IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	2 February 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for the first enlargement of time to file his assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **12 April 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 February 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
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5 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 February 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	2 April 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a second enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **12 May 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 110 days have elapsed. On the date requested, 150 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced MSgt Casillas to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.*

The convening authority also granted MSgt Casillas request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas dependents. *Id*.

MSgt Casillas' record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

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Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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2 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 April 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 1 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Third) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 3d day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Third) is **GRANTED**. Appellant shall file any assignments of error not later than **11 June 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits. Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

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, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	1 May 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a third enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **11 June 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced MSgt Casillas to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.*

The convening authority also granted MSgt Casillas request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas dependents. *Id*.

MSgt Casillas' record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors.

Undersigned counsel also provides the following information: undersigned counsel currently represents 28 clients and is presently assigned 17 cases pending initial brief before this Court. Nine cases currently have priority over the present case:

1. *United States v. George*, No. ACM 40397 – On 18 April 2024, this Honorable Court ordered briefs be filed on a specified issue, not later than 8 May 2024. Undersigned counsel is researching the specified issue and preparing to draft the appellant's brief.
2. *United States v. Gubicza*, No. ACM 40464 – The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. The appellant is confined. Undersigned counsel reviewed the record of trial and anticipates filing any assignments of error on or before 11 May 2024. The filing of the appellant's assignments of error was forestalled by undersigned counsel's discovery that the appellant never received a copy of his record of trial. She therefore worked with the Government Trial and Appellate Operations Division to move for a

consent EOT. This EOT allowed the Government time to send appellant a copy of his record of trial and undersigned counsel to consult with the appellant after receipt.

3. *United States v. Blackburn*, 40303 (f rev) – Due not later than 29 May 2024, before the United States Court of Appeals for the Armed Forces (CAAF), undersigned counsel will file a petition and supplemental brief. Undersigned counsel needs time to draft the appellant's supplemental brief.
4. *United States v. Galera*, No. ACM 40477 – The record of trial consists of three prosecution exhibits, five defense exhibits, three appellate exhibits, and three court exhibits. The transcript is 174 pages. The appellant is not confined. Undersigned counsel anticipates filing not later than 2 June 2024.
5. *United States v. Goodwater*, No. ACM 40304 (f rev) – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. The appellant is not confined. Undersigned counsel has begun her review.
6. *United States v. Johnson*, No. ACM 40291 (f rev) – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. The appellant is not confined. Undersigned counsel has begun her review.
7. *United States v. Trovatore*, No. ACM 40505 – The record of trial consists of 12 prosecution exhibits, 2 appellate exhibits, and 2 court exhibits. The transcript is 175 pages. The appellant is not confined.
8. *United States v. Simmons*, No. ACM 40462 (f rev) – The record of trial consists of 5 prosecution exhibits, 5 defense exhibits, and 9 appellate exhibits. The transcript is 104 pages. The appellant is not confined.

9. *United States v. Benoit*, No. ACM 40508 – The record of trial consists of 11 prosecution exhibits, 12 defense exhibits, 58 appellate exhibits, and 2 court exhibits. The transcript is 678 pages. The appellant is not confined.

During the requested enlargement of time, in addition to the above priorities, undersigned counsel will also be managing the following priorities:

- *Teaching three courses for a new Senior Defense Qualification Course at AFJAGS.* Given that this a new course, which will require the attendees to pass a certification test after the course instruction ends, undersigned counsel needs sufficient time to prepare. Undersigned counsel will be traveling to, and teaching the three courses in person, at Maxwell Air Force Base, Alabama, on 8-9 May 2024.
- *Attending the CAAF CLE Program in-person*. Undersigned counsel is required to attend this program for two full days of in-person instruction on 15-16 May 2024.

Additionally, undersigned counsel has been authorized to take leave on 10 May 2024 and 20-23 May 2024. 24 May 2024 is a family day and 27 May 2024 is a federal holiday.

Since requesting MSgt Casillas' second enlargement of time, undersigned counsel filed a petition and supplemental brief at CAAF in *United States v. Bickford*, No. ACM 40326, *United States v. Stanford*, No. ACM 40327, and *United States v. Kight*, No. ACM 40337; appellee's answer to the United States' Appeal under Article 62, UCMJ, in *United States v. Carlisle*, Misc. Dkt. No. 2024-03; a reply brief in *United States v. George*, No. ACM 40397; and a brief on further review in *United States v. Donley*, No. ACM 40350 (f rev). She also prepared for and participated in four moot arguments and attended one argument before this Court.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 May 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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3 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 May 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	31 May 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a fourth enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **11 July 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The

convening authority also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. MSgt Casillas has been (1) advised of his right to a timely appeal, was provided (2) an update on the status of undersigned counsel's progress on his appeal and (3) advised of this request for an enlargement of time, and (4) he agrees with this request for an enlargement of time.

Undersigned counsel also provides the following information: undersigned counsel currently represents 35 clients and is presently assigned 19 cases pending initial brief before this Court. Seven cases currently have priority over the present case:

1. *United States v. Goodwater*, No. ACM 40304 (f rev) – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. The appellant is not confined. His case was docketed before this Court on 20 June 2023 and was a partially litigated general court-martial. Undersigned counsel anticipates completing her review of the appellant's record next week after reviewing the sealed materials and filing his assignments of error no later than 14 June 2024.
2. *United States v. Blackburn*, 40303 (f rev) – Undersigned counsel has filed the appellant's petition at the United States Court of Appeals for the Armed Forces

(CAAF), is currently completing the supplemental brief, and will need to incorporate edits following internal review within the Appellate Defense Division for filing by or before 20 June 2024.

3. *United States v. Johnson*, No. ACM 40291 (f rev) – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. The appellant is not confined. His case was docketed before this Court on 13 July 2023 and was a fully litigated general court-martial. Undersigned counsel is reviewing the appellant's record and anticipates filing his assignments of error no later than 7 July 2024, if this Honorable Court grants her pending motion for a final enlargement of time.
4. *United States v. Trovatore*, No. ACM 40505 – The record of trial consists of 12 prosecution exhibits, 2 appellate exhibits, and 2 court exhibits. The transcript is 175 pages. The appellant is not confined. His case was docketed before this Court on 8 August 2023.
5. *United States v. Simmons*, No. ACM 40462 (f rev) – The record of trial consists of 5 prosecution exhibits, 5 defense exhibits, and 9 appellate exhibits. The transcript is 104 pages. The appellant is not confined. His case was docketed before this Court on 15 August 2023.
6. *United States v. Benoit, Jr.*, No. ACM 40508 – The record of trial consists of 11 prosecution exhibits, 12 defense exhibits, 58 appellate exhibits, and 2 court exhibits. The transcript is 678 pages. The appellant is not confined. His case was docketed before this Court on 15 August 2023. Further, this case was a fully litigated general court-martial which involves the death of a servicemember.

7. *United States v. Vidrine*, No. ACM 23013 - The record of trial consists of six prosecution exhibits, three defense exhibits, and three appellate exhibits. The transcript is 74 pages. The appellant is not confined. His case was docketed before this Court on 24 October 2023.

During the requested enlargement of time, undersigned counsel will also participate in a moot argument and has been authorized to take leave from 21-24 June 2024 to attend a family reunion in another state. 19 June 2024 is a federal holiday and 20 June 2024 is a family day.

Since requesting MSgt Casillas' third enlargement of time, undersigned counsel filed appellant's specified issue brief in *United States v. George*, No. ACM 40397; appellant's petition and supplement in *United States v. Kight*, No. ACM 40337; and appellant's brief in *United States v. Gubicza*, No. ACM 40464. Undersigned counsel also completed her review of *United States v. Galera*, No. ACM 40477, conducted research, and consulted with the appellant before the appellant decided to withdraw from appellate review. She further completed her review of *United States v. Matthew*, No. ACM 39796 (f rev), conducted research, and consulted with the appellant and appellant's civilian counsel, before appellant's brief was filed on 28 May 2024.

Undersigned counsel was also recently detailed nine new clients. For each new client, she must locate their contact information which is not always contained within the record of trial and engage in initial communications which include detailed conversations about the appellate process.

In addition, undersigned counsel prepared for, traveled to, and taught three courses at Maxwell Air Force Base, Alabama, on 8-9 May 2024. She also was required to attend the CAAF CLE Program in person on 15-16 May 2024, and was authorized to take leave on 10 May 2024 and 20-23 May 2024. Further, 24 May 2024 was a family day and 27 May 2024 was a federal holiday. She was also tasked with reviewing and providing input on an update to a Department of

Air Force Instruction, which she has accomplished. She further prepared for and participated in a moot argument.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 31 May 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

3 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 June 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	3 July 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a fifth enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **10 August 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 202 days have elapsed. On the date requested, 240 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority

also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. MSgt Casillas (1) was provided an update on the status of undersigned counsel's progress on his appeal, (2) advised of this request for an enlargement of time, and (3) he agrees with this request for an enlargement of time.

Undersigned counsel also provides the following information: undersigned counsel currently represents 33 clients and is presently assigned 18 cases pending initial brief before this Court. Seven cases currently have priority over the present case:

1. *United States v. Johnson*, No. ACM 40291 (f rev) – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. The appellant is not confined. His case was docketed before this Court on 13 July 2023 and was a fully litigated general court-martial. The appellant's brief is fully drafted and currently being reviewed by undersigned counsel's leadership. It will be filed no later than 8 July 2024.

2. *United States v. Goodwater*, No. ACM 40304 (f rev) – The appellant raised four issues in his initial brief. The government's answer is due on 15 July 2024. Undersigned counsel anticipates needing to draft and file a reply brief.
3. *United States v. George*, No. ACM 40397 – Due not later than 1 August 2024, before the United States Court of Appeals for the Armed Forces (CAAF), undersigned counsel will file a petition and supplemental brief. Undersigned counsel needs time to draft the appellant's supplemental brief.
4. *United States v. Trovatore*, No. ACM 40505 – The record of trial consists of 12 prosecution exhibits, 2 appellate exhibits, and 2 court exhibits. The transcript is 175 pages. The appellant is not confined. His case was docketed before this Court on 8 August 2023. Undersigned counsel is reviewing the record of trial and anticipates filing any assignments of error on or before 2 August 2024.
5. *United States v. Donley*, No. ACM 40350 – Due not later than 5 August 2024, before the United States Court of Appeals for the Armed Forces (CAAF), undersigned counsel will file a petition and supplemental brief. Undersigned counsel needs time to draft the appellant's supplemental brief.
6. *United States v. Simmons*, No. ACM 40462 (f rev) – The record of trial consists of 5 prosecution exhibits, 5 defense exhibits, and 9 appellate exhibits. The transcript is 104 pages. The appellant is not confined. His case was re-docketed before this Court on 15 August 2023, after this Court *sua sponte* remanded his record for correction.
7. *United States v. Benoit, Jr.*, No. ACM 40508 – The record of trial consists of 11 prosecution exhibits, 12 defense exhibits, 58 appellate exhibits, and 2 court exhibits. The transcript is 678 pages. The appellant is not confined. His case was docketed

before this Court on 15 August 2023. This case was a fully litigated general court-martial which involves the death of a servicemember.

During the requested enlargement of time, 4 July 2024 is a federal holiday and 5 July 2024 is a family day.

Since requesting MSgt Casillas' eighth enlargement of time, undersigned counsel filed appellant's brief in *United States v. Goodwater*, No. ACM 40304 (f rev); and appellant's supplemental brief (before the CAAF) in *United States v. Blackburn*, No. ACM 40303 (f rev). Undersigned counsel also completed her review of *United States v. Johnson*, No. ACM 40291 (f rev), and drafted the appellant's brief, in addition to reviewing five records of trial to advise servicemembers regarding their opportunity to file a direct appeal before this Court. She also prepared for and participated in two moot arguments for two cases. Finally, 19 June 2024 was a federal holiday, 20 June 2024 was a family day, and undersigned counsel was on leave from 21-24 June 2024.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 July 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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9 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 July 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	2 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a sixth enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **9 September 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority

also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. MSgt Casillas (1) was provided an update on the status of undersigned counsel's progress on his appeal, (2) advised of this request for an enlargement of time, and (3) he agrees with this request for an enlargement of time.

Undersigned counsel also provides the following information: undersigned counsel currently represents 29 clients and is presently assigned 16 cases pending initial brief before this Court. Three cases currently have priority over the present case:

1. *United States v. Donley*, No. ACM 40350 – Undersigned counsel is drafting the appellant's petition and supplemental brief for filing before the United States Court of Appeals for the Armed Forces (CAAF) on or around Monday, 5 August 2024.
2. *United States v. Simmons*, No. ACM 40462 (f rev) – The record of trial consists of 5 prosecution exhibits, 5 defense exhibits, and 9 appellate exhibits. The transcript is 104 pages. The appellant is not confined. Undersigned counsel is reviewing this record of trial and will file any assignments of error on or before Friday, 9 August 2024.

3. *United States v. Benoit, Jr.*, No. ACM 40508 – The record of trial consists of 11 prosecution exhibits, 12 defense exhibits, 58 appellate exhibits, and 2 court exhibits. The transcript is 678 pages. The appellant is not confined. His case was docketed before this Court on 15 August 2023. This case was a fully litigated general court-martial which involves the death of a servicemember. Undersigned counsel anticipates filing any assignments of error on or before 8 September 2024.

In addition to the progress reflected in the above priority list, since requesting MSgt Casillas' fifth enlargement of time, undersigned counsel filed briefs in *United States v. Johnson*, No. ACM 40291 (f rev), and *United States v. Goodwater*, No. ACM 40304 (f rev). Today, she also filed a petition and supplemental brief before the CAAF in *United States v. George*, No. ACM 40397, USCA Dkt. No. 24-0206/AF, and a brief before this Court in *United States v. Trovatore*, No. ACM 40505. She also reviewed one record of trial to advise a servicemember regarding their opportunity to file a direct appeal before this Court.

Finally, during the requested enlargement of time, undersigned counsel has been authorized leave outside of the Continental United States on 11-16 August 2024.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 August 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
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6 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	23 August 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a seventh enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **9 October 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 253 days have elapsed. On the date requested, 300 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority

also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' 10-volume record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case, however, she has begun identifying potential issues. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. MSgt Casillas (1) was provided an update on the status of undersigned counsel's progress on his appeal, (2) advised of this request for an enlargement of time, and (3) he agrees with this request for an enlargement of time.

Undersigned counsel also provides the following information: she currently represents 26 clients and is presently assigned 15 cases pending initial brief before this Court. Two cases currently have priority over the present case:

1. *United States v. Benoit, Jr.*, No. ACM 40508 – The record of trial consists of 11 prosecution exhibits, 12 defense exhibits, 58 appellate exhibits, and 2 court exhibits. The transcript is 678 pages. The appellant is not confined. His case was docketed before this Court on 15 August 2023. This case was a fully litigated general court-martial which involves the death of a servicemember. Undersigned counsel is currently reviewing this record of trial and anticipates filing any assignments of error on or before 9 September 2024.

2. *United States v. Cole*, No. ACM 40189 (rem) – The appellant's case was remanded to this Court by the CAAF to reassess the sentence or to order a rehearing on the sentence. Undersigned counsel anticipates filing the appellant's brief by or before 25 September 2024.

