's statement was one of those *tactical decisions* which do not fall "measurably below" the standards expected of fallible lawyers. See [Dewrell, 55 M.J. at 133](#) (quoting [Strickland, 446 U.S. at 690](#)) ("strategic defense counsel choices made after thorough investigation of the facts are virtually unchallengeable"). We are persuaded by the affidavit from the circuit defense counsel that this decision was carefully considered and undertaken to avoid a potentially more persuasive and evocative form of that statement (*i.e.*, that trial counsel would be able to get in touch with KR to provide her statement orally over the phone, replete with more emotion and passion than the mere written word). We disagree [*27] with Appellant's suggestion that those assessments and concerns by trial defense counsel were unreasonable. Trial defense counsel's risk analysis and subsequent decision—to allow a less impactful form of the evidence in an effort to neutralize what might otherwise be emotionally impactful statement—in this case did not fall measurably below standards expected of fallible lawyers.

In the absence of any "deficient performance" by his trial defense counsel, Appellant is entitled to no relief for this assignment of error. [Datavs, 71 M.J. at 424](#) (citation omitted).

b. Clemency Submission

¹³ We also decline Appellant's invitation to interpret our ruling in [United States v. Bailey, No. ACM 39935, 2021 CCA LEXIS 380, at *14-15 \(A.F. Ct. Crim. App. 30 Jul. 2021\) \(unpub. op.\)](#), *rev. denied*, 82 M.J. 103 (C.A.A.F. 2021), to find deficient performance in this case. In [Bailey](#), this court held that the military judge erred in permitting a trial counsel to read a written victim unsworn statement into the record. *Id.* We find [Bailey](#) factually distinguishable. Unlike in [Bailey](#), where trial counsel's act of reading the written victim unsworn statement aloud literally consisted of a different form of the statement (*i.e.*, "oral" versus "written"), here trial counsel's mere offering of the independently drafted victim unsworn statement did not change the nature of the statement (*i.e.*, it was offered as a written victim unsworn statement and remained so).

Given Capt NW's concession that he cited to an inapplicable version of [Article 60, UCMJ](#),¹⁴ in clemency and, as a consequence, requested clemency relief that the convening authority was not empowered to give (*i.e.*, reduction in confinement from 24 to 12 months), we will assume without deciding that the "deficient performance" prong of the [Strickland](#) standard is satisfied and proceed to a prejudice analysis.

Appellant failed to demonstrate there is a reasonable probability that, but for counsel's error, there would have been a different result. He has failed to identify what, if anything, he would have changed in his clemency submission but for counsel's [*28] misstatement of the law. Appellant is silent in his post-trial declaration about what alternate clemency he was interested in. Appellant's burden is not satisfied by counsel merely suggesting what Appellant "could" have done if given an opportunity to re-submit clemency, but rather what Appellant *would* have done absent the initial clemency error. We find Appellant has failed in his burden to demonstrate prejudice resulting from trial defense counsel's purportedly deficient performance in seeking clemency.

c. Post-Trial Discussions of Post-Trial Confinement Credit

In turning to address Appellant's final ineffective assistance of counsel claim, we opt to resolve this assignment of error based upon the lack of prejudice. See [Datavs, 71 M.J. at 424-25](#).

Appellant essentially argues that he felt a false sense of hope from his trial defense counsel's discussions with him concerning post-trial confinement credit. However, Appellant fails to provide a nexus between that false hope and any impairment it had on a substantial right.¹⁵ Absent that nexus there can be no prejudice; no "different outcome" is made possible by the absence of the alleged deficient conduct.

¹⁴ In accordance with the CAAF's decision in [United States v. Brubaker-Escobar, 81 M.J. 471, 474 \(C.A.A.F. 2021\)](#) (*per curiam*), it was [Article 60, UCMJ](#) (2016 MCM), which applied during Appellant's post-trial processing.

¹⁵ For example, Appellant does not claim trial defense counsel's error caused him to suffer substandard post-trial confinement conditions or affected the exercise of his

III. CONCLUSION

The findings and sentence as entered are correct **[*29]** in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. [Articles 59\(a\)](#) and [66\(d\)](#), [UCMJ](#), [10 U.S.C. §§ 859\(a\)](#), [866\(d\)](#). Accordingly, the findings and sentence are **AFFIRMED**.

End of Document



Positive

As of: May 23, 2024 3:43 PM Z

United States v. McInnis

United States Air Force Court of Criminal Appeals

May 29, 2020, Decided

No. ACM 39576

Reporter

2020 CCA LEXIS 194 *

UNITED STATES, Appellee v. Derek J. MCINNIS,
Airman First Class (E-3), U.S. Air Force, Appellant

Notice: NOT FOR PUBLICATION

Prior History: [*1] Appeal from the United States Air Force Trial Judiciary. Military Judge: Matthew D. Talcott. Approved sentence: Dishonorable discharge, confinement for one year and 10 months, forfeiture of all pay and allowances, reduction to E-1, and a reprimand. Sentence adjudged 1 August 2018 by GCM convened at Peterson Air Force Base, Colorado.

Case Summary

Overview

HOLDINGS: [1]-Where a serviceman, while on a cruise ship with his family, and after consuming at least 10 alcoholic drinks, believing it to be occupied by a particular adult female, entered the victim's cabin and attempted to wake her by rubbing her back through her shirt, the evidence was sufficient to convict him of sexual abuse of a child, in violation of Uniform Code of Military Justice art. 120b, [10 U.S.C.S. § 920b](#); [2]-The serviceman's alleged mistake of fact as to the victim's identity did not concern a fact which would have precluded the existence of the required specific intent; [3]-Further, the evidence was legally and factually sufficient particularly as the serviceman's voluntary intoxication did not negate the required specific intent and a reasonable factfinder could have determined that the serviceman's claimed mistaken identity as to the victim was not reasonable.

Outcome

Decision affirmed.

LexisNexis® Headnotes

[HN1](#) The mens rea applicable to an offense is an issue of statutory construction, reviewed de novo. In determining the mens rea applicable to an offense, the court must first discern whether one is stated in the text, or, failing that, whether Congress impliedly intended a particular mens rea.

Military & Veterans Law > Military Offenses > Rape & Sexual Assault of a Child

[HN2](#) **Military Offenses, Rape & Sexual Assault of a Child**

As in all statutory construction cases, the court begins with the language of the statute. Sexual abuse of a child in violation of Unif. Code Mil. Justice art. 120b, 10 U.S.C.S. § 920b, provides that any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child. Manual Courts-Martial pt. IV, para. 45b.a.(h)(5)(A). Sexual contact is defined as any touching, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Manual Courts-Martial pt. IV, para. 45.a.(g)(2)(B).

Military & Veterans Law > Military Offenses > Rape & Sexual Assault of a Child

[HN3](#) **Military Offenses, Rape & Sexual Assault of a Child**

The elements of sexual abuse of a child are (1) that the accused committed sexual contact upon a child by touching, either directly or through the clothing, any body part of any person; and (2) that the accused did so

with intent to arouse or gratify the sexual desire of any person. Manual Courts-Martial pt. IV, para. 45b.b.(4)(b). of 12 years. Manual Courts-Martial pt. IV, para. 45b.a.(d)(1).

Criminal Law & Procedure > ... > Sexual
Assault > Abuse of Children > Elements

Criminal Law & Procedure > ... > Acts & Mental
States > Mens Rea > General Intent

[HN4](#) Abuse of Children, Elements

The plain reading of the statute indicates that while sexual abuse of a child includes a specific intent element as to whether the touching was committed with the intent to arouse or gratify the sexual desire of any person, the fact the person being touched was a child is a general intent element.

Criminal Law & Procedure > Defenses > Ignorance
& Mistake of Fact

Criminal Law & Procedure > Defenses > Ignorance
& Mistake of Law

[HN5](#) Defenses, Ignorance & Mistake of Fact

There is a critical distinction, long recognized in the corpus of law involving sex offenses, between a mistake of fact that goes to degree of legal and moral turpitude, on the one hand, and a mistake of fact that goes to whether the act was legally or morally wrong at all, on the other hand. The pertinent inquiry is whether the purported mistake concerns a fact which would preclude the existence of the required specific intent.

Military & Veterans Law > Military
Justice > Defenses > Ignorance & Mistake

Military & Veterans Law > Military Offenses > Rape
& Sexual Assault of a Child

[HN6](#) Defenses, Ignorance & Mistake

It is a defense to sexual abuse of a child that the appellant reasonably believed that a child had attained the age of 16 years if the child had in fact attained at least the age of 12 years. Manual Courts-Martial pt. IV, para. 45b.a.(d)(2). It is not a defense that the accused reasonably believed that the child had attained the age

Military & Veterans Law > Military
Justice > Defenses > Ignorance & Mistake

Military & Veterans Law > Military Offenses > Rape
& Sexual Assault of a Child

[HN7](#) Defenses, Ignorance & Mistake

To be a defense to sexual abuse of a child, a mistake of fact must have existed in his mind and been reasonable under all the circumstances. R.C.M. 916(j)(1), Manual Courts-Martial.

Criminal Law & Procedure > Defenses > Ignorance
& Mistake of Fact

Military & Veterans Law > Military
Justice > Defenses > Ignorance & Mistake

Military & Veterans Law > Military Offenses > Rape
& Sexual Assault of a Child

[HN8](#) Defenses, Ignorance & Mistake of Fact

For sexual abuse of a child, a mistake of fact as to the identity of a minor has two elements, one subjective and one objective. For the subjective element, the ignorance or mistake must have existed in the appellant's mind. For the objective test, the ignorance or mistake must be reasonable under all the circumstances as assessed by an ordinary, prudent, sober adult.

