**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES**,<br>*Appellant*, | ) | **UNITED STATES' MOTION FOR ORAL ARGUMENT** |
| v. | ) | Before Panel No. 1 |
| Staff Sergeant (E-5)<br>**REMINGTON E. CARLISLE**<br>United States Air Force<br>*Appellee.* | ) | Misc. Dkt. No. 2024-03<br><br>6 May 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 25 of this Court's Rules of Practice and Procedure, the United States requests oral argument on the issue presented in this case. The subject of this appeal requires detailed analysis of a nuanced ruling that involved the exclusion of 33 obscene images of what appear to be children engaged in sexually explicit conduct. Oral argument will assist this Court in identifying the parties' interpretations of the President's enumerated offense, where the parties disagree, and how the military judge abused his discretion. Oral argument will also permit the Court to present hypotheticals to test the parties' positions on what constitutes child pornography as enumerated by the President under Article 134, UCMJ.

Whether obscene cartoon images of children could constitute child pornography under Article 134, UCMJ, is a question that has yet to be addressed in a published opinion by the service courts or our superior court. Oral argument will permit a robust exploration of an issue with implications for many cases in the Air Force and our sisters services.

For these reasons, the United States respectfully requests that this Honorable Court grant for oral argument.

DENIED
14 MAY 2024

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 May 2024.

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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES**,<br>*Appellant,* | ) | **UNITED STATES' REPLY UNDER ARTICLE 62, UCMJ** |
| v. | ) | Before Panel No. 1 |
| Staff Sergeant (E-5)<br>**REMINGTON E. CARLISLE**<br>United States Air Force<br>*Appellee.* | ) | Misc. Dkt. No. 2024-03<br><br>6 May 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Under Rule 20(c) of this Honorable Court's Rules of Practice and Procedure, the United States replies to Appellee's Answer (Ans. Br.) to the United States' brief in support of the issue presented (Gov. Br.), filed on 6 April 2024.

## ARGUMENT

A picture, painting, or drawing can visually depict a person, even if it lacks realism. And a visual depiction constitutes child pornography when the image is "either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." Manual for Courts-Martial, pt. IV, ¶95.c.(4) (2019 ed.). The image may "include sexually explicit images that may not actually involve minors, but either resemble or are staged to appear so." MCM, pt. IV, ¶95.c.(1) (2019 ed). The military judge abused his discretion when he misapprehended the law. He incorrectly interpreted the definitions of child pornography under Article 134, UCMJ, and incorrectly decided the 33 obscene cartoon images of what appear to be children or resemble children were irrelevant for the charges of child pornography.

### *A. A military judge abuses his discretion when he gets the law wrong, as the military judge did in this case; evaluating whether his legal conclusions were clearly unreasonable or clearly erroneous is not the test.*

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017). The appellate court's review of a legal matter is binary. The military judge either used the correct law or he did not. United States v. Garcia, 80 M.J. 379, 385 (C.A.A.F. 2020); United States v. Becker, 81 M.J. 483, 488 (C.A.A.F. 2021). This Court should review the law de novo – interpreting the enumerated child pornography offense for itself. United States v. Mitchell, 76 M.J. 413, 421 (C.A.A.F. 2017). Then this Court should apply that interpretation to the military judge's ruling to see if he correctly applied the law. The military judge either understood the law or he did not. Here, he did not. Thus, he abused his discretion.

Appellee uses the clearly erroneous and clearly unreasonable standards throughout his brief. (Ans. Br. at 6, 9, 10, 11, 18, 20). But appellate courts only use the clearly erroneous and unreasonable standard for a military judge's findings of fact and in reviewing the military judge's application of the facts to the law, not for matters of law. Garcia, 80 M.J. at 385; Becker, 81 M.J. at 488. This Court should not deviate from precedent to use the clearly erroneous or unreasonable standards for matters of law.

### *B. The military judge abused his discretion when he incorrectly interpreted the definitions under the Article 134, UCMJ, child pornography offense.*

Appellee's brief highlights and amplifies the main error in the military judge's analysis. (Ans. Br. at 5.) The military judge found ambiguity as to whether "fictional characters are 'persons' as contemplated by the penal provisions." (Id. citing App. Ex. XXIX at 9.) But this was the wrong question because it took the word "person" out of the context of the rest of the presidential explanations and definitions.

When discussing statutory interpretation principles, the military judge stated the context of the plain language should be used in determining the meaning of the words of the offense: "Whether the statutory language is ambiguous is determined 'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." (App. Ex. XXIX at 6) (citing United States v. McPherson, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)). Then he promptly disregarded this requirement of statutory interpretation when he excised the word "person" from the text and analyzed it in isolation. (App. Ex. XXIX at 7). He failed to analyze the word with its qualifiers and in its full context: "visual depiction of a minor [any person under the age of 18]." This failure to use the context of the words "visual depiction" with "minors," caused the military judge to erroneously hold that cartoon images of fictional that appear to be children could not constitute child pornography. (App. Ex. XXIX at 10).

The correct legal question is whether cartoons of fictional child characters constitute any digital or computer image or picture – made by any means – of what appear to be or resemble any person under the age of 18. They do. Child pornography, of what appears to be minors, means material that contains *any* obscene developed or undeveloped photograph, picture, film, or video of a person under the age of 18 years engaging in sexually explicit conduct or *any* obscene digital or computer image, picture, film, or video made by any means of a person under the age of 18 years engaging in sexually explicit conduct. MCM, pt. IV, ¶95.c.(4, 7, 11) (2019 ed.). In addition, "the images include sexually explicit images that may not actually involve minors, but either resemble[1] or are staged to appear so." MCM, pt. IV, ¶95.c.(1) (2019 ed.).

[1] Resemble means "to be like or similar to" or "to represent as like." Resemble, MERRIAM WEBSTER'S DICTIONARY (2024 online ed). Appellee incorrectly interprets the phrase "may not actually involve minors, but either resemble or are staged to appear so" to mean that the images

"Any" is used five times in the definition of visual depiction without qualification. *See* MCM, pt. IV, ¶95.c.(11) (2019 ed.). The word "any" means "every," "all," or "unmeasured or unlimited in amount, number, or extent." Any, MERRIAM WEBSTER'S DICTIONARY (2024 online ed.). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" United States v. Gonzales, 520 U.S. 1, 5 (1997) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)). The Supreme Court only limits the expansive interpretation of the term if "language limiting the breadth of that word" is in the statute. Id. The President's definition of visual depiction does not limit the breadth of the term "any." Thus, no ambiguity exists in the offense of child pornography because the term "any" must be interpreted expansively. The unqualified term includes the charged images here – 33 animated digital, cartoon images of what appear to be or resemble children engaging in sexually explicit conduct.

The military judge suggested that some cartoons might meet the definition of child pornography. He stated his decision might be different if "these videos and images were produced through technology that simply turns 'pictures' of child pornography (actual minors) into cartoon versions of the same." (App. Ex. XXIX at 9). The military judge also said his ruling could have been different "if there were evidence that [the] Accused, . . . took non-cartoon child pornography images and used technology to convert them into anime/hentai cartoons." (Id.) To fulfill this arbitrary conversion requirement, the government would need to prove someone converted a real image into a cartoon image – an element the President does not

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must resemble actual minors. (Ans. Br. at 11). But this interpretation is unreasonable because the phrase "actual minors" is absent from the President's explanation in ¶95.c.(1). The phrase should be interpreted to mean that the images could look like a minor, but no actual minors are required.

require. And under the military judge's logic, a person drawing an obscene image of a child from their imagination could not be child pornography. The military judge's logic ignores the unqualified use of the term "any" within the President's definition of visual depiction.

The military judge also said his ruling may have been different if this was "a case where the cartoon images closely resembled actual persons, actual human beings, rather than fictional characters related to established genre of artistic expression." (Id.) Under the military judge's logic, only nonfictional depictions could constitute child pornography – an element that the President did not include in the offense. Thus, an obscene cartoon of Shirley Temple – a real child – could constitute child pornography, but an obscene cartoon of Little Orphan Annie – a fictional child – could not. Such an interpretation would create arbitrary results and ignores the unqualified use of the term "any" within the President's definition of visual depiction.

If the military judge's interpretation is allowed to stand, it will create a precedent in which military judges arbitrarily make interlocutory factual determinations as to what images are realistic enough visual depictions to constitute child pornography under Article 134. This would be an illogical result and invade the province of the factfinder. Instead, this Court should resolve the legal question by deciding that cartoons of any type or level of realism are potentially included in the President's definition of child pornography and leave it to the factfinder to decide whether they "appear to be" or "resemble a minor."[2] This resolution would comport with the plain language of the definition of "visual depiction" which makes clear that *any* digital or computer image or picture resembling a minor, made by *any* means, can constitute child pornography if it is obscene and depicts the minor engaging in sexually explicit conduct.

[2] For example, a factfinder could determine that a crudely drawn stick figure did not "appear to be" or "resemble" a minor. (*See* Ans. Br. at 10.)

### *C. Article 134 child pornography is not wed to 18 USC §2252A. The President intended for Article 134 to encompass and expand beyond the misconduct criminalized in 18 USC §2252A.*

Article 134 is not exclusively tied to 18 USC §2252A, and the plain language of Article 134 criminalizes additional misconduct that is not articulated in §2252A such as possessing, receiving, and viewing obscene visual depictions of what appear to be minors. Appellee and the military judge argue that child pornography under Article 134, UCMJ, is exclusively tied to 18 USC §2252A. (Ans. Br. at 15; App. Ex. XXIX at 9). But the President's language in the explanation would dispel that theory. "The Article 134 offense of child pornography is *broader* than the federal and state statutes referenced below and extends to visual depictions of what appear to be minors." MCM, pt. IV, ¶95.c.(1) (2019 ed.) (emphasis added). The federal statutes "referenced below" are 18 USC §2251; §2252A, and §1466A. MCM, pt. IV, ¶95.c.(2) (2019 ed.).

The Article 134 offense of child pornography is *broader* than 18 USC §2251; §2252A, and §1466A, and not exclusively tied to any of them. Title 18 USCS §2252A criminalizes the mailing, receiving, distributing, possession, accessing, and production with intent to distribute sexually explicit images of actual minors or the distribution of "an obscene visual depiction of a minor engaging in sexually explicit conduct, or a visual depiction of an actual minor engaging in sexually explicit conduct." But §2252A does not criminalize possessing or receiving, obscene visual depictions of what appear to be minors – Article 134 does. The fact that Article 134 criminalizes possession and receipt of obscene visual depictions means it must encompasses more than §2225A. Thus Article 134 is not exclusively wed to §2225A as Appellee claims.

In addition, 18 USC §2251 essentially criminalizes various means of child pornography production (the employment, use, persuasion, inducement, enticement, coercion, or

transportation of any minor to produce any sexually explicit visual depiction). But §2251 does not criminalize possessing or receiving, obscene visual depictions of what appear to be minors – Article 134 does. What is more, 18 USC §1466A criminalizes obscene visual representations of the sexual abuse of children to include producing, distributing, receiving, or possessing with intent to distribute, "a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting." But §1466A does not criminalize viewing obscene visual depictions of what appear to be minors – Article 134 does. Article 134 is broader than §1466A. The fact that Article 134 criminalizes possessing, receiving, and viewing obscene visual depictions of what appear to be minors must mean it encompasses more than §2251 and §1466A. Article 134 criminalizes more misconduct than the federal statutes referenced in the President's explanation.

Article 134's references to obscenity show that the President intended Article 134 child pornography to be based on more than just §2252A because it criminalizes conduct laid out under §1466A as well. As a result, the military judge incorrectly gave credence to the defense argument that the language of Article 134 Child Pornography "remains wedded to that of §2252" and therefore cannot include cartoon images. (App. Ex. XXIX at 9.) On the contrary, Article 134 was intended to encompass §1466A, and therefore there is no reason to conclude Article 134's definitions were meant to exclude cartoon images.

### *D. Carpenter is persuasive authority that the military judge should have considered to resolve the alleged ambiguity in the enumerated offense of child pornography.*

Even if ambiguity did exist in Article 134, the military judge should have considered the persuasive authority from this Court in United States v. Carpenter to resolve the supposed ambiguity. 2016 CCA LEXIS 15, *28-29 (A.F. Ct. Crim. App. 14 January 2016). Courts "may also resort to case law to resolve any ambiguity, although fundamentally 'case law must comport with [the statute], not vice versa.'" United States v. Schmidt, 82 M.J. 68, 73 (C.A.A.F. 2022)

(Sparks, J., announcing the judgment of the court) (internal citations omitted). Thus, the military judge should have considered Carpenter, rather than disregarding it. (App. Ex. XXIX at 5). The military judge said, "AFCCA resolved [Carpenter] on factual sufficiency grounds, did not discuss why 'anime' fit within the definitions of Article 134 Child Pornography." (Id.) But this Court was not required to expand on its conclusions. United States v. Clifton, 35 M.J. 79, 81 (CMA 1992). To resolve the alleged ambiguity, the military judge failed to apply this Court's ultimate holding that the offense of anime child pornography was legally and factually sufficient, meaning that obscene anime of what appears to be children fit the definition of child pornography.

In this case, Appellee is charged with "obscene visual depictions of what appear to be minors engaging in sexually explicit conduct." (*Charge Sheet*, dated 12 December 2023, ROT, Vol. 1). The charge and specifications align with the President's explanation of child pornography. MCM, pt. IV, ¶ 95 (2019 ed.) (child pornography is "an obscene visual depiction of a minor engaging in sexually explicate conduct" and "extends to visual depictions of what appear to be minors"). In Carpenter, Appellant was charged with "knowing and wrongful possession of child pornography, to wit: videos and digital images of a minor, and what appears to be a minor, engaging in sexually explicit conduct." 2016 CCA LEXIS 15 *28-29. This Court said that anime could constitute "visual depictions of what appear to be children engaged in sexually explicit conduct." Id. In other words, according to this Court, anime can meet the same definition of child pornography that is currently enumerated in Article 134 and charged in this case.