In addition to the progress reflected in the above priority list, since requesting MSgt Casillas' sixth enlargement of time, undersigned counsel filed petitions and supplemental briefing before the United States Court of Appeals for the Armed Forces (CAAF) in *United States v. Donley*, USCA Dkt. No. 24-0209/AF, No. ACM 40350; and *United States v. Gubicza*, USCA Dkt. No. ____/AF, No. ACM 40464. In addition, she fully reviewed the records of trial and advised the appellants in *United States v. Simmons*, No. ACM 40462 (f rev), and *United States v. Bio*, No. ACM 24006, before the appellants withdrew from appellate review. Undersigned counsel was also on leave from 11-16 August 2024.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 23 August 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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27 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly a year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 27 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	25 September 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for an eighth enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **8 November 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 286 days have elapsed. On the date requested, 330 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority

also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' 10-volume record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case, however, she has begun identifying potential issues. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. MSgt Casillas (1) was provided an update on the status of undersigned counsel's progress on his appeal, (2) advised of this request for an enlargement of time, and (3) he agrees with this request for an enlargement of time, recognizing undersigned counsel's workload.

Undersigned counsel currently represents 26 clients and is presently assigned 13 cases pending initial brief before this Court. One case has priority over the present case:

1. *United States v. George*, USCA Dkt. No. 24-0206/AF, No. ACM 40397 – The United States Court of Appeals for the Armed Forces granted review and has ordered briefing on one issue. The appellant's grant brief and the joint appendix are due on 8 October 2024.

Since requesting MSgt Casillas' seventh enlargement of time, undersigned counsel completed and filed briefs in *United States v. Benoit, Jr.*, No. ACM 40508; *United States v. Rocha*, No. ACM 40134 (rem); and *United States v. Cole*, No. ACM 40189 (rem). During the requested enlargement of time, undersigned counsel will be (1) attending a Joint Appellate Advocacy

Training at Fort Belvoir, Virginia, on 26-27 September 2024; (2) preparing for and participating as a moot judge in at least five moot arguments; and (3) on preauthorized leave outside of the local area (over Indigenous Peoples' Day weekend) on 9-14 October 2024.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 25 September 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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Email: samantha.golseth@us.af.mil

30 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 September 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	29 October 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a ninth enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **8 December 2024**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 320 days have elapsed. On the date requested, 360 days will have elapsed.

On 5 March 2023, 3 May 2023, and 20-26 June 2023, at Osan Air Base, Republic of Korea, a general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority

also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' 10-volume record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case, however, she has begun identifying potential issues. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. MSgt Casillas (1) was provided an update on the status of undersigned counsel's progress on his appeal, (2) advised of this request for an enlargement of time, and (3) he agrees with this request for an enlargement of time, recognizing undersigned counsel's workload.

Undersigned counsel currently represents 27 clients and is presently assigned 13[1] cases pending initial brief before this Court. Two cases have priority over the present case:

1. *In re Alton*, Misc. Dkt. No. 2024-12 – Undersigned counsel was recently detailed to represent the petitioner and the petitioner's motion response is currently due on 31 October 2024. A consent motion for an enlargement of time, until 4 November 2024, is pending before this Court.
2. In addition to reviewing MSgt Casillas' record, undersigned counsel is continuing to research and prepare for *United States v. George, Jr.*, USCA Dkt. No. 24-0206/AF, No.

[1] Undersigned counsel has one motion pending to withdraw as appellate defense counsel in *United States v. Valadez*, No. ACM 40553.

ACM 40397. The Government's Answer is currently due on 14 November 2024. If filed on this date, undersigned counsel's reply brief will be due on 25 November 2024. Undersigned counsel anticipates she will be preparing for oral argument in this case until 10 December 2024 (the date the court is looking to hold oral argument on).

Since requesting MSgt Casillas' eighth enlargement of time, undersigned counsel completed and filed a grant brief and joint appendix in *United States v. George*, *Jr*., USCA Dkt. No. 24-0206/AF, No. ACM 40397. She also completed and filed a reply brief in *United States v. Benoit*, *Jr.*, No. ACM 40508. She further prepared for and participated as a moot judge in six moot arguments for three cases. She also attended two arguments and a two-day Joint Appellate Advocacy Training. Lastly, she was on leave outside of the local area (over Indigenous Peoples' Day weekend) on 9-14 October 2024 and will be on leave on 30 October 2024.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
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Email: samantha.golseth@us.af.mil

31 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 31 October 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 November 2024, Appellant's counsel submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Prosecution Exhibit 6 and Appellate Exhibits XI, XII, XXIX, and XXXVIII. These exhibits were presented or reviewed by the parties at trial.

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." R.C.M. 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 defense counsel's responsibilities. This court's order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 15th day of November, 2024,

ORDERED:

Appellant's Consent Motion to Examine Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 6 and Appellate Exhibits XI, XII, XXIX, and XXXVIII**, 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

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	14 November 2024

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

Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves this Court to permit appellate defense counsel and appellate government counsel to view Prosecution Exhibit 6 and Appellate Exhibits XI, XII, XXIX, XXXVIII. A.F. CT. CRIM. APP. R. 3.1(c)(2), 23.1(b), and 23.3(f)(1).

A general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 471, 1278; Charge Sheet. During the proceedings, Prosecution Exhibit 6 and Appellate Exhibits XI, XII, XXIX, XXXVIII were presented and sealed. R. at 36, 40, 405, 1626. Appellate counsel may examine sealed materials presented, reviewed, or 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* (2019 ed.).

Appellate defense counsel detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter*

alia, a duty to provide "competent representation,"[1] perform "reasonable diligence,"[2] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[3] These requirements are consistent with those imposed by the state bar to which undersigned counsel belongs.[4]

Each of the sealed exhibits is an exhibit which was presented or reviewed by the parties at trial. To fulfill undersigned counsel's duties, it is reasonably necessary to review the sealed materials to competently conduct a professional evaluation of MSgt Casillas's case and to uncover all issues which might afford him relief. The Government consents to this motion and both parties viewing the sealed materials detailed above.

WHEREFORE, MSgt Casillas respectfully requests this Honorable Court grant this motion and permit examination of the aforementioned sealed materials contained within the original record of trial.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
(240) 612-4770
samantha.golseth@us.af.mil

[1] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).
[2] *Id*. at Rule 1.3.
[3] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[4] Counsel of record is licensed to practice law in California.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	27 November 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for a tenth enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 30 days, which will end on **7 January 2025**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 349 days have elapsed. On the date requested, 390 days will have elapsed.

A general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months,

or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' 10-volume record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. MSgt Casillas is confined.

Through no fault of MSgt Casillas, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case, however, she has begun identifying potential issues and anticipates raising at least eight issues. This enlargement of time is necessary to allow undersigned counsel to review his case and provide him advice regarding potential errors. MSgt Casillas (1) was provided an update on the status of undersigned counsel's progress on his appeal, (2) advised of this request for an enlargement of time, and (3) he agrees with this request for an enlargement of time, recognizing undersigned counsel has a case scheduled for argument at the U.S. Court of Appeals for the Armed Forces (CAAF) which has had to take priority over his case and given his desire for her to write a brief on his behalf.

Undersigned counsel currently represents 25 clients and is presently assigned 12 cases pending initial brief before this Court, including MSgt Casillas' brief. One case has priority over the present case: *United States v. George, Jr.*, USCA Dkt. No. 24-0206/AF. Since requesting MSgt Casillas' ninth enlargement of time, undersigned counsel completed and filed (on 25 November 2024) a reply brief in *George*. This reply brief included researching for and writing an in-depth discussion of grammar and precedent discussing grammatical construction. As a result, undersigned counsel spent at least 80 hours researching, drafting, and editing this brief. Given the complex discussion, undersigned counsel's preparation for oral argument has also been extremely time intensive. Undersigned counsel is currently preparing for oral argument which has been

scheduled at the CAAF on 10 December 2024. Undersigned counsel prepared for one moot argument which occurred on 26 November 2024 and is preparing for two upcoming moot arguments. Undersigned counsel could not anticipate that the CAAF would grant review of *George* nor that the CAAF would schedule oral argument within the same timeframe that undersigned counsel hoped to accomplish MSgt Casillas' brief. Due to orders from our superior court, undersigned counsel was required to prioritize *George* when she expected she would otherwise have been able to review MSgt Casillas' record.

In addition to the above, undersigned counsel was detailed as counsel in *In re Alton*, Misc. Dkt. No. 2024-12, following the Government's filing of a motion to dismiss. Undersigned counsel had not previously represented the petitioner and had to quickly familiarize herself with his case in order to draft and file a substantive motion opposition to the Government's motion to dismiss. Undersigned counsel could not reasonably move this Court to permit her an extension of time for that motion response that would extend beyond the filing of MSgt Casillas' brief. Moreover, as Article 70, UCMJ, counsel for *United States v. Matthew*, No. ACM 39796 (reh), she also had to prioritize that appellant's motion for reconsideration given the definite timeline required for doing so, editing the civilian counsel's motion for reconsideration. Both of these filings required relatively short timelines for filing, therefore, undersigned counsel had to prioritize them over MSgt Casillas' brief. In the current enlargement of time, she has also needed to provide 6 peer reviews and act as a moot judge on 3 occasions to assist her colleagues with their preparation.

Undersigned counsel does not to want to further delay MSgt Casillas' appellate review, however, she needs additional time to be able to effectively fulfill her Article 70, UCMJ, duties, and raise and preserve each issue that has merit and that MSgt Casillas personally wants to raise.

MSgt Casillas is currently confined overseas which makes communicating with him more difficult due to the time zone difference and coordination required, nonetheless undersigned counsel has worked diligently to maintain regular communications with him, and she knows the issues that MSgt Casillas wants to raise before this Court. However, his case is complex and undersigned counsel needs time to be able to review the record and determine all the issues that may have merit. If undersigned counsel does not have time to thoroughly review his record and draft his issues, she risks failing to identify them to this Court and preserve them. Moreover, undersigned counsel needs time to be able to obtain a peer and leadership review and will have to coordinate enough time for each review around the Christmas and New Years holidays.

Undersigned counsel has endeavored to minimize the impact of her leave (taking leave primarily over holiday periods when counsel would otherwise not be expected to be at work due to family days and federal holidays). She has also recently declined many educational and service opportunities (including attending AJEI, Gateway, and teaching at a Defense Orientation Course) to prioritize her docket and is attempting to volunteer only over holiday periods when counsel would otherwise not be expected to work due to family days and federal holidays. Undersigned counsel will be volunteering from 29 November 2024 through 1 December 2024 (a family day, Saturday, and Sunday), from approximately 0730 until 1700 and even then, only because she has been previously obligated and competitively selected for a volunteer position at the White House.

Moreover, in addition to her docket, undersigned counsel has also needed to attend to personal matters related to her mother's health and multi-week hospitalization during the current enlargement of time.

Undersigned counsel believes that the above exceptional circumstances merit granting this request for an enlargement of time. If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 27 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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3 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) NATHANIEL A. CASILLAS, USAF, *Appellant.*	))))))))	UNITED STATES' PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40551 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its partial opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 390 days in length. Appellant's year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

In the request for enlargement of time, Appellant's counsel mentioned having to deal with personal issues related to her mother's hospitalization. The United States believes such issues merit a partial enlargement of time. However, because 390 days will have already elapsed since docketing, this Court should not grant an enlargement for the entire 30 days requested.

WHEREFORE, the United States respectfully requests that this Court deny, in part, Appellant's enlargement motion.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 December 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	30 December 2024

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

Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves, with the United States' consent, for an eleventh enlargement of time to file his assignments of error. MSgt Casillas requests an enlargement for a period of 10 days, which will end on **17 January 2025**. A.F. CT. CRIM. APP. R. 23.1(b), 23.3(m)(3), and 23.3(m)(6). The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 382 days have elapsed. On the date requested, 400 days will have elapsed.

A general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months,

or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*.

MSgt Casillas' 10-volume record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. MSgt Casillas is confined.

Good cause for enlargement of time

Through no fault of MSgt Casillas, undersigned counsel needs more time to complete drafting and editing his assignments of error brief. Since filing MSgt Casillas' request for a tenth enlargement of time and completing her preparation for oral argument and oral argument in a higher priority case, undersigned counsel has been diligently working to complete her review, research, and drafting of the issues, to include working on his case over the weekends and on the entire family day on 26 December 2024. This diligence has included attempting to view the sealed materials on two separate occasions and coordinating with the Air Force Appellate Government Division (JAJG) when undersigned counsel could not view the contraband contained in Appellate Exhibit XI. JAJG assisted undersigned counsel, and she was able to review this material today, during her third visit to the Court.[1] Undersigned counsel still needs multiple days[2] to complete MSgt Casillas' brief and obtain peer and leadership review, which is required by the Air Force Appellate Defense Division (JAJA).

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[1] Undersigned counsel's entire day, today, was spent resolving this issue with JAJG, preparing motions for enlargements of time, and reading 8 briefs in anticipation of moot arguments tomorrow (which she has not yet completed and will still be reviewing throughout this evening).

[2] During this time, there is a federal holiday on 1 January 2025 and a family day on 2 January 2025 and this Court and undersigned counsel's office will be closed. It is also possible that this Court and undersigned counsel's offices will be closed on 9 January 2025, following an executive order issued today.

Undersigned counsel has identified at least nine issues that she believes have merit, but she is still researching to determine the best way to frame those issues and needs time to finish this research and her drafting. Further, as part of determining how to best frame the issues, undersigned counsel needs to confer with MSgt Casillas' counsel for his first court-martial (No. ACM 40449) given the overlap in MSgt Casillas' cases. Moreover, undersigned counsel's peers are limited in their ability to provide peer review because three of the eight active-duty appellate defense counsel within JAJA are conflicted, and two of the five counsel who are not conflicted are preparing for argument at the U.S. Court of Appeals for the Armed Forces on 14 January 2025. Further, all appellate defense counsel (including undersigned counsel) are preparing for (reading 8 briefs in advance) and participating in 2.5 hours of moot arguments on each of the following days: 31 December 2024, 6 January 2025, and 10 January 2025. In addition to their own workloads, this means the availability for a peer review is limited and given the anticipated length of this brief, the review itself is also anticipated to take time, as will implementing edits from this review. Further, undersigned counsel's leadership is limited in their ability to provide leadership review because the Chief of the JAJA is on leave outside of the local area and the Deputy Chief, who is currently responsible for all leadership reviews, will be on leave on 8 January 2024 and balancing the completion of all leadership reviews for the JAJA, in addition to his workload as the Deputy Chief.

Further, undersigned counsel would like to speak with MSgt Casillas an additional time prior to filing his brief and is awaiting scheduling for this call. (As discussed below, undersigned counsel has spoken to MSgt Casillas since this Court granted the tenth enlargement of time but has since completed further review of his record and additional research.) Due to no fault of MSgt Casillas, scheduling a call is not prompt because scheduling occurs with the confinement personnel

stationed overseas, who are 14 hours ahead of undersigned counsel, and the confinement facility continues to have minimal manning for the holidays.

This enlargement of time is necessary to allow undersigned counsel to provide him advice regarding potential errors and complete MSgt Casillas' brief. MSgt Casillas (1) was provided an update on the status of undersigned counsel's progress on his appeal last week, (2) advised of the possibility of this request for an enlargement of time, and (3) given the possibility, he agreed with this request for an enlargement of time to allow undersigned counsel to complete and edit his assignments of error brief. Undersigned counsel currently represents 20 clients and is presently assigned as sole counsel on 8 cases pending initial brief before this Court, including MSgt Casillas' brief. No case has priority over MSgt Casillas' case.