Military & Veterans Law > Military Justice > Judicial
Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial
Review > Standards of Review

Military & Veterans Law > ... > Courts
Martial > Evidence > Weight & Sufficiency of
Evidence

[HN9](#) Judicial Review, Courts of Criminal Appeals

The U.S. Air Force Court of Criminal Appeals reviews

issues of legal and factual sufficiency de novo. Its assessment of legal and factual sufficiency is limited to the evidence produced at trial.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

[HN10](#) **Trial Procedures, Burdens of Proof**

The test for legal sufficiency of the evidence is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. Beyond a reasonable doubt does not mean that the evidence must be free from conflict. In resolving questions of legal sufficiency, courts are bound to draw every reasonable inference from the evidence of record in favor of the prosecution.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > ... > Courts Martial > Evidence > Weight & Sufficiency of Evidence

[HN11](#) **Trial Procedures, Burdens of Proof**

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the reviewing court is are convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the reviewing court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make our own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

Criminal Law & Procedure > Defenses > Intoxication

Military & Veterans Law > Military Justice > Defenses > Intoxication

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

[HN12](#) **Defenses, Intoxication**

Voluntary intoxication may, but does not necessarily, negate the specific intent required for some offenses. It is not a defense to a general-intent crime, but it may raise a reasonable doubt about actual knowledge, specific intent, willfulness, or premeditation when they are elements of a charged offense. When raising an issue of voluntary intoxication as a defense to a specific-intent offense, there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable of forming the necessary intent, not just evidence of mere intoxication.

Criminal Law & Procedure > Defenses > Intoxication

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

[HN13](#) **Defenses, Intoxication**

The alleged mistake of fact as to the identity of the victim has two elements, one subjective and one objective. For the subjective element, the ignorance or mistake must have existed in the appellant's mind. For the objective test, the ignorance or mistake must be reasonable under all the circumstances as assessed by an ordinary, prudent, sober adult. Voluntary intoxication is not relevant to the question of whether the appellant had a mistake of fact as to the identity of the victim because the first element of sexual abuse of a child is a general intent element, not a specific intent element.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

[HN14](#) **Substantial Evidence, Sufficiency of Evidence**

In assessing legal sufficiency, reviewing courts are limited to the evidence produced at trial and required to consider it in the light most favorable to the prosecution.

Military & Veterans Law > ... > Courts Martial > Sentences > Deliberations, Instructions &

Voting

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

[HN15](#) **Sentences, Deliberations, Instructions & Voting**

Interpreting R.C.M. 1001A, Manual Courts-Martial is a question of law, which the U.S. Air Force Court of Criminal Appeals reviews de novo. However, the court reviews a military judge's decision to admit a victim impact statement offered pursuant to R.C.M. 1001A for an abuse of discretion. A military judge abuses his discretion when his decision to permit such a statement is based on an erroneous view of the law.

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Victim Statements

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Sentences > Presentencing Proceedings

[HN16](#) **Imposition of Sentence, Victim Statements**

The U.S. Air Force Court of Criminal Appeals reviews a military judge's decision to admit evidence for an abuse of discretion. Victim impact statements offered pursuant to R.C.M. 1001A, Manual Courts-Martial are not evidence but nevertheless applied the abuse of discretion standard in reviewing the military judge's decision to allow such statements to come before the court.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial

Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

[HN17](#) **Judicial Review, Courts of Criminal Appeals**

In the absence of an objection at trial, the U.S. Air Force Court of Criminal Appeals reviews claims of erroneous admission of evidence for plain error, which is established when: (1) there is error; (2) which was plain, clear, or obvious, and (3) the error resulted in material prejudice to the appellant's substantial rights.

Criminal Law & Procedure > ... > Reviewability > Waiver > Admission of Evidence

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Evidence

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Evidence

[HN18](#) **Waiver, Admission of Evidence**

Where trial defense counsel objects to the admissibility of evidence on one ground at trial and a different ground on appeal, the new objection on appeal is reviewed under the plain error analysis.

Criminal Law & Procedure > Appeals > Reviewability > Forfeitures

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Motions > Procedures

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Evidence > Objections & Offers of Proof

[HN19](#) **Reviewability, Forfeitures**

A forfeiture is basically an oversight; a waiver is a

deliberate decision not to present a ground for relief that might be available in the law. While the U.S. Air Force Court of Criminal Appeals reviews forfeited issues for plain error, it cannot review waived issues at all because a valid waiver leaves no error for it to correct on appeal. In determining whether a particular circumstance constitutes a waiver or a forfeiture, the court considers whether the failure to raise the objection at the trial level constituted an intentional relinquishment of a known right.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts
Martial > Sentences > Fines & Forfeitures

Military & Veterans Law > ... > Courts
Martial > Posttrial Procedure > Waivers & Withdrawals of Appeals

[HN20](#) **Judicial Review, Courts of Criminal Appeals**

The U.S. Air Force Court of Criminal Appeal has made clear that the courts of criminal appeals have discretion, in the exercise of their authority under Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error.

Military & Veterans Law > ... > Courts
Martial > Sentences > Presentencing Proceedings

[HN21](#) **Sentences, Presentencing Proceedings**

Unif. Code Mil. Justice (UCMJ) art. 6b, 10 U.S.C.S. § 806b, grants victims of offenses under the UCMJ the right to be reasonably heard at sentencing hearings related to such offenses. 10 U.S.C.S. § 806b(a)(4)(B). A victim covered by this right is one who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the UCMJ. 10 U.S.C.S. § 806b(b).

Criminal Law &
Procedure > Sentencing > Imposition of
Sentence > Victim Statements

Military & Veterans Law > ... > Courts
Martial > Sentences > Presentencing Proceedings

[HN22](#) **Imposition of Sentence, Victim Statements**

Under R.C.M. 1001A, Manual Courts-Martial, victims in non-capital cases may exercise their right to be heard through sworn or unsworn statements. R.C.M. 1001A(b)(4)(B). Unsworn statements may be oral, written, or both. R.C.M. 1001A(e). Victims who are under 18 years of age may make an unsworn statement either personally or through a designee appointed under Manual Courts-Martial, **R.C.M. 801(a)(6)**. R.C.M. 801A(e), Manual Courts-Martial, requires the military judge to appoint a designee in writing. Statements offered under R.C.M. 1001A may include victim impact or matters in mitigation, and should neither exceed those topics nor recommend a specific sentence. R.C.M. 1001A(c); 1001A(e). Similar to the definition under R.C.M. 1001, victim impact under R.C.M. 1001A means any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty. R.C.M. 1001A(b)(2).

Military & Veterans Law > ... > Courts
Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

[HN23](#) **Evidence, Evidentiary Rulings**

When evidence is improperly admitted during sentencing proceedings, the test for prejudice is whether the error substantially influenced the adjudged sentence. When determining whether an error substantially influenced a sentence, the U.S. Air Force Court of Criminal Appeal considers the following factors: (1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question. An error is more likely to be prejudicial if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts
 Martial > Posttrial Procedure > Waivers &
 Withdrawals of Appeals

[HN24](#) **Judicial Review, Courts of Criminal Appeals**

The U.S. Air Force Court of Criminal Appeal has made clear that the Courts of Criminal Appeals have discretion, in the exercise of their authority under Unif. Code Mil. Justice art. 66, 10 U.S.C.S. § 866, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error.

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

[HN25](#) **Sentences, Presentencing Proceedings**

A written unsworn statement and testimony are two different things. The first is governed by R.C.M. 1001(b)(4), Manual Courts-Martial, is evidence in aggravation, and is limited by Mil. R. Evid. 403. The second is governed by R.C.M. 1001A, Manual Courts-Martial, is in-dependent of whether a witness testified, and implements the victim's right to be reasonably heard.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

[HN26](#) **Judicial Review, Courts of Criminal Appeals**

The test for prejudice is whether the error substantially influenced the adjudged sentence. When determining whether an error substantially influenced a sentence, the U.S. Air Force Court of Criminal Appeal examines the strength of the government's case, the strength of the defense's case; and the materiality and quality of the disputed court exhibit.

Military & Veterans Law > ... > Courts
 Martial > Sentences > Presentencing Proceedings

[HN27](#) **Sentences, Presentencing Proceedings**

It is highly relevant when analyzing the impact of the error on the sentence that the case was tried before a military judge, who is presumed to know the law.

Counsel: For Appellant: Major David A. Schiavone, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Major Anne M. Delmare, USAF; Mary Ellen Payne, Esquire.

Judges: Before MINK, LEWIS, and D. JOHNSON, Appellate Military Judges. Judge D. JOHNSON delivered the opinion of the court, in which Senior Judge MINK and Judge LEWIS joined.

Opinion by: D. JOHNSON

Opinion

D. JOHNSON, Judge:

A general court-martial composed of a military judge convicted Appellant, contrary to his pleas, of one specification of sexual abuse of a child, in violation of [Article 120b](#), Uniform Code of Military Justice (UCMJ), [10 U.S.C. § 920b](#), and one charge and specification of unlawful entry in violation of [Article 134](#) UCMJ, U.S.C. § [934](#).¹ The military judge sentenced Appellant to a dishonorable discharge, confinement for one year and 10 months, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. The convening [*2] authority approved the adjudged sentence.

Appellant raises five issues on appeal: (1) whether the military judge erred when he determined that Appellant's mistake of fact as to the identity of the victim only related to a general intent element of the crime and therefore must have been objectively reasonable;² (2) whether the evidence was legally and factually sufficient to support his conviction for sexual abuse of a child; (3) whether the military judge abused his discretion in

¹ All references to the Uniform Code of Military Justice (UCMJ) and Rules of Courts-Martial are to the *Manual for Courts-Martial, United States* (2016 ed.).

² For ease of discussion we renumbered assignments of error (1) and (2).

failing to suppress Appellant's statement to Carnival Cruise Lines security personnel which was obtained without a rights advisement; (4) whether Appellant's trial defense counsel were ineffective for failing to seek suppression of Appellant's statements to the Air Force Office of Special Investigations (AFOSI);³ and (5) whether the military judge erred by admitting Court Exhibit 1, the "unsworn statement" of AR's biological mother, in violation of Rule for Courts-Martial (R.C.M.) 1001A(c). Issues (3) and (4) warrant no further discussion or relief. See [*United States v. Matias*, 25 M.J. 356, 361 \(C.M.A. 1987\)](#). Finding no error materially prejudicial to Appellant's substantial rights, we affirm the findings and sentence.