Under Article 66(c)[3], this Court in Carpenter was only permitted to affirm findings and a sentence that was correct in law and fact. Id. And rather than excising the anime portion of the offense as improper, this Court decided the offense was correct in *law* and fact. Id. This Court could not have found the conviction legally sufficient or correct in law unless the anime evidence supported the charged language. 10 USC §866(c)(2016). This Court decided that anime fit squarely into the phrase "visual depiction of what appears to be a minor." 2016 CCA LEXIS at *28-29. It found no ambiguity in the term "visual depiction of what appear to be a minor" that would potentially exclude anime images. No ambiguity exists in this case either because the President used the term "any" without qualification when defining visual depiction. And the definition encompasses all mediums, all levels of realism, and all images of fictional and nonfictional children. This Court should rely on Carpenter and the President's explanations to reiterate that fictional cartoon pornography can be child pornography if it is obscene and portrays a minor or what appears to be a minor in a sexually explicit situation.

## CONCLUSION

The military judge abused his discretion when he misapprehended the law. He incorrectly interpreted the definitions of child pornography under Article 134, UCMJ, and incorrectly decided the 33 obscene cartoon images of what appear to be children or resemble children were irrelevant for the charges of child pornography. Sexually explicit cartoons – even if fictional – of what appear to be minors or which resemble minors unambiguously fit within the President's definition of child pornography under Article 134, UCMJ, and the 33 images were relevant to the offense of child pornography. Since the military judge abused his discretion, the

[3] Article 66(c) (2016) is now Article 66(d)(2023).

United States respectfully requests that this Honorable Court vacate the military judge's ruling to exclude images of animated child pornography.

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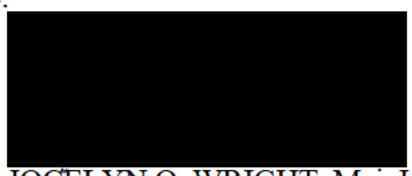
**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 6 May 2024.



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**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| **UNITED STATES,** *Appellant,* | ) | **APPELLEE'S ANSWER TO UNITED STATES' APPEAL UNDER ARTICLE 62, UCMJ** |
| v. | ) | |
| | ) | Before Panel No. 1 |
| Staff Sergeant (E-5) **REMINGTON E. CARLISLE,** United States Air Force, | ) | Misc. Dkt. No. 2024-03 |
| *Appellee.* | ) | 29 April 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

## INTRODUCTION

The military judge did not abuse his discretion because his decision was not arbitrary or fanciful, clearly unreasonable, or clearly erroneous. The military judge's findings of fact and conclusions of law—amounting to a ten-page single-spaced ruling limited to the 33 charged images and videos in this case—were thorough and were supported by the evidence provided in the record, which this Court now reviews in the light most favorable to the Appellee.

## STATEMENT OF THE CASE

SSgt Remington E. Carlisle, Appellee, generally accepts the government's discussion of the procedural background of the case. To provide more clarification, however, the three specifications at issue were charged not as violations of the general article of clause 2 of Article 134, Uniform Code of Military Justice (UCMJ), but rather as violations of the enumerated offense of Child Pornography. Charge Sheet, 10 October 2023; *Manual for Courts-Martial* (*MCM*), Part IV, ¶68b.b.(1), (3) (2016 ed.); *MCM*, Part IV, ¶95.b.(1), (3) (2019 ed.).[1]

[1] Appellee agrees the government charged the specifications at issue as straddling offenses between on or about 1 November 2018 and on or about 17 June 2021. Charge Sheet, 10 October 2023.

## STATEMENT OF FACTS

On 19 July 2023, SSgt Carlisle's commander preferred one charge and three specifications of possession, distribution, and viewing of obscene visual representations of the sexual abuse of children, in violation of 18 U.S.C. § 1466A, as assimilated. App. Ex. XIII at 10.

On or about 30 August 2023, an Article 32 preliminary hearing report was completed by the Preliminary Hearing Officer (PHO). *Id*. at 13-19. The PHO recommended that the government charge SSgt Carlisle under Article 134's enumerated offense for Child Pornography, rather than assimilate federal offenses. *Id.* at 19. In support of his recommendation, the PHO quoted Judge Stucky's dissent in *United States v. Medina*: "It is a mystery to me why, after this Court's ten-year history of invalidating convictions for child pornography offenses under clause 3, and of upholding convictions for such offenses under clause 2, we continue to see cases charged under clause 3." *Id*. at 13 (quoting *United States v. Medina*, 66 M.J. 21, 29 n.1 (CAAF 2008) (Stucky, J. dissenting)). The PHO acknowledged that Judge Stucky's commentary in *Medina* pre-dates the creation of the enumerated offense, but he failed to acknowledge that it referred to the assimilation of child pornography under 18 U.S.C. § 2252A, not 18 U.S.C. § 1466A. *Id*.

On 3 October 2023, the charge and its specifications were withdrawn and dismissed and the current charges were preferred and referred as violations of the enumerated Article 134, UCMJ, Child Pornography. *Id*. at 11; Charge Sheet, 10 October 2023.

On 22 January 2024, the government provided a Bill of Particulars to the defense, which stated that all the files to be introduced by the government were anime-type pornography. App. Ex. XIII at 21-24. On 25 January 2024, the defense filed a motion in limine, requesting that the military judge exclude the animated files and images that the government had provided notice of because they are not within the ambit of Article 134, UCMJ, Child Pornography, nor contemplated by the Manual for Courts-Martial. *Id*. at 1-24.

The military judge made the following findings of fact:

1. Originally Accused faced one charge with three specifications under Article 134 (Clause 3) related to "obscenity" -- one specification each of possessing, distributing, and viewing "obscene depictions of minors engaging in sexually explicit conduct that were transported via interstate commerce by a computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital." On advice of the Preliminary Hearing Officer, the Government converted the §1466A obscenity charges into enumerated Article 134, UCMJ, Child Pornography charges.

2. Thus, Accused now faces trial by general court-martial for one charge with three specifications related to child pornography -- one specification each of possessing, distributing, and viewing child pornography ("obscene visual depictions of what appear to be minors engaged in sexually explicit conduct"), all in violation of Article 134, UCMJ. The alleged offenses occurred between 1 November 2018 and 17 June 2021.

. . .

6. On 22 January 2024, in response to a Defense demand, the Government provided a Bill of Particulars which detailed the 33 obscene visual depictions it intended to offer to prove the charged offenses. All of these visual depictions fall into the broad category of "anime" (a style of Japanese animation) or "hentai" (a genre of Japanese anime characterized by overtly sexualized characters and sexually explicit images and plots).

. . .

7. The 33 obscene visual images maintain the artistic style of the image above in that generally they all include the large and emotive eyes common to the medium of expression, but are graphic in most other details. Most of the characters in the charged videos and images appear to have the developmental age of a child in the six to ten-years-old range (no breast development, no pubic hair, which is common to all the images and videos, no detailed external genitalia), though some exhibit more advanced development, in the range of early teenagers (*e.g.,* more breast development, larger size of body). Many of the female characters are being penetrated by very large penises (and sometimes sex toys) with most of the body of the male out of the frame--the focus of most of these images is the male penis penetrating the vulva (and sometimes anus) of the female character. Some of the pictures also show the mouths of the female characters being penetrated by the large penises or the female character with hands on the penises. Without serious debate, these images display "sexually explicit conduct."

8. Though the female characters are generally in human form, the videos and images lack many details of the human form, such as joints in the fingers, toes, elbows, and knees, finger and toe nails, the external genitalia is often shown as a line, breasts are shown with dots or small circles with development, if any,

> represented by a curved line representing the bottom of the breast, and as shown in the image above the noses of most of the characters are represented by two lines (somewhat in the shape of the letter L). Further, some of the images contain non-human additions such as wings and abnormally large ears.

App. Ex. XXIX at 1-3.

During the motions hearing and in his ruling, the military judge correctly recognized how to interpret a punitive article, asking first whether the language was plain and unambiguous. App. Ex. XXIX at 6-7; R. at 101 ("[Y]ou interpret simply the language of the statute itself and its – its plain and unambiguous, not referencing anything else, the language is plain and unambiguous, that's the inquiry.")

The military judge applied this canon of interpretation to the offense of Article 134, UCMJ, Child Pornography and its explanation. *Id*. at 7. "The first construction question before the Court is whether the word 'minor' under Article 134 Child Pornography, which is further defined as a 'person' under the age of 18 years, is plain and unambiguous as applied to the facts of this case." *Id*. The military judge concluded, based on applicable caselaw and the parties' arguments, that "competing reasonable interpretations" of the term "person" existed; as such, he surmised that the term was not plain and unambiguous. *Id*. at 7-8.

Because the term was not plain and unambiguous, the military judge considered the "'legislative history' of this Executive Branch action." *Id*. at 8. The military judge recognized Article 134, UCMJ, Child Pornography is "generally based on 18 U.S.C. §2252A, as well as military custom and regulation." *Id*. at 8. He also noted the explanatory information that provides that "[t]he Article 134 offense of child pornography is broader than the federal and state statutes" and that it "extends to visual depictions of what appear to be minors. That is, the images include sexually explicit images that may not actually involve minors, but either resemble or are staged to appear so." *Id*. The military judge determined "[r]eference to these sources does not resolve the

ambiguity as neither address the issue of what a 'person' is" when the "person" depicted is animated. *Id*.

The military judge also acknowledged the difference between 18 U.S.C. § 2252A and Article 134, UCMJ, Child Pornography: "Article 134 Child Pornography does not copy the 'indistinguishable from' language of §2252A." *Id*. Article 134, UCMJ, Child Pornography "provides similar language in that chargeable criminal images under it 'may not actually involve minors, but either resemble or are staged to appear so,' with the 'so' referring to resembling or staging to appear as 'actual minors.'" *Id*. (citing *MCM*, Part IV, ¶95c(1)). "Article 134 Child Pornography, in terms of defining what a 'visual depiction' is, also does not copy the language of §2252A expressly excluding drawings or cartoons but also does not expressly include such as a chargeable 'visual depiction.'" *Id*.

The military judge reasoned that this context "does not definitively answer the question of whether Article 134 Child Pornography was intended to include obscene depictions of fictional cartoon characters, even those that mimic human form, or whether those fictional cartoon characters are 'persons' as contemplated by the penal provisions." *Id*. at 9.

Finally, the military judge explained that he "could venture a guess as to what 'person' means in the context of obscene fictional cartoon characters and Article 134 Child Pornography. But the Court need not do so as the final cannon [sic] of construction dictates the result here." *Id*. Recognizing "courts strictly construe . . . penal provision[s] by applying the rule of lenity and resolv[ing] the ambiguity in favor of the accused," the military judge applied the rule of lenity. *Id*. The military judge concluded "the videos and images of fictional cartoon characters charged here are not 'persons,' not human beings, and do not appear to be human beings, as that term is contemplated under Article 134 Child Pornography. Those images do not 'appear to be minors,' they appear to be fictional cartoon characters." *Id*. The military judge noted that his ruling is

"based on and limited to the 33 charged videos and images in this case" and that "[g]iven the Court's ruling on the basis of the noted canons of construction, resolution of Defense's constitutional issues is unnecessary." *Id*. at 10.

## ARGUMENT

### THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BECAUSE HIS DECISION WAS NOT ARBITRARY OR FANCIFUL, CLEARLY UNREASONABLE, OR CLEARLY ERRONEOUS.

#### *Standard of Review*

The military judge's "decision to exclude evidence is reviewed for an abuse of discretion." *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021) (internal citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable, or clearly erroneous.'" *United States v. White*, 69 M.J. 236, 239 (C.A.A.F. 2010) (internal citation omitted).

When reviewing matters under Article 62(b), UCMJ, this Court may act only with respect to matters of law. 10 U.S.C. §862(b) (2017); *United States v. Baker*, 70 M.J. 283, 287-88 (C.A.A.F. 2011) (internal citation omitted). When limited to reviewing matters of law, "the question is not whether [this Court] might disagree with the [military judge's] findings, but whether those findings are fairly supported by the record." *Id*. at 288 (internal citation and quotations omitted). This Court "may not find its own facts or substitute its own interpretation of the facts." *Becker*, 81 M.J. at 489 (internal citation and quotations omitted). Rather, this Court is "bound by the military judge's factual determinations unless they are unsupported by the record or clearly erroneous." *United States v. Pugh*, 77 M.J. 1, 3 (C.A.A.F. 2017) (internal citation omitted). Finally, this Court "reviews the evidence in the light most favorable to the party which prevailed at trial," which in this case is SSgt Carlisle. *Id.* (internal citation omitted).

## *Law and Analysis*

### A. The military judge applied the correct legal principles and did not abuse his discretion by examining the term "minor" within the enumerated offense.

"The rules of statutory construction, although generally applied to construe statutes, are helpful in analyzing evidentiary rules as well as other provisions of the *Manual for Courts-Martial*." *United States v. Fetrow*, 76 M.J. 181, 185-86 (C.A.A.F. 2017). Here, the military judge was keen to this, and he questioned the parties about how the rules of statutory construction should apply, if at all. R. at 100-15. More importantly, he relied on and correctly applied binding precedent and the rules of statutory construction in his thorough written ruling. App. Ex. XXIX.

#### *1. The military judge did not abuse his discretion when he determined that the language of the enumerated offense of Child Pornography is ambiguous.*

The military judge understood and applied the correct legal principles. To begin, the military judge correctly explained that it is unnecessary to resort to canons of construction "when the criminal provision is unambiguous." App. Ex. XXIX at 6 (citing *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018)). In doing so, the military judge correctly recognized the first question was whether ambiguity existed at all. App. Ex. XXIX at 7; *see* R. at 101 (reminding the defense counsel that "you interpret simply the language of the statute itself and its – its plain and unambiguous, not referencing anything else, the language is plain and unambiguous, that's the inquiry").

He understood that whether the language is ambiguous is determined "'by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" App. Ex. XXIX at 6 (citing *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Robinson v. Shell Oil. Co.*, 519 U.S. 337, 341 (1997)); *United States v. McDonald*, 78 M.J. 376, 380 (C.A.A.F. 2019)).

Moreover, he correctly assessed whether ambiguity exists as applied. As recent as last year, the United States Court of Appeals for the Armed Forces (CAAF) gave us a perfect example of this. In *United States v. Mays*, 83 M.J. 277, 281 (C.A.A.F. 2023), the CAAF reviewed "whether the meaning of the term 'viewing' in Article 120c(a)(1), UCMJ, is broad enough to cover both viewing the private area and viewing a contemporaneously produced visual image of the private area of a person." There, the appellant was charged with holding his cellphone over a shower stall to create a contemporaneous visual image of the victim's private area. *Id*. at 280-81. The CAAF reviewed to determine the scope of the punitive article (i.e., whether "viewing" includes viewing a contemporaneously produced visual image of the private area of a person), *id*., and that is also precisely what the military judge did in this case (asking whether "minor" includes fictional cartoon characters). App. Ex. XXIX at 7.