Undersigned counsel requests this enlargement of time to ensure she can effectively fulfill her Article 70, UCMJ, duties. Undersigned counsel has consulted with the JAJG. The JAJG agrees to this request for an enlargement of 10 days. If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 December 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Office: (240) 612-4770
Email: samantha.golseth@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	21 January 2025

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

Assignments of Error

I.

Whether the Double Jeopardy Clause of the Fifth Amendment requires dismissal of Appellant's convictions because Appellant was twice tried for the same "material," an iPhone XR.

II.

Whether Appellant was denied effective assistance of counsel when defense counsel failed to understand binding precedent regarding the "unit of prosecution" in child pornography cases, and therefore, did not move to dismiss the Charge and Specifications.

III.

Whether the Government committed plain error by prosecuting Appellant for a second time, thereby severing known offenses, without proof of a manifest injustice.

IV.

Whether the findings are factually insufficient because the Government did not prove that Appellant viewed or possessed child pornography.

V.

Whether the specifications of possessing child pornography and viewing child pornography are multiplicious.

VI.

Whether Appellant was denied effective assistance of counsel when defense counsel failed to move to dismiss one of the specifications based on multiplicity.

VII.

The convening authority received court-member data sheets indicating the races and genders of potential court members, and the composition of at least some groups of detailed members shows the convening authority considered these factors. This creates a prima facie showing that race and gender were impermissibly considered when selecting members, giving rise to a presumption that the panel was not properly constituted.

VIII.

Whether it was an abuse of discretion to admit Prosecution Exhibit 18 with redactions.

IX.

Whether appellant's sentence is inappropriately severe compared to his sentence in his first trial.

X.

Whether the application of 18 U.S.C. § 922 to Appellant warrants correction.

XI.

Whether the record of trial is incomplete because a complete record of pre-referral proceedings is not included in the record of trial.

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Table of Authorities

U.S. Constitution

Statutes

U.S. Supreme Court

U.S. Court of Appeals for the Armed Forces / Court of Military Appeals

Service Courts of Criminal Appeal

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Miscellaneous

Statement of the Case

A general court-martial composed of officer members convicted Appellant,[1] contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), [2] 10 U.S.C. § 934. R. at 229 (electing trial by members), 471 (entering pleas of not guilty to the charge and specifications), 903 (advising empaneled officer members that the Appellant pleaded not guilty to the charge and specifications), 1278 (announcing findings). On 26 June 2023, the members sentenced him to four years and eleven months of confinement, a reduction in grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied Appellant's request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority also granted Appellant's request to waive all automatic

[1] In Appellant's record of trial, he is addressed at different times by the ranks of Master Sergeant and Senior Airman. *E.g.*, DD 490 (referring to him as a Master Sergeant); Entry of Judgment, 11 August 2023 (referring to the case as "United States v. MSgt Nathaniel A. Casillas" and listing his grade as E-4); Statement of Trial Results, 26 June 2023 (same); R. at 2 (referring to him as a Master Sergeant during arraignment), 13 (referring to him as a Senior Airman during a motions hearing), 221 (referring to him as a Master Sergeant during a later motions hearing), and 463 (referring to him as a Senior Airman prior to beginning voir dire). This is because Appellant's present court-martial, "*Casillas* 2," overlapped with his previous court-martial, "*Casillas* 1," where he was reduced to Senior Airman (E-4), but the reduction was temporarily deferred. App. Ex. LI at 5-6. The parties and this Court have captioned the filings in *Casillas* 2 as *United States v. Master Sergeant (E-7) Nathaniel A. Casillas*. Appellant does not raise issue with how this case is captioned and has continued this captioning for consistency. Nonetheless, the charge sheet in *Casillas* 2 was updated to reflect Appellant's new rank (Senior Airman) and pay grade (E-4) when he entered his pleas. R. at 463 (agreeing to change his rank in the specifications), 468 (explaining the charge sheet had been changed), 471 (entering pleas); Charge Sheet, 17 November 2022.

[2] Unless otherwise noted, all references to the UCMJ, Military Rules of Evidence (Mil. R. Evid.), and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of Appellant's dependents. *Id*. One hundred and seventy-one days after he was sentenced, Appellant's case was docketed at this Court.[3]

Statement of Facts

The lead up to and charging of Casillas *1 and* Casillas *2*

A National Center for Missing & Exploited Children (NCMEC) CyberTip Report began an investigation of Appellant for suspected child pornography. App. Ex. XVI at 2. As part of this investigation, in August 2020, IA[4] searched Appellant's iPhone XR. App. Ex. XXII at 10. This search led to the discovery of two images of child pornography. *Id*. These images were charged in *Casillas* 1. *Id*. Specifically, Appellant was charged with one charge and one specification of possessing child pornography on his iPhone XR, between on or about 1 December 2019 and on or about 24 March 2020, within the Republic of Korea, in violation of Article 134, UCMJ. Pros. Ex. 18 at 1 (Charge I, Specification 2). Further, he was charged with an additional charge and specification of viewing child pornography on his iPhone XR, between on or about 1 December

[3] The Air Force has demonstrated "a systemic problem" with post-trial processing errors, which "indicat[es] institutional neglect." *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (A.F. Ct. Crim. App. Jun. 7, 2024), *rev. granted*, ___ M.J. ___, 2024 CAAF LEXIS 571 (C.A.A.F. Sept. 30, 2024) (finding that post-trial processing errors "are happening at an alarming frequency in the Air Force," which cause "delays in appellate review"). While not raised as a separate assignment of error, the delay in this case exceeded the standard set out in *United States v. Livak*, 80 M.J. 631, 634 (A.F. Ct. Crim. App. 2020) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)), and Appellant would welcome any sentencing relief this Court might deem appropriate. *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002); *Valentin-Andino*, 2024 CCA LEXIS 223, at *15.

[4] IA is referred to only by his initials and not his rank or full name pursuant to A.F. CT. CRIM. APP. R. 17.2(c)(1).

2019 and on or about 24 March 2020, at an unknown location, in violation of Article 134, UCMJ. Pros. Ex. 18 at 5 (Additional Charge and Specification).

On 17 September 2022, during the Government's preparation for motions in *Casillas* 1, IA identified additional images of suspected child pornography while searching a forensic image of Appellant's iPhone XR. App. Ex. XXII at 11. The military judge in *Casillas* 1 did not allow the Government to add this evidence to *Casillas* 1 because the Government was past the time that was scheduled for turning over evidence to the Defense. R. at 1306.

On 17 November 2022, *Casillas* 2 began when the Government preferred one charge and two specifications for the viewing and possession of the additional images that were found by IA. App. Ex. XXII at 10. When this occurred, the members in *Casillas* 1 had not yet been impaneled. *See* App. Ex. XXII at 12 (explaining Appellant "originally faced court-martial in February of 2023"); App. Ex. LI at 1 (showing Appellant was sentenced in *Casillas* 1 on 5 March 2023). The charge and specifications in *Casillas* 2 allege the possession and viewing of child pornography between on or about 1 December 2019 and on or about 18 March 2020, within the Republic of Korea, in violation of Article 134, UCMJ. *Charge Sheet*, 17 November 2022. On 7 February 2023, the Government referred the charge and specifications to a general court-martial. *Id*.

Trial in Casillas *1*

In *Casillas* 1, Appellant was found guilty of both possessing and viewing child pornography on his iPhone XR. Pros. Ex. 18 at 1-5 (Charge I, Specification 2, and Additional Charge and Specification). On 5 March 2023, Appellant was sentenced in *Casillas* 1. *Id*.

Trial in Casillas *2*

On the same day that Appellant was sentenced in *Casillas* 1, he was arraigned in *Casillas* 2. R. at 1-12. In *Casillas* 2, the Government alleged that thirteen PDF files met the definition of child

pornography. App. Ex. VII (bill of particulars listing the thirteen PDF files); App. Ex. L at 4 (findings instructions listing the same thirteen PDF files). The Government sought to prove both the possession and viewing specifications with the thirteen PDFs it identified. *Id*. All thirteen PDFs came from the Safari web browser cache, or temporary directory, of Appellant's iPhone XR (the same iPhone XR that was at issue in *Casillas* 1). App. Ex. XXII at 11. Appellant was found guilty of both specifications in *Casillas* 2. R. at 1278.

Additional facts are included *infra*.

Argument

I.

The Double Jeopardy Clause of the Fifth Amendment requires dismissal of Appellant's convictions because Appellant was twice tried for the same "material," an iPhone XR.

Standard of Review

This Court reviews double jeopardy de novo because it is a question of law. *United States v. Driskill*, 84 M.J. 248, 252 (C.A.A.F. 2024) (citing *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019)). When an appellant does not raise an issue at trial, this Court reviews for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *United States v. Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)). For a constitutional error, "'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in *Chapman v. California*, 386 U.S. 18 (1967)." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing *United States v. Jones*, 78 M.J. 37, 45 (C.A.A.F. 2018)). Therefore, the burden is on the appellant to show that there was error and the

error was plain. *United States v. Carter*, 61 M.J. 30, 34 (C.A.A.F. 2005) (citation omitted). But the burden is on the Government to establish that the error was harmless beyond a reasonable doubt. *Tovarchavez*, 78 M.J. at 463.

Law and Analysis

It was plain error to prosecute Appellant twice for the same offenses. In both *Casillas* 1 and *Casillas* 2, the Government tried and convicted Appellant for viewing and possessing child pornography contained in his iPhone XR, within the same place and time, and alleging the same Article 134, UCMJ, terminal element. *Compare* Charge Sheet, *with* Pros. Ex. 18 (Charge I, Specification 2, and the Additional Charge and Specification). The second prosecution of Appellant for the same offenses was prohibited by the Fifth Amendment's Double Jeopardy Clause: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V; *United States v. Rice*, 80 M.J. 36, 40 (C.A.A.F. 2020) (applying the Double Jeopardy Clause to courts-martial).

Because the offenses are charged under the same statutory provisions, the test from *Blockburger v. United States*, 284 U.S. 299, 303-04 (1932), that is often used in double jeopardy cases is easily satisfied and unnecessary. *Driskill*, 84 M.J. at 252 (explaining the *Blockburger* test is used "[w]hen specifications allege offenses under different statutory provisions"). Recognizing that the respective viewing and possession offenses allege the same statutory provisions at the same times and locations that were charged in *Casillas* 1, the remaining question to determine whether the offenses are the same is whether they charged the same or different acts. *United States v. Coleman*, 79 M.J. 100, 103 (C.A.A.F. 2019) ("[S]eparate acts may be charged and punished separately"). To resolve that question in cases like this one, courts look to identify the applicable "unit of prosecution," or actus reus, that can be charged. *United States v. Forrester*, 76 M.J. 479,

486 (C.A.A.F. 2017). For child pornography cases, the unit of prosecution stems from the "'material that contains' illicit visual depictions" because "'[c]hild [p]ornography' is defined not as depictions but 'material that contains' illicit visual depictions." *Id.* (quoting *MCM* (2012 ed.), pt. IV, para. 68b); *MCM* (2019 ed.), pt. IV, para. 93.c.(4) (using the same definition that was analyzed in *Forrester*). The military judge at Appellant's court-martial provided the members with the same definition for child pornography. App. Ex. L at 2.

The "material" that contains illicit visual depictions is the "physical media or storage location" where the alleged child pornography is contained. *Id*. (finding the material that could be separately charged was the appellant's "HP laptop, Seagate hard drives, and Google e-mail account"); *see also United States v. Mobley*, 77 M.J. 749, 752 (A. Ct. Crim. App. 2018) (finding appellant's convictions were multiplicious when both specifications alleged possession of separate images and videos of child pornography, but all the images and videos were found on the same computer); *United States v. Arnold*, No. ACM 39479, 2019 CCA LEXIS 458, at *13-14 (A.F. Ct. Crim. App. Nov. 18, 2019) (finding the appellant was not tried twice for the "same act" because the State of North Carolina prosecuted the appellant for one material (a laptop seized from the appellant), while the Government (i.e. Air Force) prosecuted the appellant for another material (a government hard drive)).

Applying this law to Appellant's case demonstrates that Appellant has been tried twice for the same material. In *Casillas* 1, and then again in *Casillas* 2, Appellant was charged and convicted for viewing (within the same time and location) the same material: illicit visual depictions contained within his iPhone XR. *Compare* Pros. Ex. 18 at 5 (Additional Charge and Specification), *with* R. at 1278; Charge Sheet, 17 November 2022 (Specification 2); App. Ex. XXII at 11 (finding that IA found the files at issue in *Casillas* 2 when he was searching a forensic image of Appellant's

iPhone XR). The Government did the same for the possession specifications: Appellant was twice charged and convicted for possessing (within the same time and location) the same material: illicit visual depictions contained within his iPhone XR. *Compare* Pros. Ex. 18 at 1 (Charge I, Specification 2), *with* R. at 1278; Charge Sheet, 17 November 2022 (Specification 1); App. Ex. XXII at 11 (finding that IA found the files at issue in *Casillas* 2 when he was searching a forensic image of Appellant's iPhone XR). Because the material at issue, Appellant's iPhone XR, was the same for the respective viewing and possession offenses, the Government twice tried Appellant for the same offenses in violation of Appellant's Fifth Amendment right against double jeopardy.[5] U.S. CONST. amend. V. This was plain error.

This plain error materially prejudiced Appellant because he has been "subjected to the hazards of trial" and forced "to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense," which the U.S. Court of Appeals for the Armed Forces (CAAF) determined is a "distinct wrong." *United States v. Rice*, 80 M.J. 36, 45

[5] Defense counsel told the military judge that they did not intend to argue during sentencing that Appellant had already been punished for the offenses in *Casillas* 2, or that he had already been convicted for them in *Casillas* 1. R. at 1305. Defense counsel then stated in sentencing argument that the Government "was allowed to prosecute every last picture of child pornography it finds." R. at 1552. Despite defense counsel's argument, the record reveals no indication that Appellant ever knowingly, voluntarily, and intelligently waived a double jeopardy claim. *Gladue*, 67 M.J. at 313 ("Waiver is the 'intentional relinquishment or abandonment of a known right,' which precludes appellate review of an issue; forfeiture is 'the failure to make the timely assertion of a right' leading to plain error review on appeal") (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). Appellant asserts that he did not knowingly and voluntarily waive this issue, therefore, this Court should not treat this issue as waived. *See United States v. Sweeney*, 70 M.J. 296, 303-304 (C.A.A.F. 2011) ("There is a presumption against the waiver of constitutional rights, and for waiver to be effective, it must be clearly established that there was an intentional relinquishment of a known right or privilege") (citing *Harcrow*, 66 M.J. at 156). If, however, this Court determines that defense counsel's statements waived this issue, this Court should use its authority to pierce that waiver. *See* 10 U.S.C. § 866(d)(1)(A). Furthermore, as addressed below, if defense counsel waived this issue, they were ineffective for doing so because they failed to understand the binding precedent regarding the "unit of prosecution" in child pornography cases. *See Forrester*, 76 M.J. at 485-86; *MCM* (2019 ed.), pt. IV, para. 93.c.(4).