I. BACKGROUND

Appellant and his family were on the [*3] Carnival Triumph cruise ship in the Gulf of Mexico heading for New Orleans, Louisiana, after departing from Mexico in late November 2017. Although Appellant was traveling with his mother, his mother's boyfriend, and the boyfriend's family, Appellant had his own cabin (number 2238).

While on the cruise Appellant had seen a woman, later identified as MB, whom he found attractive and wanted to ask out. Appellant did not know MB's name; he just saw her in the hallway and followed her back to her cabin (number 2338). MB's cabin was on the same level as Appellant's cabin but the two cabins were not close to each other. Once MB entered her cabin, Appellant decided he wanted to talk to MB so he knocked on her door with the intention of asking MB to "hang out." He knocked on her door on at least two occasions, about two or three minutes apart. After knocking, Appellant became nervous, so both times when MB answered the door Appellant told her he had the "wrong room" or that he was "looking for someone else."⁴

On the fifth and final night of the cruise, after Appellant's traveling companions had gone to bed, Appellant purchased four double Crown Royal whiskey and cokes,

and then two shots of another [*4] whiskey at the dance club all within about an hour and 15 minutes. Appellant would later tell investigators that he consumed all the drinks he purchased and that he consumed one or two more drinks with "some other friends he met onboard." If Appellant's statements to investigators are accurate, he consumed a total of eleven or twelve drinks.

Between 0430 and 0630,⁵ Appellant walked toward cabin 2338. Two doors down was cabin 2330. The ship's security footage showed Appellant swaying and leaning against the wall as he walked down the passageway. However, testimony at trial revealed the ship was "shifty" that night because of damage to the propeller. The security footage showed Appellant standing outside cabin 2330 for approximately two and a half minutes at which point he entered the room through the cabin's single door which was unsecured.

Inside cabin 2330 was AR, a 7-year-old girl; HB, AR's godfather and guardian; QH, AR's godmother and guardian; and TW, another child. HB and QH were sleeping in a queen bed, and AR and TW slept on bunk beds attached to different walls. When folded down, the bunk beds extended into the cabin at a height of approximately four to five feet above the deck. [*5] AR's bunk was on the right wall as one walks into the cabin and extended over the queen bed, TW's bunk was attached to the wall over the head of the queen bed. Security footage revealed that Appellant was in AR's room for approximately nine minutes before he emerged from the room.

AR testified that she awoke to a "white man" rubbing her back at which point she called out for her godmother, QH. HB testified that he awoke to AR saying "Mom. Mom. Someone's in our room," and he observed Appellant easing towards the door. HB saw Appellant due to the illumination of the bathroom light which was kept on for the children. When HB asked Appellant what he was doing in their room, Appellant "bolted" towards the door, exited and ran. Security footage showed Appellant running from AR's cabin with HB chasing after him.

On the security footage Appellant is seen running through the various ship passageways and falling on

³ Appellant submits issues (1), (3) and (4) pursuant to [*United States v. Grostefon*, 12 M.J. 431 \(C.M.A. 1982\)](#).

⁴ While it is not clear what day Appellant knocked on MB's door, it did not occur on the last night of the cruise. MB testified it was daylight and before breakfast when a "tall" young man knocked on her door at least twice about 15 minutes apart.

⁵ Still pictures of the security footage admitted at trial has a time stamp of 0430 and security footage admitted at trial has a time stamp of 0630. Special Agent (SA) AP, of the Federal Bureau of Investigation testified Appellant stated it was around 0530. The exact timing is not needed for our analysis.

two occasions. During one fall Appellant's pants are falling down to thigh level. After evading HB, later footage shows Appellant's hands in front of his waist as if he was closing or adjusting his pants.

After Appellant adjusted his pants, HB caught up to Appellant. HB testified he [*6] asked Appellant what he was doing in their room, but Appellant did not respond. HB began walking Appellant to the security desk holding onto Appellant's shirt. HB testified that although he was holding onto Appellant's shirt, Appellant was walking on his own. Once HB and Appellant entered the elevator, Appellant started to slump over like he was "really, really intoxicated" and at that point HB said to Appellant, "Man, stand up. You're not that drunk." At that point, Appellant stood back up. Once they arrived at the service desk, Appellant again began to slump. HB testified that Appellant "smelled drunk."

Cruise ship personnel placed Appellant in a wheelchair and wheeled him to the medical center. A cruise ship employee testified this was a precautionary measure because Appellant's eye was bleeding and he would not respond to questions.⁶ The employee also testified that Appellant smelled of alcohol, had blood shot eyes, and appeared inebriated, but was able to sit up in the wheelchair.

After returning from the medical center, Appellant was detained by Carnival security personnel in a stateroom on the cruise ship. The chief security officer aboard the ship, AS, interviewed Appellant.⁷ When [*7] AS asked Appellant if he remembered anything, Appellant said he remembered drinking a lot of alcohol. When asked whether he remembered entering somebody else's cabin or running out of the cabin, Appellant replied "I don't remember anything else. I don't remember going to somebody else's cabin or running out."

Once the ship docked in New Orleans, Special Agent (SA) AP and SA CB with the Federal Bureau of Investigation (FBI) and Task Force Officer Detective AW, boarded the ship, reviewed the security footage,

and interviewed Appellant.⁸ SA CB and Detective AW were also present for Appellant's interview. SA AP testified at trial that Appellant told him "multiple stories." Appellant first told SA AP that he had been drinking, decided to return to his own cabin, but entered the wrong cabin. After entering the wrong cabin, Appellant was feeling his way around the cabin "in a circular motion" when he touched a little girl, who eventually screamed. This "freaked [Appellant] out" who "knew what he was doing was wrong," so he ran out of the room, "chased by the little girl's father."

About halfway through the interview, SA AP and Detective AW departed and Appellant spoke to SA CB alone. [*8] SA CB testified that Appellant explained for the first time that he had previously seen a 30-year-old female on the ship who he did not know, but found attractive and that he had knocked on her door a few times.⁹ After SA AP and Detective AW rejoined the interview, Appellant then explained that sometime around 0530 he wanted to find this woman to have sex with her, so he went to her hallway, but he didn't remember exactly which room she was in. Appellant discovered a cabin door that was not fully closed, so he waited outside the room for a few minutes and then entered. Appellant told the agents he knew what he was doing was wrong; that he was not allowed to enter that cabin; that he was not invited into the room; that he decided to enter anyway; and that his sole intention was to try to arouse the female in order to have sex with her.

Appellant further informed the two FBI agents and Detective AW that as he entered the room he felt his way around until he came to the bunk bed on the right which was at eye level. SA AP testified that Appellant told investigators that

while [Appellant] was in the room, he . . . was trying to wake up the female to have sex and he was rubbing her back. At [*9] one point [Appellant] said . . . it was in a circular motion, and [Appellant] moved approximately 2 inches lower on her back, still rubbing her back, and he was sexually aroused, and he doesn't remember unzipping his pants, but it's possible that he could have, and it's also possible that he was masturbating.

Several weeks later, Appellant was interviewed by special agents of the AFOSI. Appellant's interview was

⁶ There was evidence introduced at trial that Appellant may have been punched by one of HB's sons who were also on the cruise, but not staying in HB's cabin.

⁷ Cruise ship personnel did not read Appellant his *Miranda* rights which formed the basis for the Defense's motion to suppress Appellant's statements which was denied by the military judge, and this court found warranted no further discussion or relief.

⁸ The record does not reveal which jurisdiction Task Force Officer AW represented.

⁹ MB was 38 years old at the time of the cruise.

video recorded and admitted at trial. After waiving his rights under [Article 31](#), UCMJ, [10 U.S.C. § 831](#), Appellant told the AFOSI agents different versions of the events just as he had earlier told different versions of the events to the FBI agents and Detective AW. First, Appellant told the AFOSI agents he was looking for the lady he "met a while back" to see if she wanted "to do something." Appellant could not remember which cabin the woman was in and the numbers "started getting all wobbly" to him so he decided to return to his own cabin. As he was returning to his cabin, he entered the cabin "where the girl was" which he thought was his room. The room was dark so he was feeling around when he heard the girl scream and realized it was not his cabin. He thought "I need to get out of here" [*10] but didn't remember running, but thought he remembered falling. Appellant next remembered a doctor "touching him up a little" and then being back in his room. Appellant did not respond, when pressed by AFOSI, on why he did not turn on the light if he thought he had entered his room.

Later in the video recorded interview, Appellant told AFOSI that he entered the room looking for "the 30-year-old woman;" but the cabin numbers were getting blurry. He thought he found her room and went to knock on the door. When he went to knock, he noticed the door was open and he went inside the "dimly lit" cabin. Even though the room was dimly lit, Appellant could not "tell what was what." As he felt around, he thought he "found her" and was attempting to wake her by rubbing her back through her shirt. Appellant did not remember saying anything to her but started to "touch himself through his pants." He said he "heard the girl scream" and he ran out of the room. Appellant remained adamant throughout the interview that he did not remember unzipping or undoing his pants, his pants falling down, or being punched.

II. DISCUSSION

A. Mistake of Fact

1. Additional Background

Prior to closing arguments on findings, [*11] the military judge indicated he would consider mistake of fact as to identity as a defense applicable to the sexual abuse of a child offense. He informed counsel that in Appellant's case, there are only two elements: "sexual contact with a child with the intent to gratify sexual desire." He further

stated that he was "struggling to see the element [the mistake of fact defense] would eliminate," but as to "the identity issue, if it negates an element, to [him], [it] could only negate the child element." While trial defense counsel conceded there was no specific intent requirement for the first element of sexual abuse of a child, trial defense counsel asserted only an "honest," not an "honest and reasonable," mistake of fact as to identity of the victim was required.