The military judge's analysis of the plain language recognized the specific and broader context of the article, wherein "competing reasonable interpretations" of the term "person" existed. *Id*. at 8. The defense argued "that cartoon drawings or images of fictional characters are not 'persons,' not human beings and do not *appear* to be human beings, as that term is contemplated under Article 134, Child Pornography." *Id*. at 7 (emphasis added). In contrast, the government argued "that any depiction of 'what appears to be a minor,' as long as it resembles a human being, constitutes a 'person' under the definition." *Id*.

Here, the term "minor" is a limiting term for Article 134, UCMJ, Child Pornography. After all, Article 134, UCMJ, Child Pornography, does not penalize all sexually explicit depictions. It penalizes only sexually explicit depictions[2] of *minors* or what appears to be *minors*. *MCM*, Part

[2] Visual depictions: "any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a digital image." *MCM*, Part IV, ¶95.c.(11) (2019 ed.).

IV, ¶95c(1) (2019 ed.). The President's explanation of visual depictions is similarly limited in that, whatever the format, the sexually explicit depiction must be of a minor or what appears to be a *minor*. It was, therefore, not clearly erroneous or arbitrary for the military judge to analyze the meaning of "minor" to understand how, if at all, it limited the scope of this article.

In analyzing the meaning of this term within the context of the article, the military judge considered the plain language. First, he recognized that the definition of the term "minor" within the President's explanation of the article "is further defined as a 'person' under the age of 18 years." App. Ex. XXIX at 7; *MCM*, pt. IV, ¶95.c.(7). The term "person" is not further defined in the *Manual for Courts-Martial*, therefore he applied the ordinary meaning of the word, using common dictionary definitions to define "person" as a "human being." *Id*. at 4, 7. He also analyzed relevant caselaw to determine if the meaning of these terms had been resolved as applied to animation but found a dearth of case law addressing this issue. App. Ex. XXIX at 8. None of this was an abuse of discretion. He also correctly analyzed that in *United States v. Carpenter*, No. ACM 38628, 2016 CCA LEXIS 15 (A.F. Ct. Crim. App. Jan. 14, 2016) (unpub. op.), this Court:

> did not discuss why "anime" fit within the definitions of Article 134, Child Pornography, and cited to a Supreme Court case, *United States v. Williams*, [553 U.S. 285 (2008),] which did not address anime but rather focused on the portion of 18 U.S.C. 2252A(a)(3)(B) that criminalized offers to provide and requests to obtain child pornography.

App. Ex. XXIX at 5.

The military judge further analyzed *United States v. Baker*, No. ACM 39311, 2018 CCA LEXIS 536 (A.F. Ct. Crim. App. Nov. 13, 2018) (unpub. op.), where the interpreted offense was not the enumerated offense of child pornography, but rather a violation of a regulation. App. Ex. XXIX at 5. The military judge did not clearly err when he recognized that *Baker* also did not focus on the issue presented in this case, what "minor" means under Article 134, Child Pornography. *Id*.

His determination that there was a dearth of reported caselaw addressing what "minor" means as applied to anime under Article 134, UCMJ, Child Pornography, was not clearly erroneous. The vast majority of caselaw involving this sort of anime interprets charging under clause 3 of Article 134, as violations of 18 U.S.C. 1466A. *See, e.g.*, *United States v. Beck*, No. ACM 39793, 2021 CCA LEXIS 186 (A.F. Ct. Crim. App. Apr. 21, 2021) (unpub. op.) (reviewing a case where the government charged the appellant with knowingly receiving obscene visual depictions of a minor engaging in sexually explicit conduct, "a 23-page anime story, which contained graphic drawings depicting a father sexually assaulting his daughter," assimilating 18 U.S.C § 1466A); *United States v. Taylor*, No. ACM 38700, 2016 CCA LEXIS 108 (A.F. Ct. Crim. App. Feb. 25, 2016) (unpub. op.) (affirming the appellant's conviction for receipt and possession of obscene materials depicting sexual abuse of children based upon animated images and drawings).

The military judge appropriately analyzed the plain language of the article and looked to relevant caselaw to see if the language of this article had previously been interpreted. App. Ex. XXIX at 4-8. Recognizing competing reasonable interpretations of the plain language, the military judge did not clearly or unreasonably err when he determined the term "person," and therefore "minor," is ambiguous in context. *Id.* at 8.

Moreover, this Court should give pause to the government's arguments because they lead to an absurd result. The government argues that the President defined "child pornography" to include an "abstract image with the general characteristics of a human person (i.e., viewed from the front two eyes, a nose, and a mouth, or viewed from behind the shape of a head[,] two arms[,] and two legs)." App. Br. at 18. If true, there is no limit to the examples that could satisfy the government's definition. Crudely drawn stick figures engaging in sexual conduct could satisfy the government's definition. So could adult pornography which depicts, for example, a schoolgirl.

### *2. The military judge did not abuse his discretion by finding the history of Article 134, UCMJ, Child Pornography, did not resolve the ambiguity.*

Finding ambiguity in the plain language of the article, the military judge analyzed the "legislative" history of the Executive Branch action, which created Article 134, UCMJ, Child Pornography. *Id*. at 8-9. He considered the parties' arguments and compared the offense to the federal statutes to gain clarity, recognizing that "Article 134 Child Pornography does not copy the 'indistinguishable from' language of §2252A." *Id*. at 8. But rather, Article 134, UCMJ, Child Pornography, "provides similar language in that chargeable criminal images under it 'may not actually involve minors, but either resemble or are staged to appear so,' with the 'so' referring to resembling or staging to appear as 'actual minors.'" *Id*. (citing *MCM*, Part IV, ¶95c(1)). Nevertheless, this does not resolve what a "person" is in the context of anime/hentai. Therefore, the military judge's finding that ambiguity remained was not clearly erroneous or unreasonable. *Id*. at 8-9. Further, the military judge's finding that ambiguity remained is supported by the lack of guidance for what a "minor" means in the amendments to Article 134, UCMJ, Child Pornography, and case law.

#### *i. Changes to Federal Law leading up to the creation of Article 134, UCMJ.*

In 1996, the Child Pornography Prevention Act (CPPA) was signed into federal law. The CPPA penalized child pornography, including virtual child pornography. 18 U.S.C. § 2252A (1996). In 2002, in the case of *Ashcroft v. Free Speech Coal*., 535 U.S. 234 (2002), the United States Supreme Court struck down the CPPA's prohibition on "virtual child pornography," holding that it was unconstitutional.

In *United States v. Blouin*, 74 M.J. 247, 250 (C.A.A.F. 2015), the CAAF explained Congress' response:

> In 2003, 18 U.S.C. § 2256 was amended by Congress in response to the Supreme Court's decision in [*Ashcroft*]. *See United States v. Williams*, 553 U.S. 285, 289 . . . (2008) ("After our decision in [*Ashcroft*], Congress went back to the drawing board . . . ."); *see also* S. Rep. No. 108-2, at 1; H.R. Rep. No. 108-66, at 30. Congress altered the statute in order to limit the "virtual child" defense being successfully used in the wake of *Ashcroft*, while maintaining the statute's constitutionality. S. Rep. No. 108-2, at 4-7, 13 ("S. 151 is designed to aid child pornography prosecutions in a constitutionally responsible way.").

Congress directly explained its concerns within its findings in the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today):

> In 1982, when the Supreme Court decided [*New York v. Ferber*, 458 U.S. 747, 757 (1982)], the technology did not exist to –
> (A) computer generate depictions of children that are indistinguishable from depictions of real children;
> (B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or
> (C) disguise pictures of real children being abused by making the image look computer-generated.
>
> . . .
>
> The mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.

Public Law 108-21—30 Apr. 2003, Sec. 501, Findings, at page 28-30, (available online at: https://www.govinfo.gov/content/pkg/PLAW-108publ21/pdf/PLAW-108publ21.pdf).

Because of the PROTECT Act, the definition of child pornography was amended to its current definition:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256 (2018).

The term "indistinguishable" used within 18 U.S.C. § 2256 similarly remains defined as follows:

> the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

18 U.S.C. § 2256 (2018).

In 2003, the PROTECT Act also created the offense of "Obscene visual representations of the sexual abuse of children," under 18 U.S.C. § 1466A. 18 U.S.C. § 1466A makes it a crime to knowingly produce, distribute, receive, possess with the intent to distribute, or possess:

> a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that—(1)(A) depicts a minor engaging in sexually explicit conduct; and (B) is obscene; or (2)(A) depicts an image that is, or appears to be, of a minor engaging in graphic bestiality, sadistic or masochistic abuse, or sexual intercourse, . . . and (B) lacks serious literary, artistic, political, or scientific value.

18 U.S.C. § 1466A(a) and (b) (2018).

### *ii. Article 134, UCMJ, is based on 18 U.S.C. §2252A.*

In 2012, more than eight years after the PROTECT Act was signed into federal law, Article 134, UCMJ, Child Pornography was added to the *Manual for Court-Martial* as a new offense. *MCM*, App. 23, *Analysis of Punitive Articles*, ¶68b (2012 ed.). The analysis for Article 134, UCMJ, Child Pornography, provides the intent to base this new offense on 18 U.S.C. § 2252A, "*2012 Amendment*: This offense is new to the Manual for Courts-Martial. It is generally based on 18 U.S.C. § 2252A, as well as military custom and regulation." *Id*. At the time the enumerated offense was created, the federal definition of child pornography had been amended to prohibit images that are, or are indistinguishable from, a minor engaged in sexually explicit conduct. Moreover, the offense of "Obscene visual representations of the sexual abuse of children" had long been established as an offense under 18 U.S.C. §1466A. Despite the existence of 18 U.S.C. §1466A, which came about as part of the same Act as 18 U.S.C. §2252A, the 2012 Amendment made no reference to 18 U.S.C. §1466A. *MCM*, App. 23, *Analysis of Punitive Articles*, ¶68b (2012 ed.).

In the 2016 *MCM*, Article 134, UCMJ, Child Pornography, remained unchanged and the *Analysis of Punitive Articles* repeats the offense "is generally based on 18 U.S.C. § 2252A, as well as military custom and regulation," still making no mention of 18 U.S.C. §1466A. *MCM*, App. 23, *Analysis of Punitive Articles*, ¶68b (2016 ed.).

In the 2018, Article 134, UCMJ, Child Pornography was amended, and its amendment is explained in the *Analysis of Punitive Articles*:

> *2018 Amendment*: c. *Explanation* (1) *In general*. The scope of child pornography under Article 134 is broader than the scope of child pornography criminalized under 18 U.S.C. § 2252A. *Cf. Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). Article 134 includes visual depictions of what appear to be minors engaged in sexually explicit conduct within the definition of child pornography. *See United States v. Blouin*, 74 M.J. 247 (C.A.A.F. 2015); *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009); *United States v. Brisbane*, 63 M.J. 106, 116 (C.A.A.F.

> 2006); *United States v. Roderick*, 62 M.J. 425, 429 (C.A.A.F. 2006); *United States v. Reeves*, 62 M.J. 88, 96 (C.A.A.F. 2005); *United States v. Mason*, 60 M.J. 15, 19 (C.A.A.F. 2004); *United States v. O'Connor*, 58 M.J. 450 (C.A.A.F. 2003).
> (2) Federal "Child pornography" and "Obscenity" offenses and (3) State "child pornography" and "obscenity" offenses are new and emphasize that Article 134—(Child pornography) is not intended to preempt applicable federal and state child pornography and obscenity statutes. (2) and (3) also discuss the circumstances under which these federal and state child pornography and obscenity statutes may be charged under Article 134, clauses 2 and 3.

*MCM*, App. 17, *Analysis of Punitive Articles*, ¶95 (2019 ed.). In comparison to the explanation for Article 134, UCMJ, Child Pornography, which states "the Article 134 offense of child pornography is broader than the federal and state statutes referenced [in sections 2 and 3 of the explanation]," the analysis narrows this statement to 18 U.S.C. § 2252A, which the military judge correctly recognized. *MCM*, Part IV, ¶95.c.(1)(2019 ed.); *MCM*, App. 17, *Analysis of Punitive Articles*, ¶95 (2019 ed.); App. Ex. XXIX at 8 ("Article 134 is "broader" than §2252A").

18 U.S.C. § 1466A is mentioned for the first time in *MCM*, Part IV, paragraph 95.c.(2), but it is mentioned only as an example to "emphasize that Article 134—(Child pornography) is not intended to preempt applicable federal and state child pornography and obscenity statutes." *MCM*, App. 17, *Analysis of Punitive Articles*, ¶95 (2019 ed.). The government mischaracterized the addition of this example in its brief when it stated: "[b]y listing the federal offenses, the President provided examples of the federal offenses that Article 134 child pornography criminalized, and providing charging options to practitioners without requiring the use of the federal statute." App. Br. at 28. Contrary to the government's argument, Article 134, UCMJ, Child Pornography, remains wed to 18 U.S.C. § 2252A.

### *iii. Even after review of the 2018 Amendment and the cases cited therein, ambiguity remains.*

The 2018 Amendment analysis states Article 134, UCMJ, Child Pornography, is broader than 18 U.S.C. § 2252A, and it suggests comparison to *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002). *MCM*, App. 17, *Analysis of Punitive Articles*, ¶95 (2019 ed.). In *Ashcroft*, the CPPA's definition of child pornography included, in part, "any visual depiction, including any photograph, film, video, picture, or computer, or computer-generated image or picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." 535 U.S. at 241. The United States Supreme Court struck down this prohibition on "virtual child pornography," holding that it was overbroad and unconstitutional. *Id*. at 256. Despite *Ashcroft* and the PROTECT Acts amendments to 18 U.S.C. § 2256, which changed "appears to be" to "indistinguishable from" for purposes of 18 U.S.C. § 2252A, Article 134, UCMJ, Child Pornography, uses the same description that *Ashcroft* found to be unconstitutional: visual depictions of "what appear to be minors." *MCM*, Part IV, ¶95(c)(1) (2019 ed.). This, however, does not give clarity to what it means to "appear to be a *minor*" as applied to animated images. The ambiguity remains of how to assess whether a fictional character with non-humanlike attributes such as a chin that points in a "v," abnormally large eyes and ears, mouths with no teeth or tongue, and sometimes less than a line for a nose, can be considered a minor (i.e., a human being). *See* App. Ex. XI.