(C.A.A.F. 2020) (quoting *Abney v. United States*, 431 U.S. 651, 661 (1977)); *Green v. United States*, 355 U.S. 184, 187 (1957) ("The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense")). Appellant now stands twice convicted for the same offenses, when conviction should not have been possible in *Casillas* 2 because it was barred by Appellant's Fifth Amendment right. *Rice*, 80 M.J. at 44-45. Given the distinct harm at issue, the Government cannot prove this error was harmless beyond a reasonable doubt. The result is that the offenses in *Casillas* 2 must be dismissed. *Rice*, 80 M.J. 45 ("Having been 'retried,' the charges from the 'retrial' must be dismissed") (citing *Ex parte Nielsen*, 131 U.S. 176, 183-84 (1889) (Where "a constitutional immunity of the defendant was violated by the second trial and judgment . . . the party is entitled to be discharged from imprisonment")).

The two military-specific provisions touching on double jeopardy do not change the result required in this case. Article 44(a), UCMJ, and R.C.M. 907(b)(2)(C) prohibit trial for a second time for the same offense. However, they both limit their application by defining the first trial as a proceeding where an accused has been found guilty and that conviction is final. Article 44(b), UCMJ, and R.C.M. 907(b)(2)(C)(iii). This is meant to allow reprosecution of an offense *if* it is successfully appealed. *See United States v. Scott*, 437 U.S. 82, 90-91 (1978) (citing *Burks v. United States*, 437 U.S. 1, 1 (1978) ("The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to *further* prosecution on the same charge.") (emphasis added)). Implicit here is the requirement that there first be a successful appeal. This makes sense because otherwise, if this was read to mean that a second trial could occur so long as it occurred before the first trial was made final, the limitations in Article 44(b), UCMJ, and R.C.M. 907(b)(2)(C)(iii) would conflict with the Double Jeopardy

Clause of the Fifth Amendment, which particularly guards against the distinct wrong of a second trial for the same offense. *See Rice*, 80 M.J. at 45 (quoting *Abney*, 431 U.S. 661) ("A successive prosecution is a distinct wrong because it forces an accused 'to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense'"); *see also Green*, 355 U.S. at 187-88 ("[T]he [Government] with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity"). And Article 44(b), UCMJ, and R.C.M. 907(b)(2)(C)(iii) cannot conflict with the Double Jeopardy Clause of the Fifth Amendment because "[t]he military has a hierarchical scheme as to rights, duties, and obligations." *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997). Above all is the Constitution, under which applicable statutes must fall in line. *See id*. "While a lower source on the hierarchy may grant additional or greater rights than a higher source, those additional rights may not conflict with a higher source." *Id*. Therefore, while Article 44(b), UCMJ, and R.C.M. 907(b)(2)(C)(iii) can be read to allow a second court-martial when a conviction is successfully appealed, it cannot be read to permit a second court-martial when the first has not been successfully appealed because the Fifth Amendment would not allow it.

Rice shows this interplay of principles in action. There, the appellant's civilian federal trial had not been successfully appealed when the Government tried the appellant for a second time at a court-martial for the same offenses. 80 M.J. at 45. While the Government likely could have tried the appellant at a court-martial if the appellant successfully appealed his civilian federal conviction, *see Scott*, 437 U.S. at 90-91, the Government did not even wait for the appellant to be sentenced before prosecuting him for a second time at a court-martial, let alone for his appeals to process, *Rice*, 80 M.J. at 45. And the CAAF determined this was a "distinct violation of

Appellant's constitutional protection against a second prosecution," regardless of the later dismissal of the district court charges. *Id*. The same is true here. Appellant's convictions in *Casillas* 1 had not been successfully appealed, and yet the Government forced Appellant to endure trial on the same offenses for a second time.[6] Therefore, this Court should determine, like the CAAF did in *Rice*, that Appellant's Fifth Amendment right barred his prosecution in *Casillas* 2 and that his convictions in *Casillas* 2 must be dismissed.[7] *Id*.

Therefore, this Court should set aside the findings and sentence and dismiss the Charge and Specifications.

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[6] *Casillas* 1 has still not been successfully appealed. *Casillas* 1 was initially docketed at the Air Force Court of Criminal Appeals on 2 August 2023. Appellant's Motion for Enlargement of Time, *United States v. Casillas*, No. ACM 40449. This filing is included in the online listing of opinions and orders. United States Air Force Court of Criminal Appeals, https://afcca.law.af.mil/afcca_opinions/cp/appellate_filings_redacted_2012315.pdf (last visited Jan. 10, 2025). *Casillas* 1 was remanded for record correction on 24 September 2024. Order, *United States v. Casillas*, No. ACM 40449.

[7] If, however, this Court disagrees and determines that the limitations of Article 44 and R.C.M. 907(b)(2)(C)(iii) somehow permitted the Government to try Appellant for a second time for the same offenses despite the absence of a successful appeal, then this Court should not resolve this issue until review of *Casillas* 1 is final. *See Scott*, 437 U.S. at 90-91 (citing *Burks*, 437 U.S. at 1) ("The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to *further* prosecution on the same charge") (emphasis added)). While this is an unusual request, and one that is not easy for Appellant to make as he is currently serving his confinement sentence in *Casillas* 2 (pursuant to R.C.M. 1102(b)(2)(C)(v)), justice would demand this to observe Appellant's Fifth Amendment right, and this Court has the discretion to determine when it will decide the cases that come before it. However, this is an alternative request, and this Court should find, like *Rice*, the Government violated Appellant's right against double jeopardy when it tried him for a second time for the same offense with no successful appeal to permit this action.

II.

Appellant was denied effective assistance of counsel when defense counsel failed to understand binding precedent regarding the "unit of prosecution" in child pornography cases, and therefore, did not move to dismiss the Charge and Specifications.

Standard of Review

This Court reviews allegations of ineffective assistance de novo. *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

Law and Analysis

Appellant's defense counsel failed to move to dismiss the Charge and Specifications despite the existence of binding precedent that demonstrated that Appellant was being tried twice for the same offense. *See Issue I*, supra. This failure demonstrates an ignorance of the law that fell measurably below the standard of performance expected of fallible lawyers, and it prejudiced Appellant because the only remedy for a double jeopardy violation is the dismissal of charges.

"The Sixth Amendment[8] guarantees the right to effective assistance of counsel." *United States v. Gilley*, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, this Court applies the standard provided in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), as well as the "presumption of competence" announced in *United States v. Cronic*, 466 U.S. 648, 658 (1984). *Gilley*, 56 M.J. at 124.

To "determine if the presumption of competence has been overcome," this Court applies a three-pronged test:

> (1) Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> (2) If the allegations are true, did defense counsel's level of advocacy fall "measurably below the performance. . . [ordinarily expected] of fallible

[8] U.S. CONST. amend. VI.

lawyers"? and

> (3) If a defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result.

Id. (citing *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000), quoting *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991)).

This Court "will not second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). But "where it is not apparent what decisions were made or even that a strategic or tactical decision was made, further inquiry may be required." *Grigoruk*, 52 M.J. at 315. This Court will not, however, "compel a defense counsel to justify decisions made at trial" until this Court "reviews the allegation of ineffectiveness and the [G]overnment response, examines the record, and determines that the allegation and the record contain evidence, which if unrebutted, would overcome the presumption of competence." *Id*. (quoting *United States v. Lewis*, 42 M.J. 1, 6 (C.M.A. 1995)).

If this Court determines that the double jeopardy issue that Appellant raises in Issue I was waived by defense counsel, Appellant was denied the effective assistance of counsel. This is true because defense counsel failed to recognize the binding precedent regarding the "unit of prosecution" in child pornography cases, discussed in Issue I, and therefore failed to raise a motion to dismiss. *See Forrester*, 76 M.J. at 485-86 (holding the "unit of prosecution," or actus reus, that can be charged in child pornography cases is defined by the material that contains the child pornography, not the visual depictions). Defense counsel's failure to research and/or understand the applicable law can be seen in the record of trial when defense counsel argued that there were "two different courts-martial over two different sets of pictures," and the Government "was allowed to prosecute every last picture of child pornography it finds." R. at 1552. Defense counsel's argument solidifies that defense counsel did not understand that Appellant was being

tried for a second time for the *same offense*. Moreover, this demonstrates that this was not a strategic or tactical decision by defense counsel. Rather, defense counsel did not know the binding law on this issue and failed to raise a motion to dismiss that would have been successful if raised.

Defense counsel's performance fell measurably below the performance ordinarily expected of fallible lawyers because "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Palik*, 84 M.J. at 289 (quoting *Hinton v. Alabama*, 571 U.S. 263, 274 (2014) (per curiam)). This issue was fundamental to Appellant's case because Appellant was being prosecuted for a second time for the same iPhone XR that was at issue in *Casillas* 1. *See* Issue I. If defense counsel had researched this issue, they would have found the binding case law from the CAAF that explicitly provides the "unit of prosecution" is the material that contains child pornography and recognized that the same definition for "child pornography" applied to *Casillas* 1 and *Casillas* 2. *Forrester*, 76 M.J. at 485-86; *MCM*, pt. IV, para. 93.c.(4).

There is a reasonable probability that had defense counsel understood the applicable law and raised a motion to dismiss for double jeopardy, the Charge and Specifications in *Casillas* 2 would have been dismissed because that is the only permissible remedy for a constitutional double jeopardy violation. *Rice*, 80 M.J. at 45 (finding the "military judge erred in denying [the appellant's] motion to dismiss the possession specifications to bar retrial," when the appellant had first been tried for possession of the same material in U.S. District Court and that the remedy for "[h]aving been 'retried,'" is dismissal of the charges from the "retrial"). Thus, Appellant's convictions cannot stand.

This Court should set aside the findings and sentence and dismiss the Charge and Specifications.

III.

The Government committed plain error by prosecuting Appellant for a second time, thereby severing known offenses, without proof of a manifest injustice.

Standard of Review

This Court reviews forfeited issues for plain error. *Gladue*, 67 M.J. at 313 (citing *Harcrow*, 66 M.J. at 156). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (citing *Maynard*, 66 M.J. at 244).

Law and Analysis

When the Government was precluded from entering the additional thirteen PDFs in *Casillas* 1 due to its own untimeliness, jeopardy had not yet attached, meaning the Government could dismiss and re-prefer the charges without proof of a manifest necessity, thereby joining the offenses. R. at 1306 (explaining untimeliness in *Casillas* 1); *see* R.C.M. 907(b)(2)(C)(i)(II) (explaining jeopardy attaches in a case with members when the members have been impaneled); *United States v. Easton*, 71 M.J. 168, 173-74 (C.A.A.F. 2012) (explaining once jeopardy has attached, retrial is precluded after the dismissal of charges absent manifest necessity). It was plain error to prefer the Charge and Specifications in *Casillas* 2, because, as will be explained below, (1) all known offenses should be tried at a single court-martial and to re-prefer them at that time, the Government was not required to prove that there was a manifest necessity for dismissing the charges in *Casillas*; (2) the Government knew about the "additional" misconduct and was ready to proceed in the prosecution of that misconduct (as demonstrated by the preferral in *Casillas* 2); (3) the addition of evidence or change to a specification to try all known charges at a single court-martial would have been a proper purpose for dismissing the charges in *Casillas* 1 and re-preferring charges, and not a subterfuge to restart the R.C.M. 707 clock; and (4) the Government's decision

to instead refer the Charge and Specifications in *Casillas* 2 had the effect of severing known offenses without proof that this severance was necessary to prevent a manifest injustice.

The plain error in this case is evident when compared to *United States v. Leahr*, 73 M.J. 364 (C.A.A.F. 2014). In *Leahr*, charges had been preferred against the appellant. *Id*. at 366. An Article 32, UCMJ, investigation had been held and the charges had been referred to trial by a general court-martial. *Id*. The appellant was arraigned on the charges and a trial date was ordered. *Id*. Prior to trial, the Coast Guard Investigative Service learned of a new allegation against the appellant. *Id*. Based on the new allegation, the Government withdrew and dismissed the charges without prejudice on 1 September 2011. *Id*. "On 6 September 2011, a new charge sheet was preferred, which contained the same charges and specifications as the first, but added [a new charge related to the allegation discovered after arraignment on the original charges]" and added terminal element language to three Article 134, UCMJ, specifications, which had not been included before. *Id*. Another Article 32, UCMJ, investigation was conducted, and the charges were referred to trial by a general court-martial. *Id*.

The appellant challenged the dismissal and re-referral of charges arguing, inter alia, that when the Government dismissed the charges, it intended at all times to pursue charges against the appellant. *Id*. at 367. The CAAF determined the Government could dismiss and re-refer the charges with the additional charge because the Government desired to join the additional charge, "consonant with the preference for joinder of all known offenses at a single court-martial." *Id*. The CAAF explained that "[b]ecause [a]ppellant had been arraigned on the original charges, no such joinder was permissible, in the same trial, without his consent." *Id*. The CAAF determined that the Government clearly communicated the dismissal to the appellant, stated the reason for the dismissal was to permit the joinder of the offenses in a future action, and that the rules permitted

this.[9] *Id*. at 368-69. Further, the withdrawal and dismissal were appropriate means available to add the additional charge and not a subterfuge to restart the speedy trial clock. *Id*. at 369-70. This outcome was in line with *United States v. Koke*, 34 M.J. 313, 315 (C.M.A. 1992), where the court found "'withdrawal . . . for the purpose of judicial economy by trying all known charges in a single trial' to be proper where an accused was not unfairly prejudiced." *Leahr*, 73 M.J. at 369.

To determine whether the appellant in *Leahr* was prejudiced by the dismissal and re-referral of the charges, the CAAF applied its precedent from *United States v. Underwood*, 50 M.J. 271, 276 (C.A.A.F. 1999). *Id*. at 370. In *Underwood*, the CAAF determined the appellant was not unfairly prejudiced by the withdrawal and re-referral of charges where "the second court-martial was the same type as the first (i.e., a general court-martial), and it was before the same military judge." 50 M.J. at 276 (citing *United States v. Fleming*, 18 U.S.C.M.A. 524, 40 C.M.R. 236 (1969) (case referred to new court-martial and new law officer after previous law officer rejected plea); *United States v. Blaylock*, 15 M.J. 190, 195 (C.M.A. 1983) (re-referral to a court-martial authorized to impose a more severe punishment as retaliation for exercise of a legal right by an accused not a proper reason)). Moreover, the CAAF found "the appellant did not lose the benefit of a favorable trial ruling as a result of the command's actions," explaining the "trial judge's earlier continuance denials," which were related to the Government's failure to ensure the availability of its witnesses, "created no legally cognizable right to a trial without the prosecution witness." *Id*. at 276. Additionally, the "appellant was not in pretrial confinement during the withdrawal and re-referral process." *Id*.

[9] The CAAF was analyzing the analysis section of R.C.M. 306(a), 401(c)(1) Discussion, and R.C.M. 604(a) contained in the *MCM* (2012 ed.). The substance of these rules and their analysis and discussion are the same in the *MCM* (2019 ed.).

Applying this precedent from *Underwood*, the CAAF determined the appellant in *Leahr* was also not prejudiced. *Leahr*, 73 M.J. at 370. The CAAF reasoned the appellant's "new charges, like the dismissed charges, were referred to a general court-martial," and the charges were not referred to a new military judge. *Id*. Further, the appellant did not lose the benefit of favorable rulings, was not in pre-trial confinement between withdrawal and re-referral, and the delay did not harm the appellant's ability to present his defense at the second court-martial. *Id*.

Appellant's case mirrors *Leahr* and *Underwood.* Like in *Leahr*, the Government found additional information related to misconduct, prior to Appellant's first court-martial.[10] App. Ex. XXII at 11. Like *Leahr*, the proper course was to dismiss the charges and re-prefer them to include this discovery and try all known charges in a single trial. *Leahr*, 73 M.J. at 367; R.C.M. 306(c) Discussion ("If major changes are necessary, the affected charge should be preferred anew"); R.C.M. 401(c) Discussion ("ordinarily all known charges should be referred to a single court-martial"); R.C.M. 603 (explaining a major change can be made after referral and over the objection of the accused when "the charge is withdrawn, amended, and referred anew").