Trial defense counsel further argued that the second element of sexual abuse of a child should be read "in conjunction" with the first element, thus requiring a specific intent to gratify his sexual desire by touching a child. Trial defense counsel explained:

So essentially it would go to that -- essentially that *mens rea*, as far as the specific intent to gratify his sexual desire by touching a child. So looking at the second [*12] element that he did so with -- that he did so. He did touch the child with the intent to, in this case, gratify his own sexual desire.

Trial defense counsel conceded he could not cite any case law to support his position and noted it was a "novel issue." Trial counsel argued, "there are two separate elements and that the act of touching a child is general intent," and if the military judge considers a mistake of fact defense "it's honest and reasonable versus just honest." The military judge agreed with the trial counsel.¹⁰

[*13] On appeal, Appellant renews the argument that his mistake of fact as to identity only must be honest,

¹⁰ While the parties, to include the military judge, did not refer to the *Military Judges' Benchbook*, it provides the following guidance as to when a mistake must be "honest and reasonable."

The standard for ignorance or mistake of fact varies with the nature of the elements of the offense involved. If the ignorance or mistake concerns an element of an offense involving specific intent (e.g., desertion, larceny), willfulness (e.g., willful disobedience of an order), knowledge (e.g., assault upon commissioned officer, failure to obey lawful order), or premeditation, the ignorance or mistake need only exist in the mind of the accused. Generally, for crimes not involving specific intent, willfulness, knowledge, or premeditation, (e.g., AWOL) ignorance or mistake must be both honest (actual) and reasonable.

Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 1697 (29 Feb. 2020).

not honest and reasonable. Appellant contends that the words "did so" in the second element of sexual abuse of a child "necessarily incorporate[s] the first element" of sexual contact upon a child.

The Government responds (1) that mistake of fact as to identity is not a defense at all because AR was under 12 years of age; (2) even if mistake of fact as to identity could be an appropriate instruction, the plain text of the statute implies that the mistake must be both honest and reasonable because the first element of touching a child is a general intent element; and (3) even if this court finds that the mistake of fact as to identity only needed to be honest, not honest and reasonable, Appellant was not prejudiced.

2. Law

HN1 [↑] "The mens rea applicable to an offense is an issue of statutory construction, reviewed de novo." *United States v. McDonald*, 78 M.J. 376, 378 (C.A.A.F. 2019). "In determining the mens rea applicable to an offense, we must first discern whether one is stated in the text, or, failing that, whether Congress impliedly intended a particular mens rea." *Id.* at 378-379 (citation omitted).

HN2 [↑] "As in all statutory construction cases, we begin with the language [*14] of the statute." *Id.* at 379 (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)). Appellant was charged with sexual abuse of a child in violation of *Article 120b*, UCMJ, which provides that "[a]ny person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child. . . ." *Manual for Courts-Martial, United States* (2016 ed.) (MCM), pt. IV, ¶ 45b.a.(c). A lewd act is defined as "any sexual contact with a child." MCM, pt. IV, at ¶ 45b.a.(h)(5)(A). Sexual contact is defined as "any touching, . . . either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." MCM, pt. IV, at ¶ 45a.(g)(2)(B).

HN3 [↑] The elements of sexual abuse of a child are (1) that "the accused committed sexual contact upon a child by touching, . . . either directly or through the clothing, any body part of any person;" and (2) that "the accused did so with intent to arouse or gratify the sexual desire of any person." MCM, pt. IV, at ¶ 45b.b.(4)(b).

HN4 [↑] The plain reading of the statute indicates that

while sexual abuse of a child includes a specific intent element as to whether the touching was committed with the intent to arouse or gratify the sexual desire of any [*15] person, the fact the person being touched was a child is a general intent element. Cf. *United States v. DiPaola*, 67 M.J. 98, 101 (C.A.A.F. 2008) (finding that an indecent assault offense includes both specific and general intent elements, and it is the general intent element as to consent that requires both a subjective belief of consent and a belief that was reasonable under all circumstances).

HN5 [↑] There is "a critical distinction, long recognized in the corpus of law involving sex offenses, between a mistake of fact that goes to *degree* of legal and moral turpitude, on the one hand, and a mistake of fact that goes to whether the act was legally or morally wrong *at all*, on the other hand." *United States v. Adams*, 33 M.J. 300, 302 (C.M.A. 1991). "The pertinent inquiry is whether the purported mistake concerns a fact which would preclude the existence of the required specific intent." *United States v. Binegar*, 55 M.J. 1, 5 (C.A.A.F. 2001).

HN6 [↑] It is a defense to sexual abuse of a child that the Appellant reasonably believed that a child had attained the age of 16 years if the child had in fact attained at least the age of 12 years. MCM, pt. IV, at ¶ 45b.a.(d)(2). "It is not a defense that the accused reasonably believed that the child had attained the age of 12 years." MCM, pt. IV, at ¶ 45b.a.(d)(1).

R.C.M 916(j)(1) states:

it is a defense to an offense that the accused held, [*16] as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

3. Analysis

Mistake of fact as to identity means Appellant held, as a

result of ignorance or mistake, an incorrect belief that he was touching MB and not AR. See *id.* We assume without deciding that mistake of fact as to identity defense is different than a mistake of fact as to age defense. If Appellant was honestly mistaken, it was to the *identity* of AR, not her *age*. See [Adams, 33 M.J. at 301](#) (mistake of fact as to a sex partner's identity is a legal defense to carnal knowledge where accused was asleep in his own bed and believed it was his wife fondling and arousing him, and not [*17] his niece). The remaining question is whether, to be a defense, a mistake of fact as to identity must have existed in the mind of Appellant (that is, the mistake need only be honest), or must have also been reasonable. See [Binegar, 55 M.J. at 5](#); at 7 (concurring opinion); R.C.M. 916(j)(1).

[HN7](#) [↑] To be a defense, Appellant's mistake of fact must have existed in his mind and been reasonable under all the circumstances. See [DiPaola, 67 M.J. at 101](#); R.C.M. 916(j)(1). As such, Appellant's mistake of fact as to the identity of AR has two elements, one subjective and one objective. [HN8](#) [↑] "For the subjective element, the ignorance or mistake must have existed in Appellant's mind. For the objective test, the ignorance or mistake must be reasonable under all the circumstances as assessed by an ordinary, prudent, sober adult." [United States v. Moore, No. ACM S32477, 2018 CCA LEXIS 560, at *12 \(A.F. Ct. Crim. App. 11 Dec. 2018\)](#) (unpub. op.) (citation omitted) (describing the mistake of fact defense to abusive sexual contact under [Article 120](#), UCMJ, [10 U.S.C. § 920](#)).

For two reasons, we do not agree with Appellant that the "did so" verbiage in the specific intent element incorporates the first element of sexual abuse of a child transforming the first element into a specific intent element. First, Appellant's argument is belied [*18] by the plain language of the statute. Second, the purported mistake of identity of AR does not concern a fact which would preclude the existence of the required specific intent. We find the military judge did not err.

B. Legal and Factual Sufficiency

Appellant asserts his conviction of sexual abuse of AR is legally and factually insufficient because (1) the facts at trial demonstrated that his level of intoxication was such that he could not form the requisite intent to arouse or gratify his sexual desire; (2) Appellant never conceded sexual interest in AR and his answers were qualified with "I don't know" or "it's possible" as

Appellant could not remember due to his level of intoxication; and (3) Appellant had a reasonable mistake of fact as to the identity of the person he was touching especially in light of his level of intoxication. We are not persuaded and find his conviction for sexual abuse of a child both legally and factually sufficient.

1. Additional Background

At one point during Appellant's trial, the Prosecution played the following video recorded exchange between Appellant and SA TP of the AFOSI:

[SA TP]: You started rubbing [AR's] back. And then what?

[Appellant]: I mean, [*19] just rubbing the back.

[SA TP]: I mean, were you getting horny because you thought it was a 30-year-old woman's back that you were rubbing?

[Appellant]: Yeah.

[SA TP]: So you started getting an erection or what?

[Appellant]: Yes, sir.

[SA TP]: And then what?

[Appellant]: That's -- I mean, I maybe touched down here (indicating), but I don't remember unzipping my pants.

[SA TP]: Okay. So were you touching yourself through your pants, then?

[Appellant]: Yes, sir, yes.

[SA TP]: You were?

[Appellant]: Yes, sir.

[SA TP]: So were you kind of beginning to masturbate?

[Appellant]: Yes, sir,

Later during the interview Appellant stated:

I was feeling my way around the room. I thought I found her. So I was giving her a little nudge, like the "Hey, wake up" kind of thing. I don't remember saying anything. I'm starting to get a little aroused. I started touching myself through the pants.


At one other point during the video recorded interview SA TP asks the Appellant: "So you remember having your hand on her back and masturbating through your pants," at which point Appellant responds "Yes."


Evidence at trial demonstrated Appellant thought MB was around 30 years old. At the time of the cruise, MB was 38 years old, [*20] 66 inches tall, and weighed between 140-150 pounds. MB testified she was "not built like a child" and that Appellant had seen "her whole


body" when he twice knocked on her door and she opened it. MB testified she did not wear her hair in a braid during the cruise.


AR was measured at 52.5 inches tall during trial. During the cruise, AR had braided hair down the length of her back with beads attached at the end. On the night of the incident AR's hair was pulled back in this braid.

2. Law

HN9 We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

HN10 The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (citation omitted); see also *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002) (citation omitted). "Beyond a reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (citing *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986)), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in [*21] favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted).

HN11 The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. "In conducting this unique appellate role, we take 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *Wheeler*, 76 M.J. at 568 (alteration in original) (quoting *Washington*, 57 M.J. at 399).