The analysis of the punitive articles cites to seven cases to support that "Article 134 includes visual depictions of what appear to be minors engaged in sexually explicit conduct within the definition of child pornography." *MCM*, App. 17, *Analysis of Punitive Articles*, ¶95 (2019 ed.). *Blouin* is not informative here because though the dissent noted courts have struggled to define child pornography post-*Ashcroft*, Blouin possessed a picture of an actual minor, and the

CAAF's determination was focused on 18 U.S.C. § 2256, holding that statute requires that the images contain nudity. 74 M.J. at 250, 258 (Baker, J. dissenting).

*Forney* provides that receipt and possession of virtual child pornography may constitute conduct unbecoming an officer under Article 133, UCMJ, 10 U.S.C. § 933, however, it similarly is not informative here because it does not decide what "virtual child pornography" is, "what appears to be a minor," or whether Article 134, UCMJ, Child Pornography, is intended to include animated images. *See* 67 M.J. at 275. This the problem with each of the remaining cases as well.

While the cases provide that virtual child pornography could potentially be held to be a violation of the *general article* of clause 1 or 2 of Article 134, UCMJ, these cases do not assess whether the same could be true for the enumerated offense of Child Pornography under Article 134, UCMJ, nor do they address virtual images in the form of cartoons or animated images which are not easily confused with human beings. *Brisbane*, 63 M.J. at 116 (finding the appellant's possession of virtual child pornography was prejudicial to good order and discipline or service-discrediting when the appellant told his fellow servicemember and neighbor that he possessed seven pictures of child pornography, causing alarm to this other servicemember); *Roderick*, 62 M.J. at 429-30 (reviewing images of actual minors, and finding courts determine "whether a particular photograph contains a 'lascivious exhibition' by combining a review of the [*United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom. *United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987)] factors with an overall consideration of the totality of the circumstances"); *Reeves*, 62 M.J. at 96 (finding an improvident plea to a CPPA-based clause 3 offense (related to images of actual minors) could not be upheld as a lesser included offense under clause 2 of Article 134 because there was no "discussion of service discrediting conduct or conduct that is prejudicial to good order and discipline"); *Mason*, 60 M.J. at 19 (finding an improvident guilty plea to a CPPA-based clause 3 offense could be upheld as a lesser-included offense under

clause 2 of Article 134 because Mason "affirmatively admit[ted] to the military judge that his conduct . . . was both service-discrediting and to the prejudice of good order and discipline in the armed forces")[3,4]; *O'Connor*, 58 M.J. at 454 (concluding an improvident guilty plea to a CPPA-based clause 3 offense could not be upheld as a lesser included offense under clause 2 of Article 134 because there was no discussion of that element by the military judge during the plea inquiry).

Neither the analysis for the 2018 amendment or the cases cited therein give clarity to what it means to "appear to be a *minor*" as applied to animated images. The military judge was not clearly erroneous when he determined the history of Article 134, UCMJ, Child Pornography, does not answer whether "persons," human beings, includes anime/hentai video and images. App. Ex. XXIX at 9.

***3. The military judge did not abuse his discretion by applying the rule of lenity.***

The rule of lenity "originally rested on the interpretative reality that a just legislature will not decree punishment without making clear what conduct incurs the punishment." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 296 (Thomas/West 2012). "A fair system of laws requires precision in the definition of offenses and punishments. The less the courts insist on precision, the less the legislatures [or in this case, the President] will take the trouble to provide it." *Id*. at 301.

The rule of lenity is applied when there is a "grievous ambiguity or uncertainty," meaning "'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess

[3] *But c.f. Medina*, 66 M.J. at 26 (finding "that clauses 1 and 2 are not necessarily lesser included offenses of offenses alleged under clause 3, although they may be, depending on the drafting of the specification."))

[4] In *Mason*, the record also established the "[a]ppellant's understanding that the pornographic images . . . depicted actual minors." 60 M.J. at 21 (Crawford, J., dissenting in part and concurring in part).

as to what Congress intended.'" *Mays*, 83 M.J. at 281 (quoting *United States v. Wells*, 519 U.S. 482, 499 (1997) (in turn quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)).

As Justice Gorsuch reasoned in his dissenting opinion in *Pulsifer v. United States*, 144 S. Ct. 718, 755 (2024) (citing, among others, *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); *United States v. Batchelder*, 442 U. S. 114, 121 (1979); *Bifulco v. United States*, 447 U. S. 381, 387 (1980)):

> Suppose you are left with a reasonable doubt about whether [the accused] or the government has the better reading of the law. In circumstances like that, another rule of construction supplies an answer. It is lenity.
>
> . . .
>
> It requires courts to interpret ambiguous "penal laws" . . . in favor of liberty, not punishment.
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> This rule enforces weighty constitutional values. Courts construe ambiguous penal laws with lenity because a free nation operates against a background presumption of individual liberty. We resolve doubts about a criminal law's reach in favor of lenity, too, because in our federal government only the people's elected representatives, not their judges, are vested with the power to "define a crime, and ordain its punishment."
>
> Lenity protects vital due process interests, as well, by ensuring individuals fair notice of the consequences of their actions. And lenity performs still further work, guarding against the possibility that judges might condemn unpopular individuals to punishment on the strength of their own views about common sense, good public policy, or "no more than a guess as to what Congress intended."
>
> So suppose you thought a reasonable doubt remained about how best to construe the [penal law]. . . . The only permissible answer is one that favors liberty.

Here, after the military judge seized on the relevant caselaw and "legislative" history, ambiguity remained and all he could do was "venture a guess." App. Ex. XXIX at 9. The rule of lenity exists for ambiguities such as this: when the military judge still has a reasonable doubt after using all the legitimate tools of interpretation. *Moskal v. United States*, 498 U.S. 103, 108 (1990). This ambiguity should be left to the President to resolve, and, more importantly, while this Court

may disagree with the military judge's determination and perhaps the outcome, the military judge's determination was not arbitrary, clearly erroneous, or clearly unreasonable.

Furthermore, the "rule of lenity cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Smith v. United States*, 508 U.S. 223, 240 (1993) (internal citation and quotations omitted). The application of the rule of lenity here does not dictate an implausible interpretation of Article 134, UCMJ, Child Pornography, and the military judge arrived at this interpretation using the generally accepted meaning of the term at issue. The resulting interpretation still leaves open the possibility that virtual child pornography, where the images resemble human beings, can be penalized under Article 134, UCMJ, Child Pornography. The military judge explained as much when he stated, "[h]ad this been a case where the cartoon images closely resembled actual persons, actual human beings, rather than fictional characters related to established genre of artistic expression, then the result of this ruling could be different." App. Ex. XXIX at 9. This comports with the generally accepted contemporary meaning of "minor" in this context. *See* App. Ex. XXIX at 4. It also removes any question of surplusage as it gives purpose to "what appear to be minors." *MCM*, Part IV, ¶95c(1) (2019 ed.).

Using this interpretation, the military judge did not clearly err when he concluded the "fictional cartoon characters charged here are not 'persons,' not human beings, and do not appear to be human beings . . . . Those images do not 'appear to be minors,' they appear to be fictional cartoon characters." App. Ex. XXIX at 9.

### *4. The military judge did not require that the images be the result of converting an image of an actual child.*

The government asserts the military judge made a statement in his ruling, which he did not make. Nowhere in the ruling does the military judge state "[n]o evidence shows that a real image of child pornography was ***made into*** a cartoon. If that evidence existed, then yes that example would constitute child pornography under Article 134." *Compare* App. Br. at 17 *with* App. Ex. XXIX. Furthermore, contrary to the government's assertion, the military judge did not require that the images be the result of converting an image of an actual child. App. Br. at 17. The military judge provided examples of what could have made this ruling different. App. Ex. XXIX at 9. He explained:

> Had this been a case where the cartoon images closely resembled actual persons, actual human beings, rather than fictional characters related to established genre of artistic expression, then the result of *this ruling could be different*. And if there were evidence that Accused, or an associate of Accused, took non-cartoon child-pornography images and used technology to convert them into anime/hentai cartoons, then the result of *this ruling could be different*.

*Id*. (emphasis added). In the above quoted language, the second example is not reliant on the first example. It is evident from the way the military judge ends each sentence that he is listing independent examples. Further, the military judge gives the example of converting non-cartoon child pornography images into anime/hentai cartoons as an example of how another anime or hentai case might have a different result under facts where the images actually resemble a human being. By comparison, in his ruling, the military judge was clear that the images at issue "'do not *appear* to be minors,' they appear to be fictional cartoon characters." *Id*. The military judge did not require the images to have been converted from the image of an actual minor or that the photos include actual minors.

**B. The military judge's ruling does not require the Government to use federal statutes to charge their case. The Government remains free to use clause 1, 2, or 3 of Article 134, UCMJ.**

While obscene anime images are most commonly prosecuted as a violation of 18 U.S.C. §1466A under clause 3 of Article 134, UCMJ, as the government initially believed was correct in this case, it is not the only way the government could have charged the alleged conduct. *See* App. Ex. XIII at 11 (the initial charges assimilated 18 U.S.C. § 1466A). The Government can recharge the alleged conduct under clause 1, 2, or 3 of Article 134, UCMJ, just as the military judge explained:

> Additionally, the Court's ruling here does not leave the Government without recourse to ensure Accused faces criminal consequences for his actions with regard to these potentially obscene images. The Government is free to modify the currently charged offenses to Clause 2, Article 134 offenses, potentially with the same charging language, rather than an enumerated Child Pornography offense. Additionally, the Government is free to do what most prosecutors dealing with this subject matter have done—assimilate charges under 18 U.S.C. §1466A.

App. Ex. XXIX at 9-10. Should the government not want to charge the offense under clause 3, the government can charge this offense as a general violation of clause 1 or 2 of Article 134, UCMJ. For example, in *United States v. Driskill*, No. 23-0066, __ M.J. __, 2024 CAAF LEXIS 126, at *5 (C.A.A.F. Mar. 4, 2024) (reversing, on other grounds, the lower court) the government charged the appellant with possessing obscene cartoons under clause 2 as general misconduct: "Appellant 'did, at or near Italy, between on or about 11 October 2016 and on or about 27 March 2018, knowingly and wrongfully possess obscene cartoons, such conduct being of a nature to bring discredit upon the armed forces.'" The government may charge an offense under any of the three clauses of Article 134, and the military judge did not suggest otherwise.

### C. The military judge did not rule on SSgt Carlisle's constitutional claims, therefore, this Honorable Court has no appellate jurisdiction to review them as part of the United States' appeal.

"It has long been established that the United States cannot appeal in a criminal case without express congressional authorization." *United States v. Badders*, 82 M.J. 299, 302 (C.A.A.F. 2022) (quoting *United States v. Martin Linen Supply Co*., 430 U.S. 564, 568 (1977)). The government may appeal, and appellate jurisdiction is vested, when the government's appeal falls within the strictures of Article 62, UCMJ. *Id*. (citing *United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017)). Here, the government appeals to this Court under Article 62(a)(1)(B), UCMJ, appealing the military judge's ruling in Appellate Exhibit XXIX, arguing it "excludes evidence that is substantial proof of a fact material in the proceeding." App. Ex. XXX; 10 U.S.C. § 862(a)(1)(B). In this ruling, the military judge did not decide the constitutional issues raised by SSgt Carlisle. App. Ex. XXIX at 10 ("Given the Court's ruling on the basis of the noted canons of construction, resolution of Defense's constitutional issues is unnecessary.") As a result, no order or ruling resulted from, and no evidence was excluded as a result of, SSgt Carlisle's constitutional claims. Therefore, this Court has no appellate jurisdiction to review those claims now.

## CONCLUSION

The military judge did not abuse his discretion. The term "minor," meaning a "person under the age of 18," limits Article 134, UCMJ, Child Pornography. However, this term is grievously ambiguous as applied to anime because the plain language, context, and history of the offense do not resolve the ambiguity of what "person" means in the context of fictional cartoon characters and Article 134, UCMJ, Child Pornography. The military judge could do no more than "venture a guess" and this ambiguity satisfies the threshold for applying the rule of lenity. The military judge did not clearly or unreasonably err when he determined the videos and images depict fictional cartoon characters and do not resemble or appear to be minors, that is human beings under

the age of 18. This Court must review the facts in the light most favorable to SSgt Carlisle, and here, the military judge's ruling is not arbitrary or fanciful, erroneous, or unreasonable.

**WHEREFORE,** SSgt Carlisle respectfully requests this Honorable Court affirm the military judge's ruling.

Respectfully submitted,

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 April 2024.

Respectfully submitted,

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**IN THE UNITED STATES AIR FORCE**
**COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**, | ) | **UNITED STATES' APPEAL** |
| *Appellant,* | ) | **UNDER ARTICLE 62, UCMJ** |
| | ) | |
| v. | ) | Before Panel No. 1 |
| | ) | |
| Staff Sergeant (E-5) | ) | Misc. Dkt. No. 2024-03 |
| **REMINGTON E. CARLISLE** | ) | |
| United States Air Force | ) | 8 April 2024 |
| *Appellee.* | ) | |

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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| United States Air Force | ) | 8 April 2024 |
| *Appellee.* | ) | |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

## ISSUE PRESENTED

**WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE EXCLUDED OBSCENE VISUAL DEPICTIONS OF WHAT APPEAR TO BE MINORS BECAUSE HE FOUND THE IMAGES DID NOT MEET THE ARTICLE 134 DEFINITION OF CHILD PORNOGRAPHY.**

## INTRODUCTION

Pictures can depict people. Anime cartoon pictures of tiny, young, naked girls in pigtails with bows and no breast development or pubic hair are "visual depictions of minors" because they "appear to be" or "resemble" humans under the age of 18 based on the common sense understanding of those terms. Simply put, a cartoon image can "resemble" a human child, and the charged cartoon images do so in this case. The charged cartoon images are therefore child pornography punishable under Article 134, UCMJ. The military judge in this case ruled that 33 charged images of anime child pornography were not relevant to the charged specifications of child pornography because the images could not constitute child pornography under Article 134, because they were fictional cartoon characters. The military judge's conclusion was wrong and should be vacated four reasons. First, the military judge erroneously divorced the word "minor"

from of the rest of the term, "visual depiction of a minor," when the military judge focused only on what a "minor" is - a human being under 18 years. He abused his discretion by reading in limits of realism to the unlimited definition of "visual depiction of a minor." Second, the President's explanation of child pornography supports a broad interpretation of the offense that includes obscene cartoon images of what appear to be or resemble children. Third, the military judge improperly applied the rule of lenity because the definition of child pornography under Article 134 was not grievously ambiguous. Fourth, and finally, the government may charge an offense under any of the three clauses of Article 134 as appropriate and is not required to use federal statutes rather than an enumerated Article 134 offense. This Court should vacate the military judge's ruling and find that obscene cartoon images of what appear to be minors can constitute child pornography under Article 134, UCMJ.