Appellant would not have been prejudiced by this action. In *Leahr*, the addition of the additional charge and change to the Article 134, UCMJ, specifications were not considerations for whether the accused was prejudiced by the dismissal and re-preferral of charges. *Leahr*, 73 M.J. at 370. In fact, the CAAF dismissed the appellant's argument that the Government's action circumvented R.C.M. 601(e)(2), explaining the Government did exactly what it was required to do by starting anew. *Id*. Following this logic, Appellant would not have been prejudiced because

[10] Also, like *Leahr*, a second Article 32, UCMJ, investigation occurred in this case on 15 December 2022, therefore, the decision to prefer a second court-martial vice dismissing and re-preferring the specifications did not lessen the procedures required of the Government. Continuation of Item 24, DD Form 457, para. D, 22 December 2022.

the only impact to Appellant would have been the addition of a charge or change in the charges. And like *Underwood*, the military judge's ruling at *Casillas* 1 did not create a cognizable right to a trial without the evidence that was untimely discovered. *See Underwood*, 50 M.J. at 276.

Furthermore, Appellant would not have been prejudiced by the withdrawal and re-referral of charges because *Casillas* 1 was already a general court-martial. App. Ex. LI at 1. The re-referral of charges could not have aggravated the type of court-martial. Had the Government dismissed and re-referred the charges, there is no reason to believe that trial could not have also been before the same military judge. Further, Appellant was not confined, and the delay, if any, would not have harmed his ability to present his defense (*Casillas* 2 was tried only three and half months after Appellant was sentenced in *Casillas* 1, and it is fair to assume that part of this delay in trying *Casillas* 2 was because the parties were trying *Casillas* 1). App. Ex. LI at 1 (showing Appellant was sentenced in *Casillas* 1 on 5 March 2023), 5 (showing pretrial confinement credit was not applicable). Therefore, it is plain that the Government's action should have been to withdraw and dismiss the charges and re-refer all known charges anew (though Appellant maintains they are the same, as discussed in Issue I).

The Government's decision to refer the Charge and Specifications in *Casillas* 2 had the effect of severing known offenses, even though there is no indication that doing so was necessary to prevent manifest injustice, as required by R.C.M. 906(b)(10)(A). *United States v. Buhl*, 84 M.J. 501, 2023 CCA LEXIS 510, at *8-9 (A. Ct. Crim. App. 2023) (finding the convening authority's decision to charge a previously known additional offense in a second court-martial after the accused's initial court-martial had the same effect as severing offenses). This severance was not only plain error, but it also prejudiced Appellant in *Casillas* 2.

Appellant endured successive prosecutions.

Appellant was forced to endure successive prosecutions when the Government knew of and was ready to prosecute him for all charges during *Casillas* 1 (as demonstrated by the preferral in *Casillas* 2 before trial occurred in *Casillas* 1). *Compare* Charge Sheet, 17 November 2022, (showing the charges in *Casillas* 2 were preferred on 17 November 2022) *with* App. Ex. LI (showing Appellant was sentence in *Casillas* 1 on 5 March 2023).

Appellant's trial was tainted with an air of suspicion due to his reduction in pay grade.

During *Casillas* 2, Appellant wore the rank of Senior Airman, but his ribbon rack was larger "than probably everybody's ribbon rack in [the courtroom] combined." R. at 401. The members may not have known (during findings) why he was reduced in rank, but they were smart enough to know that he had been. And the fact that he was formerly a Master Sergeant leaked into the case when, for example, a witness referred to him by that rank. R. at 1321. That reduction in rank came from his first court-martial. App. Ex. LI (listing Appellant's sentence in *Casillas* 1, to include a reduction in pay grade to E-4). Had the Government taken the proper action of dismissing and re-referring the charges, this air of suspicion regarding his pay grade would not have been present in his court-martial because he would have been tried at only one court-martial.

The Government used the conduct from Casillas *1 as Mil. R. Evid. 404(b) evidence.*

More significantly, by severing the alleged misconduct, the Government was permitted to argue the misconduct at issue in *Casillas* 1 under Mil. R. Evid. 404(b). As Mil. R. Evid. 404(b) evidence, the members could consider:

> [T]hat between on or about 1 December 2019, and on or about 24 March 2020, the accused possessed and viewed uncharged images of child pornography and child erotica on his iPhone XR for the limited purpose of its tendency, if any, to prove the accused knowingly and wrongfully possessed, and or viewed child pornography, as alleged in Specifications 1 and 2 of the Charge, and its tendency,

> if any, to show the accused did not accidentally or mistakenly possess and or view child pornography as alleged in Specifications 1 and 2 of the Charge.

R. at 1128; App. Ex. L at 5-6. This instruction permitted the members to consider the possession and viewing of the child pornography that formed the conviction in *Casillas* 1 in its determination of whether the Government had proven the possession and viewing of the child pornography on the same iPhone XR within the same dates and location in *Casillas* 2. Pros. Ex. 6 (disc containing the thirteen PDFs argued in this case as well as visual depictions that were argued in *Casillas* 1), 18 (charge sheet from *Casillas* 1). Had the offenses been tried together, the Government could not argue this evidence under Mil. R. Evid. 404(b) and would not have received this instruction.

Furthermore, the military judge instructed the members that they could similarly consider e-mail messages involving Appellant. Pros. Ex. 3-4, 10 (e-mail messages introduced as Mil. R. Evid. 404(b)); App. Ex. L at 6 (military judge's instructions regarding these emails in *Casillas* 2). These e-mail messages were charged as separate conduct in *Casillas* 1, and because the Government effectively severed Appellant's court-martials, the Government received a Mil. R. Evid. 404(b) instruction in *Casillas* 2 when the panel otherwise would have had to follow the instruction that "[e]ach offense must stand on its own and you must keep the evidence of each offense separate. Stated differently, if you find or believe that the accused is guilty of one offense, you may not use that finding or belief as a basis for inferring, assuming, or proving that he committed any other offense." App. Ex. L at 6; Pros. Ex. 18 (charge sheet from *Casillas* 1).

The Government used the convictions from Casillas *1 in pre-sentencing.*

The Government introduced Appellant's court-martial convictions from *Casillas* 1 during pre-sentencing in *Casillas* 2. Pros. Ex. 18; *see also* R.C.M. 1001(b)(3)(A) (inviting admission of prior convictions by the prosecution). As a result, the members could consider Appellant's prior convictions as part of his history and characteristics in reaching their sentence. R. at 1530. Seizing

on this, the Government argued that "there was a prior court-martial and that court-martial found [Appellant] guilty of possessing and viewing child pornography. The scope, the magnitude of sexual deviancy is evident." R. at 1539. While the military judge instructed the members that Appellant was only to be punished for the offenses that he was convicted of in *Casillas* 2, R. at 1543, the unavoidable impression for the lay members was that Appellant now had convictions in not just one but two consecutive cases concerning imagery that is "inherently disturbing," *United States v. Fechner*, 952 F.3d 954, 958 (8th Cir. 2020), even though a studious jurist would know that the two offenses themselves were duplicative. *See* Issue I, *supra*.

Several questions from the members latched onto the aggravating nature of the prosecution's double-the-trials approach. A member wanted to know if they would get to know what his previous sentence was. R. at 1567-68 (the military judge told them they would not know this information). A member wanted to know if the sentence in *Casillas* 2 would be in conjunction with the other sentence. R. at 1568. That member wanted to know if the sentence in *Casillas* 2 would "be served in addition to[,] concurrent with[,] or subtracted from the other sentence." R. at 1584 (the military judge told the members that he could not answer this). As a result, the members sentenced Appellant with the understanding that the Government had twice prosecuted Appellant for viewing and possessing child pornography and they had no reference for Appellant's sentence in *Casillas* 1, other than his rank as a Senior Airman, to assess what rehabilitation or deterrence Appellant needed. *See* Issue VIII, infra.

The Government forced consecutive sentencing.

The Government's preferral of a second court-martial further forced Appellant to serve consecutive confinement sentences. Appellant is currently serving the confinement sentence for *Casillas* 2 because his confinement sentence in *Casillas* 2 interrupted his confinement sentence in

Casillas 1. R.C.M. 1102(b)(2)(C)(v). After completing his confinement sentence in *Casillas* 2, he will then serve the remaining portion of his confinement sentence in *Casillas* 1. *Id*. Appellant elected sentencing by members in both *Casillas* 1 and *Casillas* 2, therefore, there can be no doubt that Appellant wanted to be sentenced by members, which would have resulted in a single sentence for all offenses. R. at 1280 (electing sentencing by members in *Casillas* 2); Pros. Ex. 18 at 1 (showing sentencing forum was members); *see* Article 56(c)(3), UCMJ, 10 U.S.C. § 856(c)(3) ("In a general or special court-martial in which the accused has elected sentencing by members, the court-martial shall announce a single sentence for all the offenses of which the accused was found guilty"). This Government's failure to dismiss and re-refer all known charges in a single court-martial prejudiced Appellant's substantial right to have a single confinement sentence for all of the offenses.

Because there was plain and obvious error and it resulted in prejudice to Appellant, this Court should provide the same remedy that the Army Court of Criminal Appeals provided in *Buhl*, when the Government similarly failed to prove that separating the offenses was necessary to prevent manifest injustice: set aside the findings and sentence and dismiss the Charge and Specifications. 84 M.J. 501, 2023 CCA LEXIS 510, at *11.

IV.

The findings are factually insufficient because the Government did not prove that Appellant viewed or possessed child pornography.

Additional Facts

IA conducted a digital forensics analysis on Appellant's iPhone XR and found suspected images of child pornography in the "Safari temp[orary] directory." R. at 978, 980, 983. While these files were stored in this temporary directory, that does not mean that the files were viewed on the iPhone's screen. R. at 1026.

Safari "is the default web browser for iPhones. The temporary directory is utilized by [Safari] to preload data on pages that you are viewing" to improve the user's experience. R. at 991. Basically, when a user navigates to a website, a copy of the website will be preloaded into the temporary directory, "that way as you scroll through the page the image is already loaded for you." R. at 991, 1018. The result of this function is that images will be loaded into the temporary directory, or cache, before that content is shown on the user's screen and even if the user does not scroll to the section of the webpage that contains them. R. at 1023, 1025-26, 1061-62. For example, if a user goes to a website like Instagram using the Safari browser, the entire Instagram page will not display to the user all at once. R. at 1025. Instead, to view the entire webpage, the user must scroll down the webpage. *Id*. As the user scrolls down, more of the webpage will load and be displayed. *Id*. The page can load quickly when the user does this because the webpage has been preloaded into the temporary directory, even before the user scrolls on that page. R. at 1025-26. This is unlike "back in the day" when a user would have to wait for an image to load. R. at 991.

Files could also be saved to the Safari temporary directory from an email if the user used the Safari web browser to access their email. R. at 992. For example, if the user drafted an email in the Safari web browser and attached a photograph to the email by taking a picture with the phone's camera from within the Safari web browser. R. at 992. In this scenario, the photograph taken from within the browser would not be stored in the normal location for photographs. *Id*. Instead, it would be saved in the browser's temporary directory. *Id*. IA saw one photograph of Appellant in the Safari temporary directory that was also located in Appellant's email, and IA believed this may have been because the above example occurred. R. at 989, 992, 1030. But it also could have been because this image had been on Instagram and Appellant used his browser

to view Instagram. R. at 1031. Nevertheless, IA did not see any of the thirteen PDF files in Appellant's sent or received emails. R. at 1030, 1061.

Separately, if one of the PDF files had been created on the iPhone XR, IA would have seen the images that were in the PDF file somewhere else on the iPhone XR. R. at 1088-89. And unlike the ability, described above, to take a photograph to create an attachment to an email within the Safari web browser, there is no way to create a PDF in an email within the Safari web browser. R. at 1089. Instead, had Appellant created a PDF on his iPhone XR there would be evidence of this, and IA did not see any evidence of this. R. at 1091.

Lastly, had Appellant clicked on a link to download a file, that link would not have been stored in the temporary directory. R. at 1018-19. Instead, that file would be saved in another folder, such as a "downloads" folder on the iPhone XR. R. at 1019.

The images that IA found in the Safari temporary directory are reproduced in Prosecution Exhibit 6. R. at 983. IA was able to locate these thirteen PDF files using a forensic tool called Cellebrite. R. at 1026. Cellebrite can access areas on the iPhone XR, such as the Safari temporary directory, that a user normally could not. *Id*. This is because Appellant's iPhone XR has a proprietary operating system that is controlled by Apple. R. at 1016. Due to this proprietary software, a user would need a special tool, such as Cellebrite, to access the Safari temporary directory. R. at 1027. IA searched Appellant's iPhone XR and did not find any such tool. *Id*. He also did not find any evidence that Apple's operating software had been "jail broken," or manipulated. *Id*.

Each of the thirteen PDF files at issue were named with a series of letters and numbers that were system-generated, such as "324BB5FD-4069-4568-a40d-194560D136E9.pdf." R. at 1028; Pros. Ex 9 at 2. When the PDF files were stored in the temporary directory, there was no thumbnail

preview. R. at 1028. Meaning, even if the user could view the files in the temporary directory, they would still need to open the PDF file to verify its contents. *Id*. If a PDF file was accessed in the temporary directory, that would also be logged in the system because the modified time associated with the file would be changed. *Id*. The "Created, Modified, and Accessed" dates associated with the thirteen PDF files otherwise explain when each file was saved to the Safari temporary directory. R. at 990. And the "modified date and time is when the file is finished writing to the [temporary directory]." R. at 1032. Depending on how long it takes to download a file, the modified time may differ by a millisecond. *Id*. The "Created, Modified, and Accessed" dates are in Prosecution Exhibit 6 and Prosecution Exhibit 9, and each file reflects the same dates and times. Pros. Ex. 6, 9. IA agreed that the modified date and time for each of the PDF files matched the created time, and the files were never modified or accessed. R. at 1032.

In addition to this evidence, the Government introduced evidence under Mil. R. Evid. 404(b) that (1) Appellant possessed and viewed uncharged images of child pornography and child erotica on his iPhone XR between on or about 1 December 2019 and on or about 24 March 2020, and (2) Appellant sent e-mails messages that expressed fantasies that sexualized children. Pros. Ex. 3-4, 6. The members were permitted to use this evidence for the purpose of proving the Appellant knowingly and wrongfully possessed and viewed child pornography. R. at 1128-29.

The thirteen PDF files include image advertisements of adult pornography that depict sexually explicit images of adults. R. at 1161; *see* Pros. Ex. 6.

Standard of Review

This Court reviews issues of factual sufficiency de novo. Art. 66(d), UCMJ, 10 U.S.C. § 866(d); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citing *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).

Law and Analysis

"The test for factual sufficiency is 'whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (second alteration in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, this Court takes 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), aff'd, 77 M.J. 289 (C.A.A.F. 2018).[11]

The Government did not prove Appellant viewed child pornography.

For Specification 2 of the Charge, the Government was required to prove that Appellant knowingly and wrongfully viewed child pornography. *MCM*, pt. IV, para. 95.b.(1)(a); App. Ex. L at 2 (military judge's instruction). The Government had to prove that this viewing was not inadvertent and that it was done knowingly. *MCM*, pt. IV, para. 95.c.(12); App. Ex. L at 3.