HN12 "Voluntary intoxication may, but does not necessarily, negate the specific intent required for some

offenses." *United States v. Peterson*, 47 M.J. 231, 233 (C.A.A.F. 1997) (citing *United States v. Anderson*, 25 M.J. 342 (C.M.A. 1987)). "It 'is not a defense to a general-intent crime, but it may raise a reasonable doubt about actual knowledge, specific intent, willfulness, or premeditation when they are elements of a charged offense.'" *Id.* (citing *United States v. Hensler*, 44 M.J. 184, 187 (C.A.A.F. 1996)). "When raising an issue of voluntary intoxication as a defense to a specific-intent offense, 'there must be some evidence that the intoxication was of a severity to have had the effect of rendering the appellant incapable [*22] of forming the necessary intent,' not just evidence of mere intoxication." *Id.* at 233-34 (citation omitted).

R.C.M. 916(l)(2) provides:

Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or a premeditated design to kill, if actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

Appellant was charged with sexual abuse of a child in violation of *Article 120b*, UCMJ, which included the following elements: (1) that at the time and place alleged, Appellant committed a lewd act upon AR, a child who had not attained the age of 12 years, by touching AR's back with his hand and (2) that the Appellant did so with the intent to arouse and gratify his sexual desires. See *MCM*, pt. IV, ¶ 45b.b(4)(b).¹¹ In this case, "child" means a person who has not attained the age of 16 years. *MCM*, pt. IV, ¶ 45b.a.(h)(4). A lewd act includes "any sexual contact with a child." *MCM*, pt. IV, ¶ 45b.a.(h)(5). Sexual contact is defined as "any touching . . . either directly or through [*23] the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 45.a.(g)(2)(B).

3. Analysis

¹¹ Although sexual contact is defined as "any touching . . . if done with an intent to arouse or gratify the sexual desire of any person," Appellant was charged with sexual abuse of a child by touching AR's back with his hand with intent to arouse and gratify his sexual desires. *MCM*, pt. IV, ¶ 45.a.(g)(2)(B) (emphasis added).

Having decided that Appellant's mistake of fact must have existed in his mind and been objectively reasonable, we next consider whether the evidence is legally and factually sufficient to support a finding of guilt for sexual abuse of a child.

a. Level of Intoxication and Specific Intent

Appellant first argues his state of intoxication prevented him from forming the requisite intent to arouse or gratify his sexual desire. Appellant posits that (1) Appellant's bar receipt demonstrates that Appellant rapidly consumed 11-12 drinks; (2) security footage shows Appellant clearly swaying from the effects of alcohol; and (3) cruise ship personnel "recognized his severe intoxication and took him for medical treatment." Appellant avers these facts "establish that Appellant was intoxicated such that he could not form the requisite intent to gratify his sexual desire."

However, the Government argues that Appellant was able to recall exactly how many drinks he consumed at the dance club that evening, that he left the dance club around [*24] 0200, that he spent time conversing with other passengers and consuming another drink. He remembered his reason for going to AR's hallway which was to go to the room of a female passenger and engage in sex. Appellant was able to recall that he entered the room that was not his, feeling his way through the room until he reached a bunk bed, rubbing a person's back until he was aroused, and then running from the room once AR called out for her mother. Although Appellant claimed to have no memory of being chased throughout the ship by HB, undoing or unzipping his pants, his pants falling down, or being punched, a reasonable fact-finder could find Appellant's claimed lack of memory not credible. The Government concludes that these facts preclude Appellant's argument that his state of intoxication prevented him from forming the requisite intent.

In addition to the arguments made by the Government, the military judge, as the factfinder, could have determined Appellant's ability to run down various ship passageways as shown on the security footage refuted Appellant's contention that he was unable to form the specific intent due to his level of intoxication. The military judge may have also [*25] determined that even if Appellant's "swaying" was from the effects of the alcohol as he claims, that fact did not necessarily indicate a level of intoxication that raises reasonable doubt as to the existence of specific intent.

As to Appellant's challenge regarding his level of intoxication as observed by cruise ship personnel, the military judge could have found that the trial testimony, and security footage revealed Appellant exaggerated his level of intoxication when cruise ship personnel approached. The military judge heard testimony from HB that after he and Appellant entered the elevator Appellant started to "slump over" as if he were "really, really, intoxicated" but stood back up after HB told him to because he was not that drunk. Furthermore, a cruise ship employee testified Appellant was bleeding from his eye, and although he appeared intoxicated he was able to sit up straight in the wheelchair.


Finally, Appellant stated in the video recorded interview that on more than one occasion he was aroused and touched himself through his pants, further demonstrating his clarity of thought, and that his level of intoxication did not raise reasonable doubt as to his specific intent to arouse [*26] and gratify his sexual desires. A reasonable factfinder could have determined all these facts demonstrated Appellant's voluntary intoxication did not cause reasonable doubt about his specific intent to arouse and gratify his sexual desires.

b. Appellant Never Conceded Sexual Interest in AR


Appellant next asserts that he never "conceded any sexual interest" in AR when he made his statements to the FBI or AFOSI and that his statements concerning whether he was masturbating inside the room outside his pants or otherwise were a result of FBI and AFOSI questioning. Appellant avers he made his statements to AFOSI because they would not accept answers of "I don't know" or "it's possible;" AFOSI agents stormed out of the room in anger when he attempted to answer with "I don't know" or "it's possible;" and Appellant's statements were the result of this type of questioning by AFOSI. However, as noted above, Appellant's responses on whether he was aroused and touching himself over his pants were not qualified. Appellant consistently maintained throughout the interview that he did not recall exposing his penis; did not recall unzipping or unbuttoning his pants; and did not recall the events after [*27] he ran from the room. Therefore, a reasonable factfinder could have determined his argument that AFOSI's responses to his answers and form of questioning somehow impacted his responses, or overcame his will with regard to his statements concerning sexual arousal was not persuasive.

c. Appellant's Level of Intoxication and Mistake of Identity

Finally, Appellant avers his level of intoxication contributed to his subjective belief that he was entering the room of and touching MB. Appellant argues that his mistake was reasonable considering MB and AR's door were only separated by one door, and a single number (2330 vice 2338). A reasonable factfinder could have determined otherwise.

The germane question is whether Appellant had a reasonable mistake of fact as to the identity of the person he was touching. As noted above, [HN13](#)  Appellant's mistake of fact as to the identity of AR has two elements, one subjective and one objective. For the subjective element, the ignorance or mistake must have existed in Appellant's mind. For the objective test, the ignorance or mistake must be reasonable under all the circumstances as assessed by an ordinary, prudent, sober adult. See [Moore, 2018 CCA LEXIS 560, unpub. op. at *12](#). Voluntary [*28] intoxication is not relevant to the question of whether Appellant had a mistake of fact as to the identity of AR because the first element of sexual abuse of a child is a general intent element, not a specific intent element.

A reasonable factfinder could have determined Appellant's claimed mistaken identity was not reasonable. Appellant contends he mistook a 38-year-old woman who was 66 inches tall, weighing 140-150 pounds at the time of the cruise with a 7-year-old girl who was 52.5 inches tall at the time of trial.¹² Furthermore, evidence at trial demonstrated that during the cruise MB had shoulder length hair and AR had braided hair down her back to her waist with beads at the end. Finally, AR and HB were able to see Appellant because of the bathroom light illuminating the room, indicating the cabin was not as "dimly lit" as Appellant claimed.

[HN14](#)  In assessing legal sufficiency, we are limited to the evidence produced at trial and required to consider it in the light most favorable to the prosecution. The bulk of the evidence produced at trial included Appellant's own words to AFOSI. While not all the evidence was free from conflict, it did not have to be. See [Wheeler, 76 M.J. at 568](#) (citation omitted).

After [*29] considering all of Appellant's challenges and drawing "every reasonable inference from the evidence

of record in favor of the prosecution," the evidence is legally sufficient to support Appellant's conviction for sexual abuse of a child. [Barner, 56 M.J. at 134](#). Moreover, having weighed the evidence in the record of trial and having made allowances for not having personally observed the witnesses, we are convinced of Appellant's guilt of sexual abuse of a child beyond a reasonable doubt. See [Turner, 25 M.J. at 325](#). Appellant's conviction for sexual abuse of a child is therefore both legally and factually sufficient.

C. Court Exhibit 1

On appeal, Appellant argues that the military judge abused his discretion when he admitted Court Exhibit 1, the unsworn statement by AR's biological mother (JR); and he was prejudiced because trial counsel relied on Court Exhibit 1 to argue for admission of the victim impact testimony of QH. Appellant avers the record does not indicate that AR's biological mother was ever appointed in writing as a designated advocate under [R.C.M. 801\(a\)\(6\)](#) and R.C.M. 1001A(e). Without such appointment, Appellant argues JR may not assume the victim's rights under [Article 6b](#), UCMJ, [10 U.S.C. § 806b](#). Appellant further avers Court Exhibit 1 substantially influenced [*30] the adjudged sentence and the victim impact was powerful as "loss-of-innocence arguments" tend to be; as such, the materiality and quality of the evidence was significant. We are not persuaded that admission of Court Exhibit 1 substantially influenced the adjudged sentence and prejudiced Appellant.

1. Additional Background

AR testified during the Government's case in findings that when she saw Appellant in her room she was "sad" and she "just wanted to punch him in the eye." Both HB and QH testified during the Government's presentencing case concerning how Appellant's crimes impacted their family and AR. HB testified that it scared him that he could not protect his family because Appellant was in their room for nine minutes while he was asleep; he is absent most nights at home due to his job and he noticed differences in his wife's sleep patterns since this incident; and they updated the security on their house since the cruise for protection when he is not home. QH testified that she was upset she could not protect AR; thinks about that night often; was more protective of AR after the incident; has difficulty sleeping; and continuously ensures doors are locked. As to the impact

¹² Evidence of AR's weight was not introduced at trial.

to AR, [*31] QH testified that AR slept with QH after the incident, AR followed QH's every move, and AR did not want to be alone.

When trial counsel asked QH whether she lost custody of AR due to Appellant's offenses, trial defense counsel objected stating it was "not proper aggravation under R.C.M. 1001" because it was "not directly related to or caused by the offense." At that point the following exchange occurred:

[Military Judge]: I don't know what -- I don't know what I'm about to hear. I guess I need to hear it and I'll rule on whether I can consider it.