## STATEMENT OF CASE

The United States initially charged Appellee under clause 3, Article 134, assimilating 18 U.S.C. §1466A, but upon recommendation of the Preliminary Hearing Officer (PHO) the government withdrew and dismissed those specifications. (*Preliminary Hearing Officer Report*, dated 30 August 23, ROT, Vol. 5). On 10 October 2023, the government preferred three new specifications under clause 2, Article 134. On 12 December 2023[1], the Commander, Headquarters 15th Air Force, Shaw Air Force Base, South Carolina, referred the following charge and specifications: one specification of possession of child pornography, one specification distribution of child pornography, and one specification of viewing child pornography in violation of Article 134, UCMJ. (*Charge Sheet*, dated 12 December 2023, ROT,

[1] In the Memorandum for the Air Force Court of Criminal Appeals, dated 18 March 2024, the United States noted the referral date for this case as 29 May 2023. This was a scrivener's error. The correct referral date is 12 December 2023.

Vol. 1). The images of child pornography were all obscene visual depictions of what appear to be minors engaging in sexually explicit conduct in violation of Article 134, UCMJ. (Id.). The Accused was arraigned on 16 January 2024. (R. at 9). The general court-martial convened for a bifurcated motions hearing at Mountain Home Air Force Base, Idaho, on 13 February 2024. (R. at 13).

On 26 January 2024, the trial defense counsel filed a motion in limine to exclude evidence of the 33 visual depictions of what appear to be minors that constituted the misconduct in the three charged specifications. (App. Ex. XIII.) The United States responded on 1 February 2024. (App. Ex. XIV). On 13 February 2024, the parties presented evidence and argument on the issue. (R. at 98-118.) Trial defense counsel filed a supplemental brief on 14 February 2024. (App. Ex. XXV.) The United States filed a supplemental response on 19 February 2024. (App. Ex. XXVIII.) On 20 February 2024 at 1754 EST, the military judge issued his written ruling granting trial defense counsel's motion and excluding the 33 visual depictions of what appear to be minors as irrelevant. (App Ex. XXIX.)

On 23 February 2024 at 0830 EST, the United States filed a notice of appeal notifying the military judge that it would be appealing his ruling to exclude evidence. (App. Ex. XXX; Attachment 1.) Trial counsel forwarded the appeal and record of trial to the Air Force Appellate Operations Division, and it was received on 11 March 2024. In accordance with the Court's rules, the government filed the record of trial with the Court on Monday, 18 March 2024. The notice of appeal and record of trial were served on this Court and the Air Force appellate defense counsel, in compliance with this Court's Rules for Practice and Procedures 15 and 20(c)(1).

## STATEMENT OF FACTS

On 26 April 2021, a special agent with the Mountain Home AFB OSI detachment noticed the multiple anime[2] bumper stickers on Appellee's vehicle. (App. Ex. XXIX at 2). One of these stickers used the word "Loli." (Id.) Based on the agent's training and experience the term referenced a genre of pornography involving animated or cartoon characters who appear to be minors. (Id.).

After seeing the bumper sticker, the agent reviewed Appellee's social media accounts and cross-referenced information from databases maintained by the National Center for Exploited or Missing Children for cyber tips. (Id.) His review connected Appellee to animated images of prepubescent minors engaged in sex, which the agent believed met the elements of 18 U.S.C. §1466A, *Obscene Visual Representations of the Sexual Abuse of Children*. (Id.) Based on this information, a Federal Magistrate issued a search warrant for Appellee's home and smartphone. (Id.) The 33 charged images were found on Appellee's electronic devices pursuant to the federal search warrant. (Id.)

### *Original Charge and Specifications*

In July 2023, the government originally charged Appellee's misconduct by assimilating 18 U.S.C. §1466A under clause 3, Article 134, UCMJ. (*Charge Sheet,* dated 19 July 2023, ROT, Vol. 5.). The three original specifications read:

> Specification 1: [Appellee] did, within the continental United States, between on or about 1 November 2018 and on or about 17 June 2021, knowingly and wrongfully possess obscene visual depictions of minors engaging in sexually explicit conduct that were transported via interstate commerce by a computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.

[2] Anime is "a style of animation [or animated cartoons] originating in Japan that is characterized by stark colorful graphics depicting vibrant characters in action-filled plots often with fantastic or futuristic themes." Anime, MERRIAM WEBSTER'S DICTIONARY (2024 online ed.).

> Specification 2: [Appellee] did, within the continental United States, between on or about 1 November 2018 and on or about 17 June 2021, knowingly and wrongfully distribute obscene visual depictions of minors engaging in sexually explicit conduct that were transported via interstate commerce by a computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.
>
> Specification 3: [Appellee] did, within the continental United States, between on or about 1 November 2018 and on or about 17 June 2021, knowingly and wrongfully view obscene visual depictions of minors engaging in sexually explicit conduct that were transported via interstate commerce by a computer, in violation of 18 U.S. Code Section 1466A(b)(1), an offense not capital.

An initial Article 32 preliminary hearing was conducted by Lieutenant Colonel Thomas A. Smith, a military judge acting as the preliminary hearing officer (PHO). (*Preliminary Hearing Officer Report*, dated 30 August 23, ROT, Vol. 5). In his report, the PHO recommended that the offenses be charged under clause 2 of Article 134, UCMJ rather than clause 3 for two reasons. (Id.)

First, the PHO determined viewing as charged in Specification 3 was problematic as assimilated under 18 U.S.C. §1466A because the statute does not criminalize viewing obscene visual depictions of minors – only possessing and distributing such images. (*Preliminary Hearing Officer Report*, dated 30 August 23, ROT, Vol. 5 at 2); *See* 18 U.S.C. §1466A(a-b). Second, the PHO explained "assimilated crimes (e.g. crimes under the United States Code) do not have defined elements like UCMJ offenses do." (Id. at 3); *See* Military Judge's Benchbook, Dept of Army Pamphlet 27-9 at 3-60-2B, Note 3 (29 Feb 2020). Thus, the elements must come from the language of the statute, resulting in uncertainty until an Article 39(a) session can be called to delineate them. (*Preliminary Hearing Officer Report*, dated 30 August 23, ROT, Vol. 5 at 3). The PHO commented that, "[s]uch uncertainty as to the elements and definitions that apply to the charged offenses existing until the start of trial is not ideal for the prosecution or

defense." (Id.) For these two reasons, the PHO recommended withdrawing and dismissing the charged specifications. (Id. at 8). Then he recommended charging anew under the enumerated offense of Child Pornography under Article 134, UCMJ. (Id.)

***Current Charge and Specifications***

The United States followed the PHO's advice, and preferred charges using the enumerated offense of Child Pornography under Article 134, UCMJ. (*Charge Sheet*, dated 12 December 2023, ROT, Vol. 1). In December 2023, the government preferred new specifications that read:

> Specification 1: [Appellee] did within the continental United States, between on or about 1 November 2018 and on or about 17 June 2021, knowingly and wrongfully possess child pornography, to wit: obscene visual depictions of what appear to be minors engaging in sexually explicit conduct, such conduct being of a nature to bring discredit upon the armed forces.
>
> Specification 2: [Appellee] did within the continental United States, between on or about 1 November 2018 and on or about 17 June 2021, knowingly and wrongfully distribute child pornography, to wit: obscene visual depictions of what appear to be minors engaging in sexually explicit conduct, such conduct being of a nature to bring discredit upon the armed forces.
>
> Specification 3: [Appellee] did within the continental United States, between on or about 1 November 2018 and on or about 17 June 2021, knowingly and wrongfully view child pornography, to wit: obscene visual depictions of what appear to be minors engaging in sexually explicit conduct, such conduct being of a nature to bring discredit upon the armed forces.

(Id.).[3]

[3] The government charged all three specifications as straddling offenses between on or about 1 November 2018 and on or about 17 June 2021. (*Charge Sheet*, dated 12 December 2023, ROT, Vol. 1). For the portions of the specifications charged from 1 November 2018 to 31 December 2018, the punitive article and applicable explanations in the 2016 edition of the Manual for Courts-Martial applies. For the portions of the specifications charged from 1 January 2019 to 17 June 2021 the punitive article and applicable explanations in the 2019 edition of the Manual for

***Motion in Limine to Exclude Anime Images and Military Judge's Ruling***

Ahead of the bifurcated motions hearing, trial defense counsel filed a motion in limine to exclude 33 visual depictions that the government intended to offer as evidence of the misconduct in the three charged specifications. (App. Ex. XIII.)

All 33 anime images are pictures or animate videos of young, naked girls with no breast development or very little breast development and no pubic hair. (App. Ex. XI). They all appear to have a lighter skin tone either peachy or light tan, and they have rosy cheeks. Many of the girls are drawn with pigtails or ponytails and bows in their hair, some also have stuffed teddy bears in the picture. (Id.) If a male character is in the image with the young girl, the girl is exceptionally small compared to the male character who is depicted with extremely defined musculature and whose leg or torso is the often size of the girl. (Id.)

As a specific example, the video ending in 47a85ed.mp4, is an animated digital video of a petite girl with a braid of blonde hair wears a white bow as a headband and another white bow is tied at the end of her braid. The girl is completely naked. She has no breast development and no pubic hair. Nipple clamps are attached to both of her nipples, and she is suspended from three black straps across her torso that hold her in a bent over position. The three straps are attached to a carabiner and another black strap. An extremely muscular male character is penetrating her

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Courts-Martial applies. Section 5542, National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016). Article 134, UCMJ, was amended effective 1 January 2019 to provide world-wide applicability of federal offenses charged under clause 3, eliminating questions of extraterritoriality with offenses charged under the United States Code. *Compare* MCM, pt. IV, ¶ 60 (2016 ed.) *with* MCM, pt. IV, ¶ 91 (2019 ed.); *see also* Military Justice Review Group, Part I, dated 22 December 2015 at 937. But the presidentially enumerated Child Pornography offense under Article 134, UCMJ, was not amended from the 2016 MCM to the 2019 MCM. *Compare* MCM, pt. IV, ¶ 68b (2016 ed.) *with* MCM, pt. IV, ¶ 95 (2019 ed.). For purposes of Appellee's conduct, there was no change to the applicable enumerated offense or definitions.

with his penis from behind her. His thigh is about twice the width of the width of the girl's thigh. An inset picture shows an internal, anatomical view of the male's large veiny penis penetrating the young girl. The penis appears to hit her uterus. The penis is extremely large, the uterus looks very small. (App. Ex. XI, file ending in 47a85ed.mp4).

In another example, the picture ending in 2075d.jpg, shows a young girl with short brown hair. She is lying on her small sized bed with a teddy bear and a stuffed dog. She is naked except for knee high socks and a lace band around her neck. She does not have obvious pubic hair and she has no breast development. She has tears streaming down her face, and a penis is placed on her stomach having just ejaculated onto her stomach. The penis appears to be connected to a dark figure. (App. Ex. XI, file ending in 2075d.jpg).

After oral argument and supplemental briefing by the parties, the military judge excluded all 33 images. (App. Ex. XXIX). The military judge decided the word "minor" as used in the enumerated offense of Child Pornography in Article 134 was ambiguous. (Id.) The military judge compared the language of the enumerated Child Pornography offense under Article 134 to 18 U.S.C. §2252A and §1466A, and he used the federal statutes as a form of "legislative history" for the enumerated offense of Child Pornography under Article 134. The military judge created and then explained his requirement that an actual image of child pornography be converted into an animated image before it can be considered child pornography under Article 134:

> There is no evidence that these videos and images were produced through technology *that simply turns 'pictures' of child pornography (actual minors) into cartoon versions of the same*."
>
> . . .
>
> And if there were evidence that [the] Accused, . . . took non-cartoon child pornography images and used technology to *convert them into anime/hentai cartoons*, then the result of this ruling could be different.

. . .

> No evidence shows that a real image of child pornography was *made into* a cartoon. If that evidence existed, then yes that example would constitute child pornography under Article 134.

(App. Ex. XXIX at 9)

Then the military judge determined some ambiguity in the definition of child pornography existed and applied the rule of lenity:

> Applying the rule of lenity, the Court concludes that the videos and images of fictional cartoon characters charged here are not "persons," not human beings, and do not appear to be human beings, as that term is contemplated under Article 134 Child Pornography. Those images do not "appear to be minors," they appear to be fictional cartoon characters.

(Id. at 9). The military judge determined, "[T]he 33 charged videos and images are inadmissible as irrelevant to proof of [sic] offense under Article 134 Child Pornography. . . ". (Id.at 10). The United States appealed.

## STATEMENT OF STATUTORY JURISDICTION

The military judge ruled that the 33 charged videos and images of sexually explicit cartoon images of what appear to be children were "inadmissible as irrelevant to proof of [an] offense under Article 134 Child Pornography." (App. Ex. XXIX). The 33 images constitute Appellee's charged crimes, because they are the evidence of the child pornography Appellee possessed, distributed, and viewed. If the 33 images are excluded, the fact finder would be unable to inspect them to then determine whether they are obscene. The military judge's ruling excluded "evidence that is substantial proof of a fact material in the proceeding," and the ruling excluded all the charged images for all three specifications of the charge. 10 U.S.C. § 862(a)(1)(B). Without this evidence, the United States cannot proceed with Appellee's court-martial. For these reasons, this Court has jurisdiction under Article 62(a)(1)(B), UCMJ.