There is a real possibility that the accused did not view the thirteen PDF files located in the Safari temporary directory because IA admitted that the presence of the files in the temporary directory did not mean that the files were viewed on the iPhone's screen. R. at 1026. There were no eyewitnesses claiming they saw Appellant view the alleged images. Appellant never admitted

[11] Since Appellant's convictions are for offenses that occurred in 2019 or 2020, the factual sufficiency review standards in effect before 1 January 2021 apply here. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542 (e)(2), 134 Stat. 3388, 3612–13 (2021).

to the charged conduct. Instead, the prosecution rested on what IA could glean from the device itself. And, as IA made clear, Appellant could have visited a website that included the thirteen files without seeing them because the files could have preloaded to his temporary directory, even if Appellant did not scroll to view them. R. at 1023, 1025-26, 1061-62. Given the adult pornography content contained within the files and lack of evidence about what website these files may have existed on, there remains a real possibility that Appellant did not see them or that any viewing was inadvertent. R. at 1161 (explaining adult pornography is contained within the files); Pros. Ex. 6.

While the evidence of what Appellant *did* do is lacking, there is ample evidence of the many ways in which Appellant *did not* view the thirteen files at issue. He did not click on the files to download them because, if that occurred, the PDF files would have been saved in the downloads folder and not in the temporary directory. R. at 1018-19. Moreover, the uncharged images of child pornography and child erotica were also only located in the temporary directory and suffer from the same lack of evidence that Appellant viewed them, while yet proving that he did not download them. R. at 983, 987 (explaining 19 PDF files (which include the 13 PDF files that were charged in this case) and 13 images were found in the temporary directory); Pros. Ex. 6. And while Appellant expressed fantasies of viewing a minor undressed in two emails, that does not change that there is still a real possibility that Appellant did not view these files. Pros. Ex. 3-4. And there are no emails or other statements that suggest that Appellant had viewed these files.

Furthermore, there is no evidence that Appellant viewed these files in an email within his web browser. IA did not see any of the thirteen PDF files in Appellant's sent or received emails. R. at 1030, 1061. There is also no possibility that Appellant viewed these files by creating them within an email because Appellant could not create a PDF file within his email in the web browser.

R. at 1089-91. And there was no evidence that he viewed them by making a PDF anywhere else on the phone. R. at 1088-89.

Finally, Appellant could not have viewed the files when they were stored in the Safari temporary directory because (1) there is no evidence that Appellant had the tools to access the Safari temporary directory and (2) the dates and times of modification are not different for any of the files, but they would be different if he had somehow accessed the files to view them. R. at 1027-28, 1032.

Therefore, the Government did not prove beyond a reasonable that Appellant viewed child pornography, and this Court must set aside the finding of guilty for Specification 2 of Charge I.

The Government did not prove Appellant possessed child pornography.

For Specification 1 of the Charge, the Government was required to prove that Appellant knowingly and wrongfully possessed child pornography. *MCM*, pt. IV, para. 95.b.(1)(a); App. Ex. L at 1 (military judge's instruction). To possess child pornography, the Government was required to prove that Appellant exercised control of the thirteen PDFs found on his iPhone XR. *MCM*, pt. IV, para. 95.c.(8); App. Ex. L at 3 (military judge's instruction explaining "possessing"). Further, the Government had to prove that possession was "knowing and conscious." *MCM*, pt. IV, para. 95.c.(8); App. Ex. L at 3. Appellant cannot be convicted of possessing child pornography "if he did not know that the images were of minors, or what appeared to be minors, engaged in sexually explicit conduct." App. Ex. L at 3 (mirroring *MCM*, pt. IV, para. 95.c.(5)). "An act is done 'knowingly' if done voluntarily and intentionally." App. Ex. L at 3. Finally, the Government was required to prove "beyond a reasonable doubt that [Appellant] knew that he possessed . . . the child pornography." *Id*.

The Government did not prove that Appellant knowingly and consciously possessed the thirteen PDF files in the Safari temporary directory. In fact, there was no evidence that Appellant knew about his Safari temporary directory at all. There was no evidence that Appellant could access his temporary directory or that he ever had. R. at 1026-28, 1032. The Government did not prove that Appellant knowingly possessed the child pornography, and this Court must set aside the finding of guilty for Specification 1 of Charge I.

Therefore, this Court should set aside the findings and sentence and dismiss the Charge and Specifications.

V.

The specifications of possessing child pornography and viewing child pornography are multiplicious.

Standard of Review

"Multiplicity claims 'are forfeited by failure to make a timely motion to dismiss, unless they rise to the level of plain error.'" United States v. Coleman, 79 M.J. 100, 102 (C.A.A.F. 2019). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Flores*, 69 M.J. 366, 369 (C.A.A.F. 2011) (citing *Maynard*, 66 M.J. at 244).

Law and Analysis

Multiplicity violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006). Multiplicity occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct . . . ." *Id*. (quoting *Roderick*, 62 M.J. at 431) (emphasis omitted). Multiplicity can also occur when the same act or course of conduct is charged two ways under the same punitive article of the UCMJ. *United States v. Earle*, 46 M.J. 823, 826 (A.F. Ct. Crim. App. 1997).

In *Earle*, the appellant pleaded guilty to "assault with a means likely to produce death or grievous bodily injury and assault consummated by a battery against [the appellant's] two-month-old son." *Id*. at 824. There, this Court explained that the specifications arose from "the same blow, struck against the same victim, at the same time, charged two ways (one a lesser included offense of the other), under the same punitive article of the UCMJ." *Id*. at 826. This Court found the specifications were multiplicious and explained that when "a conviction to both ensues, one or the other must be dismissed." *Id*. at 825 (citation omitted).

Following *Earle*, this Court has found that Article 134, UCMJ, child pornography offenses can also be multiplicious of each other. In *United States v. Matthew*, No. ACM 39796 (reh), 2024 CCA LEXIS 460, at *12-13 (A.F. Ct. Crim. App. Oct. 31, 2024), this Court explained that the specifications of possession and distribution of child pornography were multiplicious because both specifications "identifie[d] identical locations and time spans for the alleged offenses, [n]either specification identifie[d] specific files or items constituting the child pornography in question," and distribution necessarily includes possession. *See also United States v. Bullington*, 18 M.J. 164, 164-65 (C.M.A. 1984) (possession and related use of the same drug are multiplicious). This Court has also explained that "possession and viewing of child pornography may, in some circumstances, be multiplicious offenses or lesser included offenses of each other." *United States v. Ramos*, No. ACM 38619, 2015 CCA LEXIS 362, at *16 (A.F. Ct. Crim. App. Aug. 31, 2015).

This case presents a circumstance where the convictions for possession and viewing of child pornography are multiplicious. Appellant's convictions include the same locations, time spans, and material for the alleged offenses, all with the same terminal element. *Compare* Pros. Ex. 18, *with* Charge Sheet, 17 November 2022. And to knowingly view or possess child pornography, Appellant must have known "the images were of minors, or what appeared to be

minors, engaged in sexually explicit conduct." MCM, pt. IV, para. 93.c.(5). But Appellant cannot know that he possesses visual depictions of minors, or what appear to be minors, without viewing the depictions. Therefore, the specifications are facially duplicative and multiplicious.

Because the specification are multiplicious, it was plain error to not dismiss one of the specifications after findings. The Government could charge multiplicious specifications in the alternative to "meet the exigencies of proof," but when a conviction on both specifications has resulted, "one or the other must be dismissed." *Earle*, 46 M.J. at 825. Appellant was materially prejudiced because no specification was dismissed and he was sentenced for both specifications.

If this Court declines to grant relief on Issues I-IV, one specification must be dismissed, *see id*., and considering the factors enunciated in *United States v. Winckelmann*, 73 M.J. 11, 15-16 (C.A.A.F. 2013), a rehearing on Appellant's sentence is appropriate. Those factors are:

> (1) Dramatic changes in the penalty landscape and exposure.
>
> (2) Whether an appellant chose sentencing by members or a military judge alone. As a matter of logic, judges of the courts of criminal appeals are more likely to be certain of what a military judge would have done as opposed to members. . . .
>
> (3) Whether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses.
>
> (4) Whether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Id. at 15-16 (internal citations omitted). A rehearing on Appellant's sentence is appropriate because regardless of which specification is dismissed there will be a dramatic change in the penalty landscape and exposure (from twenty years to ten years). *MCM*, pt. IV, para. 93.d.(1). Because Appellant chose sentencing by members, and because this Court cannot affirm a higher

sentence than would have been imposed, a rehearing is necessary. *United States v. Buber*, 62 M.J. 476, 479 (C.A.A.F. 2006) (citing *United States v. Hawes*, 51 M.J. 258, 260 (C.A.A.F. 1999)); R. at 1280. Therefore, while the gravamen of the criminal conduct will be largely the same (given its multiplicity) and the remaining offense will be of the type that this Court "should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial," these factors do not outweigh the previous two factors that weigh in favor of ordering a rehearing on the sentence.

Therefore, one of Appellant's convictions must be dismissed and this Court should order a rehearing on Appellant's sentence.

VI.

Appellant was denied effective assistance of counsel when defense counsel failed to move to dismiss one of the specifications based on multiplicity.

Standard of Review

This Court reviews allegations of ineffective assistance de novo. *Palik*, 84 M.J. at 288 (citing *Tippit*, 65 M.J. at 76).

Law and Analysis

Appellant was denied the effective assistance of counsel because Appellant's defense counsel failed to move to dismiss a specification based on multiplicity when Appellant was convicted of both specifications in *Casillas* 2 for the same conduct. *See* Issue V, supra. This failure demonstrates an ignorance of the law that fell measurably below the standard of performance expected of fallible lawyers, and it prejudiced Appellant because the only remedy for multiplicity is the dismissal of one of the multiplicious specifications. *Earle*, 46 M.J. at 825 ("when a conviction on both specifications has resulted, 'one or the other must be dismissed'").

Regardless of whether this Court finds that specifications are facially duplicative, there is

no question that Appellant was found guilty of the same conduct for both specifications because the Government alleged that he both possessed and viewed the same thirteen PDF files. App. Ex. VII (bill of particulars listing the thirteen PDF files); App. Ex. L (findings instructions listing the same thirteen PDF files). All thirteen PDF files came from the Safari temporary directory of Appellant's iPhone XR. Pros. Ex. 6, 8, 9. And the evidence offered at trial was that Appellant possessed the PDF files in his Safari temporary directory because to view them, his browser had to preload them. R. at 1018 ("you're not actually viewing the copy of the file that is stored on the server, right? Correct. You are viewing what's been stored in a temporary directory"). Therefore, he could not view them until he "possessed" them in the Safari temporary directory of his iPhone XR. R. at 991, 1018. The specifications of possessing and viewing child pornography in *Casillas* 2 arose from the same conduct, at the same time, charged two ways, under the same punitive article of the UCMJ, and the resulting convictions are multiplicious.

This issue was fundamental to Appellant's case because Appellant was convicted for the same conduct in two separate specifications and the CAAF has explicitly provided that the Government could charge multiplicious specifications in the alternative to "meet the exigencies of proof," but when a conviction on both specifications has resulted, "one or the other must be dismissed." *Earle*, 46 M.J. at 825. And there is a reasonable probability that had defense counsel understood the applicable law and raised a motion to dismiss one of the specifications in *Casillas* 2, a specification would have been dismissed because that is the only permissible remedy for multiplicity. *See id.* The failure to raise this motion after findings prejudiced Appellant because he now stands convicted and sentenced for two specifications. R. at 1278, 1623.

This Court should set aside one of the specifications and order a rehearing on Appellant's sentence. *See* Issue V, supra.

VII.

The convening authority received court-member data sheets indicating the races and genders of potential court members, and the composition of at least some groups of detailed members shows the convening authority considered these factors. This creates a prima facie showing that race and gender were impermissibly considered when selecting members, giving rise to a presumption that the panel was not properly constituted.

Additional Facts

The convening authority detailed members to this court-martial in a series of three convening orders. Special Order A-4, 7 February 2023; Special Order A-8, 7 June 2023; Special Order A-9, 22 June 2023. Before selecting the members to be detailed in each order, the convening authority received a memorandum with lists of proposed nominees and court member data sheets for each nominee attached. *See* Pretrial Advice. The court member data sheets listed biographical information about each nominee and included a copy of the nominee's Single Unit Retrieval Format (SURF), a summary of that member's personnel data, as an attachment. *See* Court Member Data Sheets.[12] The data sheets indicated each nominee's race and gender on the attached SURF. *Id.* After receiving the lists of nominees and accompanying information, the convening authority selected members by initialing next to their names on indorsements to the requests. *See* 1st Indorsement to Pretrial Advice and 1st Indorsements to Excusal and Replacement of Court Members. As a particular example, the convening authority, in Special Order A-8, removed five female officers and four male officers and then added the exact same number of female and male officers. Special Order A-8, 7 June 2023.

[12] The court member data sheets are listed as attachments to documents in the record of trial but are not included in the record of trial; they are included as an appendix to a Motion to Attach filed simultaneously with Appellant's brief.

Standard of Review

Where no objection is made, court-martial composition issues are reviewed for plain error. *United States v. King*, 83 M.J. 115, 120-21 (C.A.A.F. 2023). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *Id.* "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *Harcrow*, 66 M.J. at 159 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Relatedly, "an appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *Tovarchavez*, 78 M.J. at 462; *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

"[W]henever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *United States v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023). The Government may then seek to rebut that presumption. *Id*. Should the Government be unable to rebut the presumption, automatic reversal is warranted. *Id*. at 74; s*ee also Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017) (granting "automatic relief to defendants who prevailed on claims alleging race . . . discrimination in the selection of the petit jury"); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *Johnson*, 520 U.S. at 466 (citing Supreme Court precedent for the proposition that cases *not* governed by Federal Rule of Criminal Procedure Rule 52(b) are "structural errors" without a prejudice analysis).

Law and Analysis

"The Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. This statement is no less true in the military justice system where the convening authority might arbitrarily select members based on race to create a more diverse panel, or one representative of the accused's race. *Jeter*, 84 M.J. at 73. In extending *Batson* to panel member selection, the CAAF unequivocally articulated, "It is impermissible to exclude or intentionally include prospective members based on their race." *Id.* "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, only to have discriminated at other stages of the process." *Id*. at 74.

However, at the time of Appellant's court-martial, *United States v. Crawford* provided that convening authorities *could* use race to select a panel when it was "in favor of, not against, an accused." 35 C.M.R. 3, 13 (C.M.A. 1964). Military appellate courts did "not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty." *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994). Taking note of race during panel selection became further extended in *United States v. Smith*, a case about gender, providing:

> As we interpret Article 25 in light of *Crawford*, Congress has not required that court-martial panels be unrepresentative of the military population. Instead, Congress has authorized deviations from the principle of representativeness, if the criteria of Article 25 are complied with. Thus, *a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community -- such as blacks, Hispanics, or women -- be excluded from service on court-martial panels*.

27 M.J. 242, 249 (C.M.A. 1988) (emphasis added). Not only could race be used to make a panel more representative of the accused's race, but also race could be considered to make a more diverse panel, representative of the military community. Then, based on this extension of *Crawford*, the

CAAF noted, "In our view, a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population." *Id*. As such, at the time of Appellant's trial, both race and gender could be considered to create a panel.