[Trial Defense Counsel]: Well, Your Honor, I think counsel is about to get into a custody issue. It's kind of beyond the facts of this case.

[Senior Trial Counsel]: Sir, you will receive Court Exhibit 1, which is an unsworn statement from [JR]. She's the biological mother of [AR]. And after this -- because of this incident, she sought custody of her biological daughter.

After hearing the testimony about the custody issue, the trial counsel stated: "Your Honor, I have nothing further for the witness. To consider this evidence, you need to consider the Court Exhibit 1, which I can provide to the Court at this time." While providing Court Exhibit 1 to the military [*32] judge, trial counsel stated it was an unsworn statement of JR, "the [Article 6b](#) guardian of [AR]."¹³ When the military judge inquired whether there

was any objection from the Defense, the trial defense counsel responded "Your Honor, just to the line about the biological mother taking custody back. Again, under — under—it's not proper victim impact under RCM 1001 - 1001(a)."

After overruling the objection, the military judge clarified:

I find that the reactions of [AR's] mother to this crime directly impacted [AR]: It changed her living situation; it changed the way her mother felt about her own ability to protect her daughter, about her own abilities to be the mother to her daughter. All of these clearly would have impacted [AR]. In the unsworn, [JR] makes this connection directly. To the extent, Defense Counsel, if you have evidence that rebuts this, you're free to admit that evidence and I'll give it its appropriate weight and it will impact how much weight I give to this. But on its face, and as described, this is appropriate victim impact. Evidence will be admitted and considered. Additionally, with regard to the testimony of [QH], I find it also to be appropriate victim impact testimony to the extent she cared for, had custody of [AR], and she no longer does. [*34] And according to [AR's] mother, this is a direct result of the commission of this crime and how her mother felt about it.

After QH finished testifying about losing custody of AR and after a recess, the military judge clarified:

. . . With regard to the victim impact testimony, for any reviewing court -- with regard to the testimony, the victim impact testimony regarding the custody issue, to the extent I consider the crime resulted in [AR's] two motherly figures doubting themselves and each other's ability to parent [AR], this directly impacted [AR], that [QH] was unable to protect [AR] while on the cruise, according to the victim unsworn, was the reason [AR's] biological mother sought custody [AR's] mother wished -

The direct emotional impact from the crime and the natural reaction of those involved are fair considerations as victim impact. Impacts on [AR] and how her parental figures view themselves, their safety, the safety of [AR], and their views on each other's ability to parent her are directly linked to this crime and are victim impacts.

These impacts apply to [HB], [QH], and [AR] herself. With that said, there are independent actors involved in any ultimate decision regarding [*35]

care.

¹³ Court Exhibit 1 states:

[AR] has a very big sensitivity to doors and locks. She calls and text me all the time while I'm at work. She likes to be under my husband as well when I'm not at home. One incident, I was taking her to the dollar store to get her a doll. They only had "white" baby dolls. [AR] expressed that she didn't want the white baby doll because it reminded her of the "the man". I wanted her to get the white baby doll to better explain the situation but she still didn't want it. Even though she has her own room, she always wants to sleep with me. Every time a door locks or makes noise, she gets scared and ask "mama did you hear that? what was that noise?" At the Hotel in Colorado Springs, CO, [AR] was very curious about the doors being locked and made sure the deadbolt lock on the door was in place. [AR] is always under me when we go places and [*33] while at home. I wanted custody back because I felt like I wasn't there to protect her. The story didn't make sense which is why I wanted her back with me because I wanted to keep an eye on her. When I found out what happened, I was sad and upset. I just wanted to have my baby back in my

custody. The ultimate decision on [AR's] custody situation were not necessarily a direct result of the accused's crime.

[AR's] mother and the judge, who awarded custody, made independent decisions. The decision-making process to seek custody, to question oneself, to question [QH], to feel guilt and frustration from the crime are directly impacts of this crime. The ultimate custody decision made by some other court is not.

After both trial and defense counsel's sentencing arguments, the military judge clarified his earlier ruling.

Any argument or suggestion that I considered the ultimate decision regarding the custody of [AR] as a matter in aggravation or victim impact, I have given no weight to. I have considered the custody dispute itself, the emotions involved, the guilt, the stress, the impacts that led [AR's] mother to seek custody as a victim impact, because it directly related to these crimes. I have not considered that [QH, AR's guardian] lost custody of AR as a matter of victim impact. In other words, the accused's crime did not take AR from [QH, her guardian]. I did not consider the evidence in [that] way.

2. Law

HN15 [↑] "Interpreting R.C.M. 1001A is a question of law, which we review de novo." [*36] *United States v. Barker*, 77 M.J. 377, 382 (C.A.A.F. 2018) (citation omitted). However, we review a military judge's decision to admit a victim impact statement offered pursuant to R.C.M. 1001A for an abuse of discretion. *Id.* at 383 (citing *Humpherys*, 57 M.J. at 90).¹⁴ A military judge abuses his discretion when his decision to permit such a statement is based on an erroneous view of the law. *Id.* (citing *United States v. Lubich*, 72 M.J. 170, 173

¹⁴ **HN16** [↑] Appellate courts review a military judge's decision to admit evidence for an abuse of discretion. See, e.g., *Humpherys*, 57 M.J. at 90. In *United States v. Hamilton*, this court held that victim impact statements offered pursuant to R.C.M. 1001A are not "evidence" but nevertheless applied the abuse of discretion standard in reviewing the military judge's decision to allow such statements to come before the court. 77 M.J. 579, 585 (A.F. Ct. Crim. App. 2017) (en banc), rev. granted, 77 M.J. 368 (C.A.A.F. 2018). When the CAAF applied the abuse of discretion standard in *Barker*, it assumed without deciding that such statements are evidence but noted it would decide that question in its review of *Hamilton*. *Barker*, 77 M.J. at 383 n. 9.

(C.A.A.F. 2013)).

HN17 [↑] In the absence of an objection at trial, we review claims of erroneous admission of evidence for plain error, which is established when: (1) there is error; (2) which was plain, clear, or obvious, and (3) the error resulted in material prejudice to Appellant's substantial rights. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007) (citations omitted).

HN18 [↑] Where trial defense counsel objects to the admissibility of evidence on one ground at trial and a different ground on appeal, the new objection on appeal is reviewed under the plain error analysis. *United States v. Barnes*, No. ACM 38720, 2016 CCA LEXIS 267, at *7 (A.F. Ct. Crim. App. 27 Apr. 2016) (un-pub. op.).

HN19 [↑] "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). The Court of Appeals for the Armed Forces (CAAF) held "[w]hile we review forfeited issues for plain error, we cannot review waived issues [*37] at all because a valid waiver leaves no error for us to correct on appeal." *Id.* (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005) (quotation marks and citation omitted)); see also *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008). In determining whether a particular circumstance constitutes a waiver or a forfeiture, we consider whether the failure to raise the objection at the trial level constituted an intentional relinquishment of a known right. *Campos*, 67 M.J. at 332.

HN20 [↑] "However, the CAAF has made clear that the courts of criminal appeals have discretion, in the exercise of their authority under *Article 66*, UCMJ, 10 U.S.C. § 866, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error." *United States v. Lee*, No. ACM 39531, 2020 CCA LEXIS 61, at *17 (A.F. Ct. Crim. App. 26 Feb. 2020) (unpub. op.) (citing *United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018) (quoting *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001); *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016)).

HN21 [↑] *Article 6b*, UCMJ, grants victims of offenses under the UCMJ the right to be reasonably heard at sentencing hearings related to such offenses. 10 U.S.C. § 806b(a)(4)(B). A victim covered by this right is one

"who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under [the UCMJ]." [10 U.S.C. § 806b\(b\)](#).

[HN22](#)[↑] Under R.C.M. 1001A, victims in non-capital cases may exercise their right to be heard through sworn or unsworn statements. R.C.M. 1001A(b)(4)(B). Unsworn statements may be oral, written, or both. R.C.M. 1001A(e). **[*38]** Victims who are under 18 years of age may make an unsworn statement either personally or through a designee appointed under [R.C.M. 801\(a\)\(6\)](#). *Id.* [R.C.M. 801\(a\)\(6\)](#) requires the military judge to appoint a designee in writing.¹⁵ Statements offered under R.C.M. 1001A "may include victim impact or matters in mitigation," and should neither exceed those topics nor recommend a specific sentence. R.C.M. 1001A(c); 1001A(e), Discussion. Similar to the definition under R.C.M. 1001, victim impact under R.C.M. 1001A means "any financial, social, psychological, or medical impact on the victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001A(b)(2).

[HN23](#)[↑] When evidence is improperly admitted during sentencing proceedings, "the test for prejudice is whether the error substantially influenced the adjudged sentence." [Barker, 77 M.J. at 384](#) (internal quotation marks and citations omitted). When determining whether an error substantially influenced a sentence, this court considers the following factors: "(1) the strength of the Government's case; (2) the strength of the defense case; (3) the materiality of the evidence in question; and (4) the quality of the evidence in question." [United States v. Bowen, 76 M.J. 83, 89 \(C.A.A.F. 2017\)](#) (quoting [United States v. Kerr, 51 M.J. 401, 405 \(C.A.A.F. 1999\)](#)). "An error is more likely to be prejudicial **[*39]** if the fact was not already obvious from the other evidence presented at trial and would have provided new ammunition against an appellant." [Barker, at 384](#) (citation omitted).