## ARGUMENT

**THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE ERRONEOUSLY EXCLUDED OBSCENE VISUAL DEPICTIONS OF WHAT APPEAR TO BE MINORS BECAUSE, CONTRARY TO HIS RULING, THE IMAGES MET THE ARTICLE 134 DEFINITION OF CHILD PORNOGRAPHY.**

### *Standard of Review*

A military judge's decision to exclude evidence is reviewed for an abuse of discretion. United States v. Bowen, 76 M.J. 83, 87 (C.A.A.F. 2017). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." United States v. Donaldson, 58 M.J. 477, 482 (C.A.A.F. 2003). These standards also apply to interlocutory appeals under Article 62, UCMJ. United States v. Mitchell, 76 M.J. 413, 417 (C.A.A.F. 2017).

"In ruling on an appeal under Article 62, the Court of Criminal Appeals may act only with respect to matters of law." 10 U.S.C. § 862(b). When reviewing the military judge's findings of fact, this Court is limited to determining whether "the military's judge's factual findings are clearly erroneous or unsupported by the record." United States v. Lutcza, 76 M.J. 698, 701 (A.F. Ct. Crim. App. 2017) (citations omitted). "When a court is limited to reviewing matters of law, the question is not whether a reviewing court might disagree with the trial court's findings, but whether those findings are 'fairly supported by the record.'" Id, 76 M.J. at 701.

### Law

### *Statutory Interpretation for Article 134 Enumerated Offenses*

"The rules of statutory construction, although generally applied to construe statutes, are helpful in analyzing evidentiary rules as well as other provisions of the Manual for Courts-Martial." United States v. Fetrow, 76 M.J. 181, 185-186 (C.A.A.F. 2017). Child pornography

under Article 134 is a provision of the Manual, so the canons of statutory interpretation are used to analyze it as if it were a statute. Id.; Manual for Courts-Martial, pt. IV, ¶ 95 (2019 ed.)

A court reads the plain language of the provision giving effect to every clause and word. Duncan v. Walker, 533 U.S. 167, 172 (2001); United States v. Kearns, 73 M.J. 177, 181 (C.A.A.F. 2014). Courts "interpret words and phrases used in the UCMJ by examining the ordinary meaning of the language, the context in which the language is used, and the broader statutory context." United States v. Pease, 75 M.J. 180, 184 (C.A.A.F. 2016).

"Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 (Thomas/West 2012) (discussing the ordinary-meaning canon of statutory interpretation). "The plain language will control, unless use of the plain language would lead to an absurd result." United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007). When reviewing the plain language of a statute, rule, or provision of the Manual, the Court construes it "to avoid rendering any language superfluous or redundant." Fetrow, 76 M.J. at 186.

***Presidentially Enumerated Offense: Child Pornography, Article 134, UCMJ***

The general article of Article 134, UMCJ, passed by Congress states:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (2019 ed.). The possession, viewing, distribution, or production of child pornography, in violation of Article 134, is a Presidentially enumerated offense that narrows the scope of Article 134 and stands as an example of a violation of Article 134.

Congress authorizes the President to enumerate offenses under Article 134. Congress has the power "[t]o make rules for the government and regulation of the land and naval forces." U.S. CONSTITUTION, art. I, § 8. To execute their legislation:

> Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations.

J. W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928). Congress may delegate to the President the power "to fill up details and implement statutory provisions, or to determine the details of the legislative scheme." United States v. Smith, 13 U.S.C.M.A. 105, 118 (C.M.A. 1962). Congress delegated the prescription of procedural rules for courts-martial to the President as the "Commander in Chief of the Army and Navy of the United States." 10 U.S.C. § 836; U.S. Constitution, art. II, § 2. Although the President cannot create substantive law, he may list examples of offenses that violate Article 134, UCMJ. United States v. Jones, 68 M.J. 465, 471-472 (C.A.A.F. 2010). The Presidentially promulgated offenses under Article 134 ensure the statute is neither void for vagueness nor constitutionally overbroad. Parker v. Levy, 417 U.S. 733 (1974).

The President's enumerated offenses under Article 134, UCMJ, are highly persuasive authority for the courts and "offer[] guidance to judge advocates under his command regarding potential violations of the article." Id. Historically, "to determine the elements" of an offense under Article 134, UCMJ, trial courts, and our superior courts look "at both the statute and the

President's explanation in MCM pt. IV. . ." United States v. Zachary, 63 M.J. 438, 441 (C.A.A.F. 2006).

The President enumerated child pornography as an offense under Article 134 criminalizing the possession, receipt, viewing, distribution and production of child pornography. MCM, pt. IV, ¶95.b. (2019 ed.). He defined child pornography as "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." MCM, pt. IV, ¶95.c.(4) (2019 ed.). A minor is "any person under the age of 18 years." MCM, pt. IV, ¶95.c.(7) (2019 ed.). And a visual depiction

> includes any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image.

MCM, pt. IV, ¶95.c.(11) (2019 ed.). The President has explained that the offense of child pornography under Article 134 "extends to visual depictions of what appear to be minors," and that "the images include sexually explicit images that may not actually involve minors, but either resemble or are staged to appear so." MCM, pt. IV, ¶95.c.(1) (2019 ed.).

**Analysis**

Pictures can depict people. Anime cartoon pictures of tiny, young, naked girls in pigtails with bows and no breast development or pubic hair are "visual depictions of minors" because they "appear to be" or "resemble" humans under the age of 18 under the common sense understanding of those terms. The images are child pornography punishable under Article 134, UCMJ. The military judge's ruling should be vacated for four reasons. First, the military judge erroneously divorced the term "minor" from the context of the offense, specifically "visual

depiction of what appears to be a minor," and he abused his discretion by reading in limits of realism to the unlimited definition of visual depiction of a minor. Second, the President's explanation of child pornography supports a broad interpretation of the offense that includes obscene cartoon images of what appear to be or resemble children. Third, the military judge improperly applied the rule of lenity because the definition of child pornography under Article 134 was not grievously ambiguous. Fourth, and finally, the government may charge an offense under any of the three clauses of Article 134 as appropriate and is not required to use federal statutes rather than an enumerated Article 134 offense.

### *A. The military judge abused his discretion by requiring realism as part of the definition of visual depiction of a minor.*

The President intended that the enumerated child pornography offense encompass materials depicting both actual minors and what appear to be minors, and the President did not require a certain level of realism in the visual depictions. The military judge failed to appreciate how the President's enumerated child pornography offense differed from the federal counterparts. (App. Ex. XXIX at 8). The President enumerated wrongfully viewing, possessing, and distributing child pornography as offenses under Article 134. MCM, pt. IV, ¶ 95b.(1); 95b.(3) (2019 ed.). Unlike the federal counterparts 18 U.S.C. §2251, §2252A, and §1466A that criminalize either actual child pornography or obscene materials, the President's enumerated offense forbids both (1) obscene visual depictions of what appears to be minors and (2) visual depictions of actual minors. Child pornography means "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." MCM, pt. IV, ¶95.c.(4) (2019 ed.). "Minor means any person under the age of 18 years." MCM, pt. IV, ¶95.c.(7) (2019 ed.). The definition delineates between "obscene visual depiction of a minor" and "visual depiction of an actual

minor." Using the canon against surplusage, the Court cannot ignore the absence of the word "actual" in the first part of the sentence and the presence of the word "actual" in the second half of the sentence. *See* Yates v. United States, 135 S. Ct. 1074, 1085, 191 L. Ed. 2d 64 (2015) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). These two phrases should be interpreted to mean two things: (1) visual depictions of what appear to be minors but are not actual minors, and (2) visual depictions of actual minors. To support this proposition, the explanation section for the offense states, "The Article 134 offense of child pornography is broader than the federal and state statutes referenced below and extends to visual depictions of what appear to be minors." MCM, pt. IV, ¶95.c.(1) (2019 ed.).

The President's definition of a visual depiction is deliberately expansive and includes photographs, videos, and, importantly, pictures. A visual depiction is:

> ***any*** developed or undeveloped photograph, picture, film, or video; ***any*** digital or computer image, picture, film, or video made by ***any*** means, including those transmitted by ***any*** means including streaming media, even if not stored in a permanent format; or ***any*** digital or electronic data capable of conversion into a visual image.

MCM, pt. IV, ¶93.c.(11) (2019 ed.) (emphasis added). The word "any" means "every," "all," or "unmeasured or unlimited in amount, number, or extent." Any, MERRIAM WEBSTER'S DICTIONARY (2024 online ed.). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" United States v. Gonzales, 520 U.S. 1, 5 (1997) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976)). The Supreme Court only limits the expansive interpretation of the term if "language limiting the breadth of that

word" is in the statute. Id.[4] "Any" is used five times in the definition of visual depiction without qualification. MCM, pt. IV, ¶95.c.(11) (2019 ed.). Thus, the term "any" should be interpreted expansively.

Using the word "any" throughout, the visual depiction definition provides an expansive list of formats of child pornography: any developed photograph, any undeveloped photograph, any picture, any film, any video, any digital or computer image, any digital or computer picture, any digital or computer film, or any digital or computer video, or any digital or electronic data capable of conversion into a visual image. A painting on a canvas or a drawing on a sketch pad would be "pictures" and thus visual depictions. Any digital or computer image or picture created using digital drawing software or artificial intelligence would be a visual depiction. The 33 charged images in this case are all anime style cartoon images that appear to be drawn using digital drawing or painting software. The girls in the pictures all have two eyes, a nose, a mouth, ears, hair atop their head, two arms, and two legs. They are not drawn with characteristics that make them appear as mythical creatures, or aliens, or non-human in some way. A person looking at the images would be able to identify these as pictures of children. They both "appear to be" and "resemble" humans under age 18.

The military judge ignored the term "any" in the definition of visual depiction and arbitrarily qualified the term "person" by requiring the obscene picture of the person to be the

[4] *See also* Republic of Iraq v. Beaty, 556 U.S. 848, 856 (2009) ("[T]he word 'any' . . . has an expansive meaning, giving us no warrant to limit the class of [things referenced]." (some internal quotation marks and citation omitted)); ACLU Immigrants' Rts. Project v. United States Immigr. & Customs Enf't, 58 F.4th 643, 657 (2d Cir. 2023) ("The statutory use of the word 'any' has long signaled Congress's intent to sweep broadly to reach all varieties of the item referenced. (some internal quotation marks and citation omitted).); Cohen v. JP Morgan Chase & Co., 498 F.3d 111, 117 (2d Cir. 2007) ("Use of the word 'any' in statutory text generally indicates Congress's intent to sweep broadly to reach all varieties of the item referenced.").

result of a conversion from a depiction of an actual child. (App. Ex. XXIX at 9). That "conversion" requirement does not exist. The military judge explained the "conversion requirement" in his ruling:

> There is no evidence that these videos and images were produced through technology ***that simply turns 'pictures' of child pornography (actual minors) into cartoon versions of the same***."
>
> . . .
>
> And if there were evidence that [the] Accused, . . . took non-cartoon child pornography images and used technology to ***convert them into anime/hentai cartoons,*** then the result of this ruling could be different.
>
> . . .
>
> No evidence shows that a real image of child pornography was ***made into*** a cartoon. If that evidence existed, then yes that example would constitute child pornography under Article 134.

(App. Ex. XXIX at 9) (emphasis added). But an actual image of child pornography as a starting point is not required for obscene visual depictions. The President explicitly states such a requirement does not exist: "[T]he images include sexually explicit images that ***may not actually involve minors,*** but either resemble or are staged to appear so." MCM, pt. IV, ¶95.c.(1) (2019 ed.) (emphasis added). The definition of visual depiction incorporates photos of minors being made into cartoons, but it is not a perquisite for all obscene visual depictions. The military judge arbitrarily read in a requirement that an actual image of a real child be used to make the obscene image. That is an incorrect application of the law that is not supported by a common sense understanding of the President's explanations.

Absent a conversion from an image of an actual child, the military judge seemed to believe only photo-realistic images would satisfy the requirement for an obscene picture. The military judge said, "Had this been a case where the cartoon images closely resembled actual

persons, actual human beings, . . .then the result of this ruling could be different." (App. Ex. XXIX at 9). Because the President uses the term "any" without qualification throughout the definition of visual depiction, the President's offense does not require that the images be hyper-realistic. "Any picture" could include a portrait that is so perfectly drawn it has the quality of a photograph, but it could also be a more abstract image with the general characteristics of a human person (i.e. viewed from the front two eyes, a nose, and a mouth, or viewed from behind the shape of a head two arms and two legs). Someone looking at the picture could say, "that is a picture of a person." In the explanation, the President stated the images "may not actually involve minors, but either resemble or are staged to appear so." MCM, pt. IV, ¶95.c.(1) (2019 ed.). Had the President wanted to only criminalize hyper-realistic pictures, he would have stated as much – or he would have used the language from 18 U.S.C. § 2252A,"indistinguishable from . . . minor." Instead, he used the term "resemble" a minor rather than requiring the image look identical to an actual person. The military judge again arbitrarily read in realism. (App. Ex. XXIX at 9).

The military judge also concluded that "[t]he fact that no reported court has squarely addressed the application of Article 134 Child Pornography (since its enumeration in 2012) to fictional cartoon characters as 'persons' suggests that an interpretation that it so applies would not be widely shared." (App. Ex. XXIX). This statement assumes other legal minds also divorced the word "minor" from its context of the term "visual depiction of a minor" and found the term "person" ambiguous in the context of the entire explanation of the enumerated offense. But this Court did not find the term "person" grievously ambiguous in United States v. Carpenter when it held, "Possession of anime is prohibited by Article 134, UCMJ, if it depicts what appears to be children engaged in sexually explicit conduct or if it is obscene." 2016 CCA LEXIS 15,

*29 (A.F. Ct. Crim. App. 2016) (unpub. op.). Another explanation for the military judge's conclusion is that no legal mind - prior to the trial judge - has seriously suggested that cartoon "pictures" cannot depict "persons." Of course they can.

The military judge erred by ignoring the extensive use of the term "any" in the definition of visual depiction. "Any" depiction would incorporate the realistic and the imaginative because "any" is unqualified, and it incorporates both. An image of Disney's Snow White – a fictional character – in her traditional form as an animated character, in an edited hyper-realistic cartoon form, or as a photograph of a person in a Snow White costume are all visual depictions of a person. Vincent van Gogh in his, *Selfportrait with Bandaged Ear*, 1889,[5] is a visual depiction of a nonfictional human despite the lack of realism. Pablo Picasso's 1972 *Self Portrait Facing Death*, though abstract, is a visual depiction of a nonfictional person[6]. The visual depiction definition uses "any" expansively and without qualification. Thus, all these examples would be incorporated into the definition.