Last year, though, *Jeter* explicitly held *Batson* had abrogated *Crawford*'s encouragement to use race when deciding who should be appointed to a panel: "A person's race is simply unrelated to his fitness as a juror." *Jeter* did not consider the question of using gender as a basis for juror fitness. However, it is clear through the abrogation of *Crawford* by *Batson*, *Smith* is similarly abrogated by *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129 (1994). *J.E.B.* followed *Batson* and extended *Batson*'s holding to gender: "We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* As with race, "intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *Id*. The Supreme Court also wrote:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

Id. at 145. It is clear, then, gender, like race, cannot be considered for court member selection, whether members of certain genders or races are intentionally "included" or "excluded." To "include" one means "excluding" another. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id*. at 142 n.13. *Jeter* unequivocally states that "race shall not be a criterion in the selection of court-martial members," and its reasoning indicates the same must be true of gender. 84 M.J. at 73.

Jeter lays out a process for determining whether impermissible criteria were used in the

selection of court-martial members. First, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *Id.* at 70. In *Jeter*, the appellant made such a prima facie showing largely based on the inclusion of racial identifiers in court member questionnaires. *Id.* at 73–74.

Equivalent identifiers are present here, as the court member data sheets sent to the convening authority with each request for members included racial and gender identifiers for the members on an attached SURF. *See* Court Member Data Sheets. The inclusion of these identifiers on court member data sheets indicates the convening authorities solicited the race and the gender of prospective court members. *See Jeter*, 84 M.J. at 73. The *Jeter* court also noted the understandable belief that *Crawford* was still good law at the time contributed to the prima facie showing, and the same is true here because Appellant's court-martial also took place before the court's holding in *Jeter*. *Id.* at 74. Based on these factors, Appellant has made a prima facie showing that gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process.

A closer analysis of the court member selection in this case reveals a stronger indication that impermissible criteria influenced member selection, bolstering the prima facie showing: the convening authority, in Special Order A-8, removed five female officers and four male officers and then added the exact same number of female and male officers. Special Order A-8, 7 June 2023. The fact that the convening authority replaced the excused members with the same exact ratio of male to female members demonstrates a deliberate effort to balance the gender composition of the detailed members. This is understandable because, as the *Jeter* court noted, the law at the time authorized and even encouraged such considerations for the purpose of creating more diverse

panels. 84 M.J. at 74. However, *Jeter* makes it clear this is not allowed, so the use of this impermissible indicator when selecting court members is a plain error at the time of appellate consideration. *Id.*

Once a prima facie showing has given rise to the presumption that the panel was not properly constituted, "[t]he government may then seek to rebut that presumption." *Id.* at 70. Here, the documentation regarding the selection of court members fails to rebut this presumption because none of it indicates the convening authorities did not consider the racial and gender identifiers available to them in the court member data sheets. On the contrary, the results of at least one selection process indicate a probable use of the gender identifiers. Without rebuttal, the presumption that these impermissible identifiers were used when selecting court members stands, constituting clear and obvious error since it is plain at the time of appellate review that these factors may not be considered at all. Although the plain error standard normally calls for an assessment of prejudice, that is not necessary here because the composition of a court-martial is a structural issue, and the unrebutted presumption warrants automatic reversal. *See Jeter*, 84 M.J. at 74; *Johnson*, 520 U.S. at 466. This Court should therefore grant the same remedy the court granted in *Jeter* by setting aside the findings of guilty and the sentence. 84 M.J. at 75.

Therefore, this Court should set aside the findings and sentence and dismiss the Charge and Specifications.

VIII.

It was an abuse of discretion to admit Prosecution Exhibit 18 with redactions.

Additional Facts

Prosecution Exhibit 18 is the Entry of Judgment from *Casillas* 1. Pros. Ex. 18. Prosecution Exhibit 18 was admitted with Appellant's sentence redacted over defense objection. R. at 1205.

The defense objected based on the rule of completeness under Mil. R. Evid. 106, and argued that Appellant's sentence was relevant for aggravation and mitigation because it helped the members assess Appellant's rehabilitative potential, implying this was part of Appellant's service history. *Id*. The defense argued that it should be able to argue, "He is not going to be committing these crimes anytime in the future because of being rehabilitated," via his confinement sentence in *Casillas* 1. R. at 1214. Further, without this information, the members would instead see that Appellant was at a second court-martial (wearing the rank of senior airman) but would be forced to wonder what Appellant's sentence was. *Id*. And as defense counsel anticipated, the members did want to know Appellant's prior sentence was. R. at 1567-68 (asking if they would get to know the sentence from *Casillas* 1).

The Government argued Appellant's sentence was nonetheless inadmissible, relying on *United States v. Barrier*, 61 M.J. 482 (C.A.A.F 2005), for the principle that "other cases cannot be given to court-martial members for comparative purposes."[13] R. at 1207. Defense counsel reasoned that *Barrier* did not apply to Appellant's case because "[i]n *Barrier*, the appellant had given an unsworn in the sentencing period that referenced similar cases, not his own, to compare sentences to." R. at 1210. Whereas here, the sentence is Appellant's and the purpose for introducing it was mitigation not comparison. R. at 1214. But the military judge determined that *Barrier* was "on point," stating sentences from other court-martials could not be given to court-martial members for "comparative purposes." R. at 1225-26 (citing *United States v. Mamaluy*, 10 C.M.A. 102, 106 (1959)). And, "that principle is founded on the hypothesis that accused persons are not robots to be sentenced by a fixed formula, but rather they are offenders who should be given individualized consideration and punishment." *Id*.

[13] Discussed infra.

The military judge admitted the exhibit with Appellant's sentence redacted after conducting a Mil. R. Evid. 403 analysis. R. at 1225-26. The military judge specifically determined the probative value was substantially outweighed by "the danger of unfair prejudice, confusion of the issues, and misleading the members in light of [*Barrier*] and [*Mamaluy*]." R. at 1226.

Standard of Review

This Court reviews the military judge's ruling on the admissibility of evidence for an abuse of discretion. *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997).

Law and Analysis

While it was a problem altogether that Appellant was the subject of two courts-martial for the same thing, *see Issues I-III*, supra, that unique dilemma created a situation where the military judge abused his discretion by admitting a redacted and, therefore, incomplete record of judgment. The military judge abused his discretion by relying on a legal principle that did not apply to Appellant's case.

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)).

Mil. R. Evid. 106 provides, "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." The "additional portions of the statement must still meet the Mil. R. Evid. 401 relevance standard." *United States v. Rosales*, 74 M.J. 702, 707 (A.F. Ct. Crim. App. 2015) (citing *United States v.*

Cannon, 33 M.J. 376, 383 (C.M.A. 1991)); *accord United States v. Garrett*, 716 F.2d 257, 272 (5th Cir. 1983); *United States v. Marin*, 669 F.2d 73, 84-85 (2d Cir. 1982)). Moreover, Mil. R. Evid. 106 does not render inadmissible evidence admissible. *See Rosales,* 74 M.J. at 707 (citing *United States v. Terry*, 702 F.2d 299, 314 (2d Cir. 1983) (noting that Federal Rule of Evidence 106 does not render inadmissible evidence admissible)).

The Government can introduce "a 'conviction' in a court-martial case when a sentence has been adjudged," and it can do this "by the judgment." R.C.M. 1001(b)(3); R.C.M. 1001(b)(3)(C) Discussion (citing R.C.M. 1111). "The judgment of the court should provide a complete statement of the findings and the sentence reflecting the effect of any post-trial modifications." R.C.M. 1111(b)(4) Discussion.

Here, when the Government sought to introduce part of a writing, Appellant's redacted entry of judgment from *Casillas* 1, the rule of completeness required that redacted portion—Appellant's sentence—also be introduced. This is because Appellant's record of conviction (the entry of judgment) included not just the findings but the approved sentence. R.C.M. 1001(b)(3); R.C.M. 1001(b)(3)(C) Discussion (citing R.C.M. 1111); R.C.M. 1111. Appellant's sentence was relevant because his sentence is a part of Appellant's service history, much like how an appellant's punishment as part of an Article 15 would be introduced and not redacted. *See* R.C.M. 1001(b)(2) (allowing the introduction of "disciplinary actions including punishments under Article 15"). It was further relevant because the members could use this information, like they use an administrative demotion or Article 15 punishment to assess the punishment that Appellant had already received for purposes of evaluating his rehabilitation. It was error to not admit Appellant's sentence because his sentence was part of his conviction and service history that explained his history and ongoing rehabilitation. *See* R.C.M. 1001(b)(2)-(3); R.C.M.1002(f)(1) (explaining "the

nature and circumstances of the accused and the history and characteristics of the accused" should be considered in sentencing); R.C.M. 1002(f)(3)(D)-(F) (explaining adequate deterrence of misconduct, protection of others from further crimes by the accused, and rehabilitation of the accused are considerations in sentencing).

Despite the legal force in support of presenting the complete entry of judgment to the members, the military judge incorrectly ruled otherwise in reliance on the *Barrier* case that is distinguishable to the point of being inapt. *Barrier* addressed "whether [an] [a]ppellant's proposed statement regarding the sentence of another accused in an unrelated case was relevant to the issue of [the] [a]ppellant's sentencing." 61 M.J. at 485. The facts underlying this issue were that the appellant "called the members' attention to the sentence awarded to SrA Watson," and the appellant "did not assert that Watson's case was closely related to his own." *Id*. The CAAF determined this information was irrelevant and that the military judge properly instructed the members that it was irrelevant. *Id*. at 485-86. Those instructions included:

> [T]he disposition of other cases is irrelevant for your consideration in adjudging an appropriate sentence for this accused. You did not know all the facts of those other cases, or other cases in which sentences were handed down, nor anything about those accused in those cases, and it is not your function to consider those matters at this trial.

Id. at 483.

The holding and reasoning of *Barrier* does not apply to Appellant's case because Appellant was not asking to introduce information about "another accused in an unrelated case." *Id*. at 485. Appellant was invoking the rule of completeness to introduce information about himself and his history that was relevant to the members' determination of his sentence. *See* R.C.M.1002(f)(1) (explaining "the nature and circumstances of the accused and the history and characteristics of the accused" should be considered in sentencing). Further, unlike *Barrier*, the members did know the

facts of Appellant's other case because those facts were introduced as Mil. R. Evid. 404(b) evidence during trial and were further introduced in the entry of judgment in Prosecution Exhibit 18. Pros. Ex. 3-4, 6, 18.

More importantly, defense counsel did not intend to argue that the members should use Appellant's sentence in *Casillas* 1 as a comparison, but rather as mitigation because Appellant was "imprisoned," and "[h]e is not going to be committing these crimes anytime in the future because of being rehabilitated." R. at 1214. The members could and should have been able to use Appellant's ongoing sentence from *Casillas* 1 to evaluate the sentence that Appellant needed to have adequate deterrence of misconduct. R.C.M. 1002(f)(3)(D). Especially because the members knew the conduct in *Casillas* 2 was alleged to have occurred at the same time as the conduct in *Casillas* 1, before Appellant was sentenced in *Casillas* 1. Pros. Ex. 18 (showing the offense dates and the date Appellant was sentenced in *Casillas* 1); App. Ex. XXXIII (flyer displaying alleged dates of misconduct in *Casillas* 2). Moreover, if the members knew Appellant was going to be confined for two years, that could further mitigate the need to provide protection of others from further crimes by the accused. R.C.M. 1002(f)(3)(E). And, if the members knew Appellant was in confinement and therefore could potentially have access to the rehabilitation programs that were discussed in pre-sentencing because of that sentence, the members could have determined a lesser sentence was needed to ensure Appellant's rehabilitation. R.C.M. 1002(f)(3)(F); R. at 1429 (explaining treatment that is available in confinement is often longer than 18 months); R. at 1614 (members asking "[w]hat is taken into consideration when determining whether a convicted individual goes to a Level 1, 2, or 3 facility for confinement? Specifically, how many months [or] years of confinement" determine the level of facility). Instead, all the members could see was that Appellant had been reduced in rank. *See* R. at 401 (explaining Appellant wore the rank of Senior

Airman but his ribbon rack was larger "than probably everybody's ribbon rack in [the courtroom] combined"); R. at 1321 (witness referring to Appellant as a Master Sergeant). Therefore, unlike *Barrier*, where the appellant was attempting to compare his case to an unrelated airman in an unrelated case, which was irrelevant, Appellant's sentence in *Casillas* 1 was relevant for the members consideration in *Casillas* 2.

Furthermore, there was not a risk of unfair prejudice to the Government, confusion of the issues, or misleading the members, even considering that the members would see the convening authority's action because the military judge's instruction informed the members that they could not consider what, if any, action the convening authority might take in this case. R. at 1529 (instructing the members "must not adjudge an excessive sentence in reliance upon possible mitigating action by the convening authority or higher authority"). And absent evidence to the contrary, members are presumed to follow the military judge's instructions. *United States v. Stewart*, 71 M.J. 38, 42 (C.A.A.F. 2012) (citing *United States v. Taylor*, 53 M.J. 195, 198 (C.A.A.F. 2000)). Generally, members are permitted to see a commander's action on an appeal of an Article 15 or administrative demotion when admitted as sentencing evidence, because it provides the ultimate punishment that the appellant received, which can provide aggravating or mitigating information. *See* R.C.M. 1001(b)(2) (permitting the introduction of evidence from the accused's service record); *United States v. Mead*, 72 M.J. 479, 481-82 (C.A.A.F. 2013) (finding punishment under Article 15, UCMJ, can be revealed during a court-martial for consideration in sentencing). And there is no reason that the same would not be true of Appellant's prior sentence under the unique facts of this case.

Finally, Appellant was prejudiced by the military judge's error because the members sentenced Appellant without a full picture of the deterrence, protection, and rehabilitation that was

already in play. And it was clear that the members wanted to know this information so that they could assess the deterrence, protection, and rehabilitation already in place. *See, e.g.,* R. at 1567-68, 1614 (asking questions about Appellant's confinement and how much confinement was needed for Level 1, 2, and 3 confinement facilities). Therefore, this Court cannot confidently find this error did not have a "substantial influence" on Appellant's sentence. *United States v. Cole*, 84 M.J. 398, 407 (C.A.A.F. 2024) (citing *Kotteakos v. United States*, 328 U.S. 750, 756 (1946)).

This Court should set aside the sentence and authorize a rehearing.

IX.

Appellant's sentence is inappropriately severe compared to his sentence in his first court-martial.

Additional Facts

In *Casillas* 1, Appellant was sentenced for two charges and fifteen specifications of violating Article 134, UCMJ, which included two specifications for possessing child pornography and one specification for viewing child pornography. App. Ex. LI. He was also sentenced for one charge and specification of violating Article 92, UCMJ, and one charge and three specifications of violating Article 120c, UCMJ. *Id*. For these offenses, the members sentenced Appellant to two years of confinement, a $2,500.00 fine, a reduction in pay grade to E-4, forfeiture of all pay and allowances, and a reprimand. App. Ex. LI at 7.

In *Casillas* 2, Appellant was convicted of one charge and one specification each of possessing and viewing child pornography. R. at 1278. For this case, the members sentenced Appellant to four years and eleven months of confinement, a reduction in grade to E-1, and a reprimand. R. at 1623. This was despite trial counsel's argument that eighteen months of confinement was just punishment and allowed Appellant to receive the treatment he needed. R. at 1537, 1540-41.