3. Analysis

Appellant alleges the military judge erred in three respects. First, the military judge did not properly designate JR in writing as AR's designated

representative pursuant to [Article 6b](#), UCMJ; R.C.M. 1001A(e) and [R.C.M. 801\(a\)\(6\)](#). Second, the military judge considered the substance of the entire statement submitted by a non-appointed individual pursuant to [Article 6b](#), UCMJ; R.C.M. 1001A(e) and [R.C.M. 801\(a\)\(6\)](#). Finally, the military judge considered the sentence in JR's written statement regarding custody over defense objection. Appellant's third allegation of error—the one line regarding JR seeking custody in Court Exhibit 1—is preserved by objection. Before we can consider the first two allegations of error, we must determine whether Appellant waived the issue and whether we will apply waiver or forfeiture.

a. Waiver

Appellant appears to have not only waived his right to object to the military judge's failure to appoint JR in writing, but also to the military judge's decision to consider the substance of the remainder of JR's statement.

As to lack of appointment, the record **[*40]** of trial contains no written designation of JR as AR's representative. The only reference to JR having this role is one comment by the senior trial counsel that identified JR as "the [Article 6b](#) guardian" of AR. While there was extensive discussion of whether JR was a victim herself, neither trial defense counsel nor the military judge took issue with the senior trial counsel's comment that JR was AR's [Article 6b](#) representative. Under these circumstances, we find trial defense counsel made a deliberate decision not to present a ground for relief that might be available in the law. We do not know whether trial defense counsel did not present that ground for relief because he knew the military judge had properly appointed JR or because he knew that by objecting the remedy would be for the military judge to then appoint JR. Under either situation, trial defense counsel made a deliberate decision not to present a ground for relief when trial counsel identified JR as "the [Article 6b](#) guardian" of AR and trial defense counsel said nothing in response to that statement except to object to the line concerning custody.

With the admission of the entirety of Court Exhibit 1, this is not simply a **[*41]** case where an exhibit was admitted without any objection or comment from defense counsel. Here, prior to admitting Court Exhibit 1, the military judge asked if there were any objections and defense counsel expressly indicated that he had none other than "the line about the biological mother

¹⁵ [R.C.M. 801\(a\)\(6\)](#) no longer requires the designation in writing from the military judge. See Exec. Order 13,825, [83 Fed. Reg. 9889](#) (8 Mar. 2018); *Manual for Courts-Martial, United States* (2019 ed.).

taking custody back." See [United States v. Davis](#), 79 M.J. 329, 331 (C.A.A.F. 2020); [United States v. Ahern](#), 76 M.J. 194, 198 (C.A.A.F. 2017). [HN24](#) [↑] However, the CAAF has made clear that the Courts of Criminal Appeals have discretion, in the exercise of their authority under [Article 66](#), UCMJ, [10 U.S.C. § 866](#), to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error. See, e.g., [United States v. Hardy](#), 77 M.J. at 442-43. Thus, even if Appellant waived both issues, this court must determine whether an error exists that merits piercing his waivers. See [Hardy](#), 77 M.J. at 443. On its face, Appellant's assignment of error suggests that the court-martial may have admitted and considered a victim impact statement delivered by a person who was not properly appointed pursuant to [Article 6b](#), UCMJ, R.C.M. 1001A(e), and 801(a)(6); the admission of which prejudiced Appellant. Accordingly, we find it appropriate to address the substance of Appellant's claims. See [Lee](#), 2020 CCA LEXIS 61 unpub. op. at *17.

b. Lack of Designation in Writing

As stated above, it is possible [*42] there was no comment by trial defense counsel because the military judge had already appointed JR in writing prior to trial. In that case, as we have seen with other record of trial omissions, appellate government counsel could have moved to attach the military judge's written designation in an attempt to show Appellant suffered no material prejudice because the error did not affect the proper appointment of JR. Here, the Government did not file a motion to attach a written appointment by the military judge. Instead, the Government's answer to this assignment of error simply states, "Unfortunately here, there is no discussion on the record concerning AR's mother having been appointed her designee." Under these circumstances, we will presume a written appointment never happened. Failure by the military judge to appoint a designee in writing is a clear and obvious error. As such, after examining Appellant's remaining allegations of error by the military judge, we will test for material prejudice below.

c. Consideration of Substance of the Entire Statement

Considering the substance of the entire statement submitted by a non-appointed individual pursuant to [Article 6b](#) is a clear and obvious [*43] error. Trial

counsel's statement that JR is the "[Article 6b](#) guardian of [AR]" does not eliminate this error as trial counsel had no authority to appoint JR. [R.C.M. 801\(a\)\(6\)](#) reserves this responsibility solely to the military judge. As such, after examining Appellant's remaining allegation of error by the military judge, we will test for material prejudice below.

d. Line About Custody

As noted above when the trial defense counsel objected to "the line about the biological mother taking custody back," the military judge overruled the objection. Our review of Court Exhibit 1 reveals one sentence that specifically uses the word "custody," although two other sentences discuss having AR back with JR. The line referencing custody states: "I wanted custody back because I felt like I wasn't there to protect her."

Since this objection was properly preserved at trial we will consider whether the military judge abused his discretion. The military judge made two clarifying rulings on how he would consider the loss of custody by QH after he admitted Court Exhibit 1. In the first ruling, he twice referenced "victim impact testimony" and never referenced Court Exhibit 1, a written unsworn statement. We find his first [*44] clarification ruling only applied to the testimony of QH and not the written unsworn statement of JR given on AR's behalf. [HN25](#) [↑] A written unsworn statement and testimony are two different things. The first is governed by R.C.M. 1001(b)(4), is evidence in aggravation, and is limited by Mil. R. Evid. 403. The second is governed by R.C.M. 1001A, is in-dependent of whether a witness testified, and implements the victim's right to be reasonably heard.

We also conclude the military judge's second clarification ruling also did not address his admission of Court Exhibit 1. The military judge stated, "In other words, the accused's crime did not take AR from [QH, her guardian]. I did not consider the evidence in [that] way." As we have held that a victim unsworn statement is not "evidence" and this precedent was binding on the military judge, we conclude that once again, the military judge was referring to the testimony of QH and not the written unsworn statement of JR. [United States v. Hamilton](#), 77 M.J. 579, 585 (A.F. Ct. Crim. App. 2017) (en banc), rev. granted, 77 M.J. 368 (C.A.A.F. 2018).

We now must determine whether the line that JR wrote—"I wanted custody back because I felt like I wasn't there to protect her"—was victim impact of AR.

We find this statement to not reference victim impact that AR suffered, but instead shows what JR's [*45] state of mind was upon learning of the offense that Appellant committed. This statement did not include direct "financial, social, psychological, or medical impact" that AR suffered and was therefore improper for consideration under R.C.M. 1001A(b)(2) as victim impact. As the senior trial counsel made clear, JR was not attempting to make her own victim impact statement, she was only exercising AR's right to be reasonably heard under R.C.M. 1001A(e). Under these circumstances, we find the military judge abused his discretion when he permitted JR to include a line in the unsworn statement about JR's rationale for seeking custody of AR. We test for material prejudice below.

e. Material Prejudice

[HN26](#)[↑] "The test for prejudice is whether the error substantially influenced the adjudged sentence." [Barker, 77 M.J. at 384](#) (internal quotation marks and citations omitted). When determining whether an error substantially influenced a sentence, we examine the strength of the Government's case, the strength of the Defense's case; and the materiality and quality of Court Exhibit 1. *Id.*

Here, the Government's case was exceptionally strong. Appellant admitted variations of his guilt to two different law enforcement agencies. Appellant's video recorded statement [*46] to AFOSI was admitted into evidence, as well as the security videos from the ship. Trial counsel introduced testimony from HB and QH during presentencing, the substance of which is detailed above. AR testified during findings that when she saw Appellant in her room she was "sad" and she "just wanted to punch him in the eye."

In contrast, the Defense's case was comparatively weak. Appellant's presentencing case consisted of an unsworn written and oral statement, two character letters, and accolades that Appellant received.

The materiality and quality of the one paragraph unsworn statement by JR as Court Exhibit 1 was limited. JR states AR is sensitive to doors being locked, always likes to sleep with her mother, is always around her mother, and she did not like a white baby doll because it reminded her of "the man." Similar information was already before the military judge in the form of testimony from QH who testified that AR slept beside her, followed her every move, and did not want to be by herself. See [United States v. Harrow, 65 M.J. 190, 200 \(C.A.A.F.](#)

[2007\)](#) ("When a fact was already obvious from . . . the testimony at trial' and the evidence in question 'would not have produced any new ammunition,' an error is likely to be harmless.") [*47] (alteration in original) (citations omitted)). Although the testimony of QH was describing AR's reactions with QH vice her biological mother, JR, the reactions of AR to Appellant's crimes are the crux of the evidence.

The maximum sentence available in this case was a dishonorable discharge, confinement for 20 years and 6 months, forfeiture of all pay and allowances, and reduction to E-1. The trial counsel argued for a dishonorable discharge, confinement for five years, total forfeiture of all pay and allowances and reduction to E-1. Appellant was sentenced to a dishonorable discharge, 1 year and 10 months of confinement, forfeiture of all pay and allowances, reduction to E-1, and a reprimand despite the admission of Court Exhibit 1 and comparative weakness of Appellant's sentencing case.

[HN27](#)[↑] Moreover, it is highly relevant when analyzing the impact of the error on the sentence that the case was tried before a military judge, who is presumed to know the law. [Barker, 77 M.J. at 384](#) (citing [United States v. Bridges, 66 M.J. 246, 248 \(C.A.A.F. 2008\)](#) (citations omitted)). We find the admission of Court Exhibit 1 did not substantially influence Appellant's sentence.

III. CONCLUSION

The approved findings and sentence are correct in law and fact, and no error materially prejudicial [*48] to the substantial rights of Appellant occurred. [Articles 59\(a\)](#) and [66\(c\)](#), UCMJ, [10 U.S.C. §§ 859\(a\), 866\(c\)](#).

Accordingly, the findings and the sentence are **AFFIRMED**.