Of course, child pornography's remaining elements, specifically that the visual depictions be obscene, ensure that all animated characters and works of art are not criminal to view, possess, or distribute. Obscenity is the line between innocent conduct and criminal conduct in this case. *See* Miller v. California, 413 U.S. 15, 23 (1973) (Obscene images are not forms of constitutionally protected artistic expression). The more abstract a cartoon image is, the less obscene it may be. But the degree to which an image portrays sexual conduct in a patently offensive way is a factual question for the fact finder, not an issue of law to be resolved by the military judge. United States v. Puckett, 60 M.J. 960, 962-63 (A.F. Ct. Crim. App. 2005)

[5] https://www.vangoghmuseum.nl/en/art-and-stories/stories/all-stories/5-things-you-need-to-know-about-van-goghs-self-portraits
[6] arts.pallimed.org/2010/07/pablo-picasso-self-portrait-facing.html?m=1

(unpub.op.) ("[T]he question whether materials depict 'lascivious exhibition of the genitals,' an element of the crime, is for the finder of fact."); *See also* United States v. Petty, 13 U.S.C.M.A. 398, 401 (C.M.A. 1962) ("[A] question of fact, the matter was one for court-martial's consideration."). Appellee may benefit from the fact that his images are cartoons, anime, or hentai because a fact finder may determine the images are more imaginary than realistic, so they are not obscene. That does not mean they cannot be visual depictions of a minor simply because they are cartoons, anime, or hentai.

At bottom, the 33 charged cartoon images "appear to be" or "resemble" human persons under the age of 18, using the common sense definitions of "appear to be" and "resemble." The military judge divorced the word "minor" from its context – that is, the military judge failed to consider the entirety of the term, "visual depiction of a minor." By interpreting minor to mean only realistic human beings, he incorrectly interpreted the offense's definitions and misapplied the law. He abused his discretion by reading in limits to the unlimited definition of visual depiction of a minor.

### *B. The President's explanation in Article 134 supports a broad interpretation of child pornography that includes obscene cartoon images of what appear to be children.*

Other provisions of the Manual provide the historical context of child pornography under Article 134, and they support the government's position that Article 134 includes obscene cartoon images of what appear to be children. The Manual's explanation of child pornography references 18 U.S.C. §2251 (exploitation of children); §2252A (actual child pornography) and §1466A (obscene child images), and it states practitioners may be prosecuted under clause 3 of Article 134.

The military judge used the federal statutes mentioned in the explanation as a limit on the President's child pornography offense. (App. Ex. XXIX at 9). But the explanation neither limits

charging options nor exclusively ties Article 134 to those federal statutes. MCM, pt. IV, ¶ 95.c.(2) (2019 ed.). "The Article 134 offense of child pornography is broader than the federal and state statutes referenced below and extends to visual depictions of what appear to be minors." MCM, pt. IV, ¶95.c.(1) (2019 ed.). And military practitioners are not bound by federal statutes when using the UCMJ for an offense. The explanation states, "Practitioners may charge these offenses [violation under Title 18] utilizing Article 134, clause 3 (crimes and offenses not capital)." MCM, pt. IV, ¶95.c.(2) (2019 ed.). Then the President, limited only by the Constitution and the terminal elements of Article 134, created a robust and unique child pornography offense that was not limited by the requirements of one federal statute.

"The UCMJ is a self-contained statute that both defines criminal offenses and promulgates the procedures by which those offenses are to be prosecuted and adjudicated." United States v. Dinger, 77 M.J. 447, 453 (C.A.A.F. 2018) (Determining whether a federal statute limited the authority of a court-martial to impose any authorized sentence on a retiree). "The [UCMJ] establishes an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in the U.S. district courts." United States v. Dowty, 48 M.J. 102, 106 (C.A.A.F. 1998). The military and civilian systems are "separate as a matter of law." Id.

Child pornography under Article 134 has criminalized obscene visual depictions of what appeared to be minors since its enumeration in 2012. MCM, pt. IV, ¶68b.c. (2012 ed.). To assist practitioners, the President continues to update the references to analogous federal statutes in the explanation of the offense. But the President does not require that practitioners use the federal statutes, he uses the term "may" providing a charging option to prosecutors. MCM, pt. IV, ¶95.c.(1)(2019 ed.). The President goes on to say the offense "is not intended to preempt

prosecution of other federal and state law child pornography and obscenity offenses which may be amenable to courts-martial via Article 134 clauses 2 and 3." (Id.) Thus practitioners are not bound by the federal or state offenses when using Article 134. The Drafter's Analysis for the offense in the 2012 edition of the Manual only referenced 18 U.S.C. §2251. Drafter's Analysis, MCM, A23-22 (2012 ed.). Title 18 U.S.C. § 2251 criminalizes the creation of sexually explicit visual depictions of actual children. The 2018 Amendment to the Drafter's Analysis still referenced 18 U.S.C. §2251 but added 18 U.S.C. §2252A which criminalizes certain activities relating to child pornography. Drafter's Analysis, MCM, A17-16 (2019 ed.). Then in 2019, the President added 18 U.S.C. §1466A criminalizing obscene visual depictions – including cartoons – to the explanation. MCM, pt. IV, ¶95c.(2) (2019 ed.). By listing the federal offenses, the President provided examples of the federal offenses that Article 134 child pornography criminalized, and providing charging options to practitioners without requiring the use of the federal statute.

Based on the explanations provided in the Manual and references to federal law and state law, the President intended child pornography under Article 134 to be an expansive offense that included but is not limited to the conduct criminalized in the federal child pornography and obscenity. The military judge should not have used the federal statutes to arbitrarily limit the elements and definitions of child pornography under Article 134.

### *C. The military judge improperly applied the rule of lenity because child pornography under Article 134 was not grievously ambiguous.*

The rule of lenity did not apply in this case because the terms "person" is a simple term that is not grievously ambiguous. ". . .[T]he rule of lenity applies only when a reasonable doubt persists *after* the traditional canons of interpterion have been considered." Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 197 (Thomas/West 2012). To

invoke the rule, a court must conclude that there is a "grievous ambiguity or uncertainty in the statute." Staples v. United States, 511 U.S. 600, 619, n. 17 (1994) (quoting Chapman v. United States, 500 U.S. 453, 463 (1991)). *See also* United States v. Mays, 83 M.J. 277, 281 (C.A.A.F. 2023) ("[T]he rule of lenity applies only in cases of significant ambiguity."). The military judge identified no grievous ambiguity, so the threshold to trigger the rule of lenity was not met.

"The simple existence of some statutory ambiguity, is not sufficient to warrant application of [the rule of lenity], for most statutes are ambiguous to some degree." Mays, 83 M.J. at 281 (citing Muscarello v. United States, 524 U.S. 125, 138-39, (1998)). "The rule of lenity applies only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended." Mays, 83 M.J. at 281 (citing United States v. Wells, 519 U.S. 482, 499 (1997) (internal citations omitted).

The military judge decided the term "person" meant "human being." (App. Ex. XXIX at 4). But he said there were two conflicting interpretations of the term "person": the trial defense counsel's interpretation that cartoon versions of actual human beings are required, and the government's interpretation that any visual depiction if it resembles a human being is all that's required. (Id. at 7-8). The context creates the differing interpretations, but the term "person" in isolation is not ambiguous – it means human being. The defense's and the military judge's interpretations fall apart when looking to the context of the enumerated offense. The President explained, "the images include sexually explicit images that ***may not actually involve minors***." MCM, pt. IV, ¶95.c.(1) (2019 ed.) (emphasis added). In context, actual human beings are not required.

Neither the language of Article 134 nor the President's enumerated child pornography offense are grievously ambiguous. They are not ambiguous at all. The government disagrees

with the military judge's decision that "minor" and "person" are ambiguous terms. Both words are easily understood term. When used in context with the definitions and the President's explanation, obscene anime images of what appears to be a child or which resemble a child are proscribed. The military judge failed to explain why the presidentially enumerated offense of child pornography was grievously ambiguous. He improperly granted Appellee relief by applying the rule of lenity.

***D. The government may charge an offense under any of the three clauses of Article 134 as appropriate and is not required to use federal statutes rather than an enumerated Article 134 offense.***

The government may charge obscene visual depictions of what appears to be minors as child pornography or under 18 U.S.C. §1466A. The government is not bound to either charging scheme. *See* MCM, Part IV, ¶ 95.c.(2) (2019 ed.). Without being privy to all the government's evidence, the military judge dictated that 18 U.S.C. §1466A was the only charging scheme available to the government. The military judge said, "The Government is free to modify the currently charged offenses to clause 2 Article 134 offenses, potentially with the same charging language, rather than an enumerated Child Pornography offense." (App. Ex. XXIX at 10). "Additionally, the Government is free to do what most prosecutors dealing with this subject matter have done--assimilate charges under 18 U.S.C. §1466A." (App. Ex. XXIX at 10). This conclusion is inaccurate. The government is not bound to one charging scheme over another if evidence is available for both.

The explanation for child pornography references 18 U.S.C. §2251; §2252A and §1466A, and states "practitioners ***may*** charge" offenses under clause 3 of Article 134. But the explanation does not require prosecutors to do so. MCM, Part IV, ¶ 95.c.(2) (2019 ed.). Based on the explanations provided in the Manual and references to optional federal law, the President

intended the child pornography offense under Article 134 to include conduct punishable under 18 U.S.C. §2251 (actual child pornography) ; §2252A (actual child pornography) and §1466A (obscene images). Mandatory words like "must" impose a duty, but permissive words like "may" grant discretion. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 112 (Thomas/West 2012) (discussing the Mandatory/Permissive Canon). Had the President intended for possession, viewing, or distribution of obscene child images to only be charged under clause 3 by assimilating §1466A then he would have said "must," or words to that effect, rather than "may."

In this case, charging under clause 3, Article 134 is problematic for two reasons. First, viewing obscene images of what appear to be children is not criminalized under §1466A. Second, the images may or may not have travelled in interstate or foreign commerce. Digital forensic evidence was not provided to the military judge during motions, so he would be unable to determine if §1466A was an appropriate charging scheme. Appellee could have made the images himself without moving them through interstate commerce, and under such facts, §1466A would not have been an appropriate offense.

Prosecutors may choose which clause of Article 134 they use to prosecute offenses. CAAF has held, "Some conduct that falls into one or both of the first two categories [of Article 134] may also be a crime under Title 18 of the United States Code; and in that event, the conduct is punishable whether committed by a servicemember or a civilian." United States v. Falk, 50 M.J. 385, 386 (C.A.A.F. 1999). "Therefore, an accuser in preferring charges, or trial counsel in prosecuting, may opt to rely on the generally applicable federal penal statute rather than to proceed under the first two clauses of Article 134." Id. Just as the Court says the accuser may opt to charge under the federal statute, the opposite is also true. The accuser may opt to charge

under the first two clauses of Article 134. The Court used "may opt" language to show that discretion allows charging under multiple charging schemes. Because of the worldwide nature of the armed forces' mission the UCMJ is a self-contained legal system that permits prosecution of misconduct under Title 10 of the United States Code and does not require use of federal statutes – although the option is available under Article 134, clause 3.

The military judge improperly dictated the charging scheme of the United States. The military judge had only the limited evidence from motions before him. The military judge would not have known what offenses could be charged based on only some of the government's available evidence.

### *E. Appellee's constitutional claims do not warrant relief, but if this Court evaluates them, Appellee was not denied fair notice, the offense is not void for vagueness, and no equal protection violation occurred.*

The military judge did not address trial defense counsel's constitutional claims of lack of fair notice, void for vagueness, and equal protection because relief was granted on other grounds. The government does not believe these issues need to be addressed to resolve this appeal. But the government addresses the claims if this Court disagrees and believes these questions need to be addressed.

#### *1. The enumerated child pornography offense under Article 134 provided fair notice to Appellee and ensured the offense was not void for vagueness.*

Appellee had constitutional fair notice that possessing, viewing, and distributing obscene visual depictions of what appear to be minors is criminal because the offense was enumerated, analogous federal statutes criminalized it, and case law indicated its illegality. Fifth Amendment due process requires an accused have fair notice that the conduct he is committing is criminal. *See* U.S. CONSTITUTION, amend. V; Rose v. Locke, 423 U.S. 48, 49 (1975). "[A] criminal statute [must] give a person of ordinary intelligence fair notice that his contemplated conduct is

forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954); United States v. Williams, 553 U.S. 285, 304 (2008). The Presidentially promulgated offenses under Article 134 ensure the statute is neither void for vagueness nor constitutionally overbroad. Parker, 417 U.S. at 733. CAAF recognized that "Presidential narrowing of the 'general' article through examples of how it may be violated is part of why Article 134, UCMJ, is not unconstitutionally vague." Jones, 68 M.J. at 472 (citing Parker, 417 U.S. at 753-56). Sources of fair notice include the "MCM, federal law, state law, military case law, military custom and usage, and military regulations." United States v. Vaughan, 58 M.J. 29, 31 (C.A.A.F. 2003).

To determine whether an accused received fair notice that his conduct was proscribed under Article 134, the Court first looks at the Manual to determine whether the charged offense is specifically enumerated by the President under Article 134, UCMJ. *See* Vaughan, 58 M.J. at 31 (first determining "child neglect" was not an enumerated offense); United States v. Bivins, 49 M.J. 328, 329 (C.A.A.F. 1998) (beginning fair notice analysis by determining "[b]igamy is not an enumerated offense"). The 2019 Manual enumerates child pornography as an offense and the offense criminalizes the possession, viewing, and distribution of "obscene visual depiction of a minor engaging in sexually explicit conduct." The Manual broadly states, "visual depiction includes ***any*** developed or undeveloped photograph, ***picture***, film, or video; ***any*** digital or computer image, ***picture***, film, or video ***made by any means***, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image." MCM, pt. IV, ¶95.c.(11) (2019 ed.) (emphasis added).

If the offense is enumerated, as is the case here, then courts determine whether the plain language of the President's explanation of that offense provided fair notice to a reasonable

service member of ordinary intelligence. *See* United States v. McGuinness, 35 M.J. 149, 152 (C.M.A. 1992) ("[w]e need to decide only whether appellant's conduct is plainly within the terms of the statute"); United States v. Sullivan, 42 M.J. 360, 366 (C.A.A.F. 1995) (concluding "any reasonable officer" would know the conduct at issue was punishable under Article 134, UCMJ). This focus on the plain language of the offense aligns with how the Supreme Court and other federal courts evaluate questions of fair notice, for "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." United States v. Lanier, 520 U.S. 259, 266 (1997).