Positive

As of: March 21, 2024 2:10 PM Z

United States v. Jones

United States Army Court of Criminal Appeals

November 6, 2019, Decided

ARMY 20180189

Reporter

2019 CCA LEXIS 450 *; 2019 WL 5849054

UNITED STATES, Appellee v. Sergeant MARCUS F. JONES, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Review denied by [United States v. Jones, 2020 CAAF LEXIS 263 \(C.A.A.F., May 6, 2020\)](#)

Prior History: [*1] Seventh Army Training Command. Joseph A. Keeler, Military Judge, Lieutenant Colonel Joseph B. Mackey, Staff Judge Advocate.

Case Summary

Overview

HOLDINGS: [1]-The servicemember's sentence was proper even though it was error to allow the government to introduce the victim's statement because the servicemember suffered no prejudice. Rather than the victim's email, the facts surrounding the crimes—the servicemember's status as a 31-year-old married non-commissioned officer, his actions with the victim, his tenaciousness in seeking out under-aged girls, his text messages, and his preparations for sexual relations—were what influenced the sentence.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Courts Martial > Evidence

Military & Veterans Law > Military Justice > Judicial

Review > Standards of Review

[HN1](#) **Courts Martial, Evidence**

A military judge's decision to admit evidence is reviewed for an abuse of discretion. A military judge abuses his discretion when he admits evidence based on an erroneous view of the law. The law at the time of appeal rather than the law at the time of trial is applied.

Military & Veterans

Law > ... > Evidence > Admissibility of

Evidence > Real Evidence & Writings

[HN2](#) **Admissibility of Evidence, Real Evidence & Writings**

The government cannot offer a victim's unsworn statement as part of its presentencing case. R.C.M. 1001A, Manual Courts-Martial is itself part of the presentencing procedure, and is temporally located between the trial and defense counsel's respective presentencing cases. It belongs to the victim, and is separate and distinct from the government's right under R.C.M. 1001(b)(4), Manual Courts-Martial.

Military & Veterans Law > ... > Courts

Martial > Evidence > Admissibility of Evidence

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

[HN3](#) **Evidence, Admissibility of Evidence**

In military justice cases, the test for prejudice is whether the error substantially influenced the adjudged sentence. In evaluating prejudice, courts weigh (1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in

question, and (4) the quality of the evidence in question.

Counsel: For Appellant: Lieutenant Colonel Tiffany D. Pond, JA; Major Julie L. Borchers, JA; Captain Oluwaseye Awoniyi, JA (on brief).

For Appellee: Colonel Steven P. Haight, JA; Lieutenant Colonel Wayne H. Williams, JA; Major Craig Schapira, JA; Major Meghan Peters, JA (on brief).

Judges: Before BROOKHART, SALUSSOLIA, and SCHASBERGER, Appellate Military Judges.

Opinion

SUMMARY DISPOSITION

Per Curiam:

Sergeant Marcus F. Jones asks that we set aside his sentence and order a rehearing because the military judge improperly allowed the government to introduce a statement by the victim during the government's presentencing case. We agree that it was error to allow the government to introduce the victim's statement. However, as we find that appellant suffered no prejudice, we decline to order a sentence rehearing and affirm the sentence approved by the convening authority.¹

A military judge sitting as a general court-martial convicted appellant, consistent with his pleas, of one specification of attempted sexual assault of a child, one specification of attempted sexual abuse of a child, and one specification [*2] of sexual abuse of a child, in violation of [Articles 80](#) and [120b](#), Uniform Code of Military Justice, [10 U.S.C. §§ 880](#) and [920b](#) [UCMJ]. The military judge sentenced appellant to a dishonorable discharge, confinement for four years and six months, and reduction to the grade of E-1. The convening authority, in accordance with a pretrial agreement, approved the dishonorable discharge, confinement for thirty-six months, and reduction to E-1.²

¹We have given full and fair consideration to the matters personally raised by appellant pursuant to [United States v. Grostefon](#), 12 M.J. 431 (C.M.A. 1982), and find they are without merit.

²The military judge granted appellant eighteen days of confinement credit that the convening authority's action failed to reflect. So far as appellant has not already received such credit, he shall be credited eighteen days against his

Appellant's case is now before us for review pursuant to [Article 66, UCMJ](#).

BACKGROUND

Appellant, a thirty-one-year-old married non-commissioned officer stationed in Germany, wanted to engage in sexual relations with a "girl to call [him] daddy." To find such a girl, he placed an advertisement in the "casual encounters" page on the local Craigslist.

The advertisement worked; a fifteen-year-old Romanian girl living in Germany responded. Appellant exchanged emails with AB and ultimately met her in person three or four times. During these meetings, appellant kissed AB and told her that he wanted to have sex. She declined. As she would not have sex with him, appellant ended their relationship.

Appellant again turned to Craigslist seeking a sexual encounter. This time, he responded [*3] to a Craigslist advertisement from an individual he thought was a fourteen-year-old girl named "Kelly." After sending "Kelly" sexually explicit emails describing his penis size and the sexual acts he wanted to perform with her, appellant arranged to meet "Kelly." Appellant brought condoms, lubricant, penis rings, and candy to "Kelly's" house and knocked on the door. He was greeted by military law enforcement agents, who promptly arrested appellant.

Appellant entered into a pretrial agreement with the government. Therein, he agreed to plead guilty to sexually abusing AB, as well as the attempts at sexual misconduct with regard to "Kelly." Initially, AB agreed to testify as part of the presentencing proceedings. After preparing to testify, AB got cold feet. On the day of trial, AB told the government she did not want to testify, and instead she sent an email to the trial counsel entitled "Notes regarding Mr. Jones."

The email was in question and answer format. AB answered questions such as, "How did it make you feel as a person?" and "Did it affect your view of the [A]rmy?" In her responses, AB stated appellant made her feel "guilty" and like a "bad person," and that she felt like she [*4] disappointed him for not wanting a sexual relationship. She also stated she is no longer as naïve as she was, or as trusting. She specifically stated that

sentence. See Army Reg. 27-10, Legal Services: Military Justice, para. 5-32.a (11 May 2016); [United States v. Arab](#), 55 M.J. 508, 510 n.2 (Army Ct. Crim. App. 2001).

she does not blame the Army or think worse about the Army because of appellant's actions.

The government moved to enter AB's email as Prosecution Exhibit 3. The defense objected on the grounds that it was neither proper Rule for Courts-Martial [R.C.M.] 1001(b)(4) evidence, nor was it proper under R.C.M. 1001A. Specifically, the defense argued AB's email lacked foundation, contained hearsay without an exception, was in question and answer format, and was improperly offered as part of the government's presentencing case. After argument on the issue, the military judge admitted a redacted version of the email offered by the government under R.C.M. 1001A.

LAW AND DISCUSSION

HN1[↑] A military judge's decision to admit evidence is reviewed for an abuse of discretion. United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002) (citation omitted). A military judge abuses his discretion when he admits evidence based on an erroneous view of the law. United States v. Lubich, 72 M.J. 170, 173 (C.A.A.F. 2013). We apply the law at the time of appeal rather than the law at the time of trial. United States v. Harcrow, 66 M.J. 154, 159 (C.A.A.F. 2008).

At the time of appellant's trial, there was little precedent on how to implement R.C.M. 1001A. Since that time, the Court of Appeals [*5] for the Armed Forces [CAAF] decided United States v. Barker, 77 M.J. 377 (C.A.A.F. 2018) and United States v. Hamilton, 78 M.J. 335 (C.A.A.F. 2019), and this court decided United States v. Cornelison, 78 M.J. 739 (Army Ct. Crim. App. 2019). While the facts of these cases are not directly on point, taken together, they make it clear that **HN2**[↑] the government cannot offer a victim's unsworn statement as part of its presentencing case. As the CAAF stated in *Barker*, "R.C.M. 1001A is itself part of the presentencing procedure, and is temporally located between the trial and defense counsel's respective presentencing cases. It belongs to the victim, and is separate and distinct from the government's right . . . under R.C.M. 1001(b)(4)." 77 M.J. at 378 (emphasis in original).

Based on *Barker*, *Hamilton*, and *Cornelison*, we find the military judge abused his discretion by allowing the government to introduce AB's email as an unsworn statement during its presentencing case. We then turn to whether this error prejudiced appellant. **HN3**[↑] The test for prejudice "is whether the error substantially influenced the adjudged sentence." United States v.

Sanders, 67 M.J. 344, 346 (C.A.A.F. 2009) (citation omitted). In evaluating prejudice, we weigh "(1) the strength of the government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." United States v. Bowen, 76 M.J. 83, 89 (C.A.A.F. 2017) (citation omitted).

Here, the government's sentencing case [*6] was strong. The stipulation of fact explicitly detailed appellant's crimes. It highlighted appellant's efforts to pressure and take advantage of AB, and when that did not suffice, his attempt at having sexual relations with a girl he presumed was fourteen. The defense case consisted of appellant apologizing in an unsworn statement, along with a "Good Soldier Book" with statements of support discussing how appellant changed after his misconduct was discovered. As to the last two factors, AB's email did introduce some new information, specifically that she felt guilty and was less trusting. Given the nature of the crimes, her reaction is neither surprising nor particularly prejudicial.³ Additionally, the email indicated that AB neither blamed nor thought worse of the Army after appellant's misconduct, which ultimately worked to appellant's benefit and further undermined the materiality of the AB's email on appellant's sentence.

Rather than AB's email, we find the facts surrounding appellant's crimes—his status as a thirty-one-year-old married non-commissioned officer, his actions with AB, his tenaciousness in seeking out under-age girls, his text messages, and his preparations for sexual [*7] relations—were what influenced the sentence.

CONCLUSION

Upon consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

End of Document

³ When we compare AB's email to the text messages sent by appellant to "Kelly" describing the sexual acts he planned to perform on a fourteen-year-old girl, it is clear that AB's email was far less aggravating and material to appellant's sentence than the text of the messages themselves.

CERTIFICATE OF SERVICE, U.S. v. MARTIN (20230234)

I certify that a copy of the foregoing was sent via electronic submission to
the Defense Appellate Division at [REDACTED]
[REDACTED] on the 4th day of June, 2024.

[REDACTED]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546