Together with the plain language of the enumerated offense, 18 U.S.C. §1466A and military case law provide sufficient notice that Appellee's misconduct is criminal. An analogous statute, 18 U.S.C. §1466A, is a source of notice that possessing and distributing obscene cartoon images of what appear to be children is prohibited. As CAAF explained in Vaughan, federal and state law can give servicemembers notice that their conduct is criminal and chargeable under Article 134. But that does not mean they must be charged under the exact federal or state statutes that provided notice of proscribed conduct. The member need not be on notice of the exact charging mechanism ahead of committing the offense – merely that they were provided notice of the act's criminality via some mechanism such as an enumerated offense, analogous state or federal statute, military regulation, or military custom. Vaughan, 58 M.J. at 33.

Military courts have held the viewing, possession, and distribution of cartoon images is criminal. Military case law, even if unpublished, provides a source of notice to servicemembers that the conduct is criminal. In Carpenter, the Air Force court reviewed all of appellant's conviction for legal and factual sufficiency. 2016 CCA LEXIS at *28. Under Article 66(c), this Court was only permitted to affirm findings and sentence correct in law and fact, and if the Court

had found the offense improper it would have set aside the portion of the offense that was incorrect. Instead, the court explicitly stated, "Lastly, we address the anime pornography. . . . As previously stated, 29 images were admitted. "Possession of anime is prohibited by Article 134, UCMJ, if it depicts what appears to be children engaged in sexually explicit conduct or if it is obscene." Carpenter, 2016 CCA LEXIS at *28-29. Even if this Court determines this case is slightly different than Carpenter, when evaluating fair notice, "it is immaterial that there is no litigated fact pattern precisely in point." United States v. Kinzler, 55 F.3d 70, 74 (2d Cir. 1995) (internal citations omitted). "Where, as here, the language of the statute plainly covers the defendant's actions, the statute need not have been previously held applicable on the same facts to survive a vagueness attack." United States v. Martin, 1993 U.S. App. LEXIS 18849, at *7 (10th Cir. July 22, 1993) (unpub. op.) (citing Locke, 423 U.S. at 51). Thus, an analogous case provides fair notice even if the facts are slightly different.

It is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952). By enacting Article 137, UCMJ, Congress ensured each punitive article was explained to servicemembers. 10 U.S.C. § 937(a). Appellee was on notice and crossed that line of proscribed conduct when he possessed obscene animated cartoons. Appellee was not deprived of constitutional fair notice, and the military judge's ruling should not be upheld on this basis.

### *2. The government's charging scheme did not violate equal protection because a reasonable basis for difference in treatment existed.*

Equal protection was not violated when the government charged child pornography, an offense requiring sex offender registration, versus charging him under 18 U.S.C. §1466A's that may or may not require it. Appellee was not treated unfairly because his crime was charged as child pornography while other servicemembers were charged with possession of obscene materials under §1466A. In criminal cases, "An 'equal protection violation' is discrimination that is so unjustifiable as to violate due process." United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015) (citing United States v. Rodriguez-Amy, 19 M.J. 177, 178 (C.M.A. 1985)). But "equal protection is not denied when there is a reasonable basis for a difference in treatment." Akbar, 74 M.J. at 406 (citing United States v. McGraner, 13 M.J. 408, 418 (C.M.A. 1982)).

Appellee argued at trial that other servicemembers were prosecuted under clause 3 of Article 134, assimilating 18 U.S.C. §1466A, for identical, or substantially similar offenses and sex offender registration was not required. (App. Ex. XXV at 6-7). But he was charged under clause 2 for violating the presidentially enumerated child pornography offense, and sex offender registration would be required if he is convicted. (Id.). Appellee failed to show the charging scheme – using the child pornography offense – was an attempt to discriminate against him.

At least two reasonable bases for charging under Article 134 child pornography for anime images rather than a federal statute – exist. First, the evidence available to the government may require one charging scheme over another. Depending on the testimony of the government's forensic digital expert a trial – who did not testify in motions – this may be a situation in which the child pornography did not move in interstate or foreign commerce. Thus, prosecution under a federal statute with a jurisdictional element is foreclosed. *See* 18 U.S.C. §1466A(d). Evidence has yet to be presented on whether these images travelled in interstate or foreign commerce – a

required element of 18 U.S.C. §1466A(d). Also, viewing obscene material is not punishable under the federal statute, but it is under Article 134. *Compare* 18 U.S.C. §1466A(a) *with* MCM, pt. IV, ¶95b.(1) (2019 ed.) Choosing one charging scheme over another based on the evidence does not create "discrimination that is so unjustifiable as to violate due process." United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015). And second, the government may charge an accused under the first two clauses of Article 134 or under the federal statute using clause 3, but neither Congress nor the President dictated a requirement of one over the other in the plain language of the statute or the President's explanations. 10 U.S.C. §934; MCM, pt. IV, ¶95.c. (2019 ed.).

The government acknowledges that 18 U.S.C. §1466A is not listed in DODI 1325.07, Attachment 4, Enclosure 2, or the SORNA, and child pornography under Article 134 is listed. But sex offender registration is a jurisdiction specific endeavor even though federal guidance is provided. According to the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking:

> While most jurisdictions outline specific offenses requiring registration, some jurisdictions also include 'catch-all' provisions, which typically require individuals convicted of an offense that is 'by its nature a sex offense,' to register. There are also a handful of jurisdictions where registration is required if an individual commits an offense as a result of sexual compulsion or for purposes of sexual gratification.[7]

Thus, sex offender registration can be triggered by the conviction itself or by the underlying conduct if it is "comparable, similar, or substantially similar to one or more of the receiving

[7] https://smart.ojp.gov/sorna/current-law/case-law/i-sorna-requirements#_ftnref23 (last accessed 15 Feb 23)

jurisdictions registerable offenses."[8] Appellee did not provide any evidence that the goal in charging this offense as child pornography was to trigger sex offender registration.

The government possessed a rational basis for choosing the present charging scheme, and the choice did not violate equal protection. Appellee is not entitled to relief based on an Equal Protection claim.

## CONCLUSION

Thus, the military judge abused his discretion when he decided the 33 obscene cartoon images of what appear to be children or resemble children were irrelevant for the charges of child pornography. Sexually explicit cartoons of what appear to be minors or which resemble minors fit within the president's definition of child pornography under Article 134, UMCJ, and the 33 images were relevant to the offense of child pornography. For these reasons, the United States respectfully requests that this Honorable Court vacate the military judge's ruling to exclude images of animated child pornography.

[8] Id.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 April 2024.

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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES** | ) | **Misc. Dkt. No. 2024-03** |
| ***Appellant*** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | **ORDER** |
| **Remington E. CARLISLE** | ) | |
| **Staff Sergeant (E-5)** | ) | |
| **U.S. Air Force** | ) | |
| ***Appellee*** | ) | **Panel 1** |

On 25 March 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Appellate Exhibit XI. The sealed exhibit was presented at trial. The court finds that the exhibit was reviewed by trial and defense counsel at Appellee's court-martial.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 27th day of March, 2024,

**ORDERED:**

Appellant's Consent Motion to Examine Sealed Materials is **GRANTED**. Appellate government counsel and appellate defense counsel may view **Appellate Exhibit XI**, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

**IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

| | | |
|---|---|---|
| **UNITED STATES**,<br>*Appellant,* | ) | **UNITED STATES' CONSENT MOTION TO VIEW SEALED MATERIALS** |
| v. | ) | Before Panel No. 1 |
| Staff Sergeant (E-5)<br>**REMINGTON E. CARLISLE**<br>United States Air Force<br>*Appellee.* | ) | Misc. Dkt. No. 2024-03<br><br>25 March 2024 |

**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves for both parties to examine the sealed materials in Appellate Exhibit XI (Disc w/33 contraband images *SEALED*).

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to appellate counsel's responsibilities, undersigned counsel asserts that review of the referenced appellate exhibit is necessary to conduct a complete review of the record and to advocate competently on behalf of the United States. The Government contests the military judge's ruling that excluded the 33 charged images of obscene visual depictions of what appear to be children. The 33 images are contained in Appellate Exhibit XI. It is necessary for undersigned counsel to review the images to understand the full context of the discussion of whether these images constitute child pornography under Article 134, UCMJ.

Appellate Defense Counsel was consulted with regards to this motion to examine the sealed appellate exhibits. Appellate Defense Counsel consents to this request, provided both parties are permitted to review the sealed Appellate Exhibit XI.

**WHEREFORE**, undersigned counsel respectfully requests that this Honorable Court grant this motion.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 March 2024.

JOCELYN Q. WRIGHT, Capt, USAF
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# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

| | | |
|---|---|---|
| **UNITED STATES**<br>***Appellant*** | ) | **Misc. Dkt. No. 2024-03** |
| **v.** | ) | **NOTICE OF DOCKETING** |
| **Remington E. CARLISLE**<br>**Staff Sergeant (E-5)**<br>**U.S. Air Force**<br>***Appellee*** | ) | |

The record of trial and a notice of an intent to appeal pursuant to Article 62, UCMJ, 10 U.S.C. § 862, was filed in the above-styled case with this court on 18 March 2024.

Accordingly, it is by the court on this 18th day of March 2024,

**ORDERED:**

The case is assigned Misc. Dkt. No. 2024-03 and referred to Panel 1.

FOR THE COURT

[redacted] Capt, USAF
Deputy Clerk of the Court

**DEPARTMENT OF THE AIR FORCE**
**OFFICE OF THE JUDGE ADVOCATE GENERAL**
**MILITARY JUSTICE AND DISCIPLINE**

18 March 2024

MEMORANDUM FOR AIR FORCE COURT OF CRIMINAL APPEALS

FROM: AF/JAJG

SUBJECT: Record of Trial – Article 62 Appeal – SSgt Remington E. Carlisle

1. On 29 May 2023, the Commander, Headquarters 15th Air Force, Shaw Air Force Base, South Carolina, referred the following charge and specifications: one Charge and three Specifications for possession, distribution, and viewing of obscene visual depictions of what appear to be minors engaging in sexually explicit conduct in violation of Article 134, UCMJ. The Accused was arraigned on 16 January 2024. The general court-martial convened for a bifurcated motions hearing at Mountain Home Air Force Base, Idaho, on 13 February 2024.

2. On 26 January 2024, the trial defense counsel filed a motion in limine to exclude evidence of the 33 visual depictions of what appear to be minors that constituted the misconduct in the three charged specifications. (App. Ex. XIII.) The United States responded on 1 February 2024. (App. Ex. XIV). On 13 February 2024, the parties presented evidence and argument on the issue. (R. at 98-118.) Trial defense counsel filed a supplemental brief on 14 February 2024. (App. Ex. XXV.) The United States filed a supplemental response on 19 February 2024. (App. Ex. XXVIII.) On 20 February 2024 at 1754 EST, the military judge issued his written ruling granting trial defense counsel's motion and excluding the 33 visual depictions of what appear to be minors as irrelevant. (App Ex. XXIX.)

3. On 23 February 2024 at 0830 EST, the United States filed a notice of appeal notifying the military judge that it would be appealing his ruling to exclude evidence. (App. Ex. XXX; Attachment 1.) The ruling excluded "evidence that is substantial proof of a fact material in the proceeding," and the ruling affected all three specifications of the charge. 10 U.S.C. § 862(a)(1)(B). Trial counsel forwarded the appeal and record to the Air Force Appellate Operations Division, and it was received on 11 March 2024.

3. Pursuant to Article 62, UCMJ, and Rule 20 of the Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States files the attached certified original record of trial and the notice of appeal in the above case and notifies this Honorable Court of the United States' intention to appeal the military judge's ruling.

MATTHEW D. TALCOTT, Colonel, USAF
Chief, Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

2 Attachments:
1. Notice of Appeal
2. Record of Trial

cc: AF/JAJA

**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 18 March 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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**ATTACHMENT 1**

**DEPARTMENT OF THE AIR FORCE**
**TRIAL JUDICIARY**

| | | |
|---|---|---|
| UNITED STATES | ) | NOTICE OF ARTICLE 62 |
| | ) | APPEAL |
| v. | ) | |
| | ) | |
| STAFF SERGEANT REMINGTON E. CARLISLE | ) | |
| 366th Communications Squadron (ACC) | ) | |
| Mountain Home Air Force Base, Idaho | ) | 23 February 2024 |

The Government respectfully files the following Notice of Appeal, pursuant to Article 62, Uniform Code of Military Justice, and Rule for Courts-Martial 908(b).

1. The Government intends to appeal the military judge's 20 February 2024 ruling granting the Accused's motion to exclude evidence. The military judge stated he excluded the evidence as irrelevant. The ruling affects Specifications 1, 2, and 3 of the Charge.

2. The military judge made a ruling that the 33 charged videos and images of anime and cartoon child pornography were inadmissible as irrelevant to an offense under Article 134, Child Pornography. The ruling excludes evidence that is substantial proof of a fact material in the proceeding: specifically, all 33 videos and images constituting the misconduct charged in Specification 1, 2, and 3 of the Charge.

3. The Government does not make this appeal for the purposes of delay.

4. Before filing this notice, Trial Counsel has consulted with AF/JAJG and the Staff Judge Advocate of the Convening Authority, as required by paragraph 19.14.1 of Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 24 January 2024. Both the Convening Authority and his Staff Judge Advocate have approved this appeal.

Respectfully submitted,

[redacted]

CHRISTINA S. ZANIC, Maj, USAF
Special Trial Counsel

**CERTIFICATE OF SERVICE**

I hereby certify that the Military Judge's ruling referenced above was issued on 20 February 2024 at 1754 hours (EST). On 23 February 2024, within 72 hours of the ruling, I caused a copy of this notice of appeal to be served at 0830 hours (EST), on the Military Judge, Colonel Brian Thompson, and Defense Counsel, Maj Joshua Joyce and Capt Luisa Arnone.

[redacted]C, Maj, USAF
Special Trial Counsel

**ATTACHMENT 2**

*The Record of Trial was hand delivered to the Air Force Court of Criminal Appeals with this filing.*