Standard of Review

This Court reviews sentence appropriateness de novo employing "a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005) (quoting *United States v. Bauerbach*, 55 M.J. 501, 504 (A. Ct. Crim. App. 2001)).

Law and Analysis

Appellant's sentence is inappropriately severe, and this Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). This authority provides this Court with broad discretion, that is, "not legality alone, but legality limited by appropriateness." *United States v. Nerad*, 69 M.J. 138, 141 (C.A.A.F. 2010) (citing *United States v. Atkins*, 8 C.M.A. 77, 23 C.M.R. 301, 303 (C.M.A. 1957)); *see also United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999)) (explaining "the power to review a case for sentence appropriateness" provides this Court with "broad discretion to determine whether a sentence 'should be approved,' a power that has no direct parallel in the federal civilian sector"). In fulfilling this Court's duty under Article 66(d), UCMJ, this Court considers the "uniformity and evenhandedness of sentencing decisions," *Sothen*, 54 M.J. at 296 (citing *Lacy*, 50 M.J. at 28; *United States v. Boone*, 49 M.J. 187, 191-92 (1998)), as well as "the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial," *United States v. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citations omitted).

This Court is "not required . . . to engage in sentence comparison with specific [other] cases

'except in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases.'" *Lacy*, 50 M.J. at 288 (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). Cases are "closely related" when, for example, they involve "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." *Id*. "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" *Id*. "If the appellant meets that burden, or if the court raises the issue on its own motion, then the Government must show that there is a rational basis for the disparity." *Id*.

This is one of the rare cases when sentence comparison is appropriate. Appellant's case was only broken into two courts-martial because of the Government's decision to proceed in that manner vice dismissing and re-referring the case. *See* Issue III. The conduct at issue in both cases involves the possession and viewing of the same child pornography (same material). *See* Issue I. Therefore, Appellant is not only the same person, but there is also a direct nexus between the offenses at issue. And Appellant's sentences are highly disparate.

Comparing *Casillas* 1 and *Casillas* 2 reveals a significant difference in the volume of charged misconduct. *Casillas* 1 involved nineteen specifications, including fifteen specifications for violating Article 134, UCMJ (including the possession and viewing of child pornography on his iPhone XR); one specification for violating Article 92, UCMJ; and three specifications of violating Article 120c, UCMJ. App. Ex. LI. In contrast, *Casillas* 2 involved only two specifications. R. at 1278. And yet, Appellant's confinement sentence was much greater in *Casillas* 2: four years and eleven months versus two years in *Casillas* 1. *Compare* R. at 1623, *with* App. Ex. LI. Meanwhile, Appellant's impressive service record at both trials would have included

the same thirteen combat deployments and voluminous awards and decorations for his heroic efforts because the Government was required to admit the Appellant's Personal Data Sheet and Enlisted Performance Reports in pre-sentencing. R.C.M. 1001(b)(2); Pros. Ex. 11-12. Because Appellant was sentenced to more than twice the confinement that he received in *Casillas* 1, his sentence is inappropriately severe.

Therefore, this Court should conclude that no more than two years of confinement should be affirmed, in line with his sentence in *Casillas* 1.

X.

The application of 18 U.S.C. § 922 to Appellant warrants correction.

Additional Facts

Appellant is a United States citizen by birth. *See* R. at 1328 (Appellant was born in Las Vegas, New Mexico). Appellant possessed multiple firearms and would like to possess firearms. Decl. of Appellant. The Statement of Trial Results (STR) and Entry of Judgment (EOJ), post-trial documents that memorialized the outcome of Appellant's case, purport to strip Appellant of his constitutional right to bear arms for life. STR at 3 (citing 18 U.S.C. § 922); EOJ at 3 (citing 18 U.S.C. § 922); U.S. CONST. amend. II. This determination is on the First Indorsement to each post-trial document, which are consecutively paginated with a preceding portion previously signed by the military judge. STR at 1-4; EOJ at 1-4. The military judge is required to incorporate the STR in the EOJ.[14] 10 U.S.C. 860c(1)(A) (2019).

[14] It was error for the military judge to not incorporate the STR in the EOJ by listing it as an attachment to the EOJ, which similarly warrants remand for correction. The error prejudices Appellant because it may preclude Appellant from raising the firearm prohibition issue at the CAAF, under Article 67, UCMJ, based on the argument that the military judge's inclusion of the STR and its First Indorsement in the EOJ (as required by 10 U.S.C. 860c(1)(A)), was incorrect in law when it included the firearms prohibition. The authority of the CAAF to address this issue under Article 67, UCMJ, 10 U.S.C. § 867, is a question that may be resolved by the CAAF in

During Appellant's trial, no evidence suggested that Appellant was a "fugitive from justice," an unlawful user of or addict to a controlled substance, "adjudicated as a mental defective," or "committed to a mental institution." 18 U.S.C. § 922(g)(2)-(4). Though available as part of the sentence, Appellant was not sentenced to a dishonorable discharge. *Compare* R. at 1524, *with* R. at 1623. Each specification was subject to a maximum confinement of ten years. *MCM*, pt. IV, para. 93.d.(1); R. at 1524. Both the STR and EOJ note that Appellant was not convicted of a crime of domestic violence. STR at 3 (citing 18 U.S.C. § 922(g)); EOJ at 3 (citing 18 U.S.C. § 922(g)).

Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *United States v. Zegarrundo*, 77 M.J. 612, 613-14 (A.F. Ct. Crim. App. 2018) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Vanzant*, 84 M.J. 671, 680 (A.F. Ct. Crim. App. 2024), *rev. granted*, USCA Dkt. No. 24-0182, ___ M.J. ___, 2024 CAAF LEXIS 640 (C.A.A.F. Oct. 17, 2024).

Law and Analysis

The Courts of Criminal Appeals possess "limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). In *United States v. Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *12-13 (C.A.A.F. Sep. 5, 2024), the Court of Appeals for the Armed Forces recently rejected the authority of the Courts of Criminal Appeals to address the firearms prohibition in the STR under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

United States v. Johnson, No. ACM 40257, USCA Dkt. No. 24-0004/SF, 84 M.J. 343 (C.A.A.F. Mar. 29, 2024), *vacated and review of other issues granted*, ___M.J. ___, 2024 CAAF LEXIS 561 (C.A.A.F. Sep. 24, 2024).

But this Court remains empowered by statute to correct the unconstitutional deprivation of Appellant's Second Amendment right to bear arms through Article 66(d)(2), UCMJ. 10 U.S.C. § 866(d)(2); *see also Williams*, 2024 CAAF LEXIS 501, at *14-15 (considering relief under that statute but rejecting it only because of the unique procedural posture of the case).

Article 66(d)(2), UCMJ, authorizes this Court to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the" EOJ. 10 U.S.C. § 866(d)(2). Appellant meets each of the statutory thresholds: (1) an error, (2) raised by Appellant, (3) occurring after the entry of judgment under Article 60c, UCMJ. *Id*.; *Williams*, 2024 CAAF LEXIS 501, at *14-15. Because only one category of 18 U.S.C. § 922(g) could possibly apply to Appellant, and its reflection in his post-trial paperwork runs afoul of the superior protection found in the Second Amendment, this Court can and should direct correction, consistent with its authority under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

1. Appellant has demonstrated error: the unconstitutional application of what appears to be 18 U.S.C. § 922(g)(1) to Appellant.

Facially, only one part of 18 U.S.C. § 922 could conceivably apply to Appellant: 18 U.S.C. § 922(g)(1)'s prohibition arising from a conviction of a crime punishable by imprisonment for a term greater than one year, because Appellant faced up to ten years for each offense. R. at 1524. But this is the only category under 18 U.S.C. § 922(g) that could seem to apply to Appellant. And, as discussed below, when the sole applicable provision is viewed through the lens of the absence of violence in Appellant's case, the purported statutory application of 18 U.S.C. § 922(g)(1) must yield to the superior protection afforded by the Constitution.

"The military has a hierarchical scheme as to rights, duties, and obligations." *Romano*, 46 M.J. at 274. Above all is the Constitution. *See id.* "While a lower source on the hierarchy may grant additional or greater rights than a higher source, those additional rights may not conflict with

a higher source." *Id*. As applied to Appellant, the question then becomes: Does the purported application of the lifetime firearm ban enumerated in 18 U.S.C. § 922(g)(1) comport with the Second Amendment?

When evaluating that question, the Supreme Court of the United States has articulated the governing test:

> [W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The [G]overnment must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) (quoting *Konigsberg v. State Bar of Cal*., 336 U.S. 36, 49 n.10 (1961)).

Broadly speaking, and though not without limitation, the Second Amendment "confer[s] an individual right to keep and bear arms." *D.C. v. Heller*, 554 U.S. 570, 595, 626 (2008). As such, the Second Amendment plainly covers Appellant's right to keep and bear arms, even after his conviction. And, as *Bruen*'s test set out above makes clear, it then falls on the Government to show why its lifetime regulation of that right—here, purportedly through 18 U.S.C. § 922(g)(1)—comports with America's "historical tradition of firearm regulation." 597 U.S. at 17.

The Supreme Court took up the contours of this assessment in *United States v. Rahimi*, 602 U.S. 680 (2024). Concluding that 18 U.S.C. § 922(g)(8) "fits comfortably within [the Nation's historical] tradition," the court employed a methodology considering whether the regulation at issue is "relevantly similar"—as opposed to identical—to those acceptable to the Nation's founding generation. *Id*. at 681, 690. The determination was clear under the facts specific to *Rahimi* because "the Government offer[ed] ample evidence that the Second Amendment permits the disarmament of individuals who pose" what the Court described as "a clear threat of physical

violence to another." *Id*. at 693, 698. But the Court cabined its approval, limiting its affirmance to *temporary* disarmament after a finding of a credible threat to physical safety and noting the vital nexus found between 18 U.S.C. § 922(g)(8) and the historical tradition of "banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id*. at 682 (citations omitted), *see also id*. at 701 (rejecting the contention "responsible" is the governing principle in any situation).

Rahimi's limited approval comports with "'longstanding' precedent in America and pre-Founding England . . . that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*." C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) (emphasis added). But here, Appellant's case never involved a threat to physical safety or special danger of misuse.

Moreover, 18 U.S.C. § 922(g)(1) cannot constitutionally apply because the Government has not proven—and cannot prove—that such a ban as applied to Appellant is consistent with this country's history and tradition. Historically, a firearm disability has been applied to "those convicted of a 'crime of violence.'" *Id*. at 699. A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, larceny, burglary, and housebreaking." *Id*. at 701 (cleaned up). By contrast, the possession and viewing of child pornography are not crimes of violence and Appellant's convictions did not involve violence of any kind. And unlike *Rahimi*, disarmament under 18 U.S.C. § 922(g)(1) (the only possible category for prohibition) is not temporary; it will last forever.

Appellant now seeks the constitutionally required relief from the statutory firearms ban for life set out in his post-trial paperwork. Such relief is mandated by the Government's inability to

satisfy the *Bruen* test through a historical analogue for a non-violent case like Appellant's. And such relief is within this Court's power to provide because, as discussed below, Appellant has demonstrated the erroneous application of the firearm prohibition occurred after entry of judgment.

2. The error on the indorsement to the EOJ occurred after the entry of judgment.

The alleged error is an "error . . . in the processing of the court-martial after the" entry of judgment. 10 U.S.C. § 866(d)(2). The applicable Air Force regulation required that "[*a*]*fter* the EOJ is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 20.41 (Apr. 14, 2022) (emphasis added) (DAFI 51-201). The firearm denotation on the First Indorsement that accompanies the EOJ into the record of trial explicitly happens *after* the EOJ is signed by the military judge pursuant to Article 60c, UCMJ. *Id*. That is just what happened here, with the First Indorsement to the EOJ signed on 22 August 2023 after the military judge signed on 11 August 2023. *Compare* EOJ at 2, *with* EOJ at 3.

3. Jurisdiction under Article 66(d)(1), UCMJ, is distinct from Article 66(d)(2), UCMJ.

When an error occurring after entry of judgment is raised by an appellant, Article 66(d)(2), UCMJ, provides an independent jurisdictional basis for this Court to conduct its duties. *Williams*, 2024 CAAF LEXIS 501, at *13-14.

This Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is consistent with this Court's published opinion in *Vanzant*, 84 M.J. 671. In *Vanzant*, this Court determined it did not have authority to act on collateral consequences that are not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id*. at *23 ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under

[Article 60c, UCMJ, 10 U.S.C. § 860c]'"). The CAAF agreed with this interpretation. *Williams*, 2024 CAAF LEXIS 501, at *11-13. But whereas *Vanzant* and *Williams* concern those matters leading up to the EOJ, Appellant is asking this Court to review an error in post-trial processing after the EOJ under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See Vanzant*, 84 M.J. at 680 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)).

Vanzant does not control review of this issue as raised under Article 66(d)(2), UCMJ. But *see United States v. Lawson*, No. ACM 23034, 2024 CCA LEXIS 431, at *2 (A.F. Ct. Crim. App. Oct. 17, 2024) (broadly summarizing *Vanzant* as standing for the proposition that "the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the [EOJ] is beyond a Court of Criminal Appeals' statutory authority to review"). The characterization of *Vanzant* in *Lawson* is incorrect. The 18 U.S.C. § 922 firearm prohibition notation included in the First Indorsement to the EOJ is not beyond this Court's statutory authority to review under Article 66(d)(2), UCMJ. *See Williams*, 2024 CAAF LEXIS 501, at *13 (calling Article 66(d)(2), UCMJ, the "error-correction authority"); *but see United States v. Pulley*, No. ACM 40438 (f rev), 2024 CCA LEXIS 442, at *3 (A.F. Ct. Crim. App. Oct. 24, 2024) (citing *Vanzant* and *Williams* for this Court's inability to correct the firearm prohibition, but without analyzing Article 66(d)(2), UCMJ). Article 66(d)(1), UCMJ, is distinct, and that section is all *Vanzant* analyzes. Using the CAAF's analysis in *Williams*, this Court should find jurisdiction under Article 66(d)(2), UCMJ, and ensure correction of the unconstitutional firearms error in post-trial processing.

4. Correction under R.C.M. 1112(d)(2).

To effectuate any remedy, this Court should use its power under R.C.M. 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction. This is appropriate because the First Indorsement is a required component of the EOJ, albeit not part of

the "findings" and "sentence," and the error materially affects Appellant's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41. Finally, even though the STR contains an indorsement as well, the operative indorsement is the one on the EOJ. DAFI 51-201, at ¶ 29.33. The EOJ and indorsement are the "final disposition." *Id*. Changing the firearm prohibition on the EOJ therefore corrects the unconstitutional bar. Specifically, it would correct the erroneous indexing of Appellant in the National Instant Criminal Background Check System (NICS), which is used nationwide by federal firearm licensees (FFL) to determine if someone is eligible to obtain a firearm. ABOUT NICS, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics (last visited Jan. 14, 2025). It would correct the indexing because the Air Force is required to update NICS following an appeal. Department of the Air Force Manual (DAFMAN) 71-102, at ¶ 4.4.3.1 (July 21, 2020) (incorporating guidance memorandum from Sept. 10, 2024), https://static.e-publishing.af.mil/production/1/saf_ig/publication/afman71-102/afman71-102.pdf (last visited Jan. 14, 2025); *see* NICS Indices, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/nics-indices (last visited Jan. 14, 2025) (noting it is the contributing agency's responsibility to remove an individual from NICS indices if their prohibitor is no longer valid).

Therefore, this Court should remand the record to correct the EOJ's unconstitutional bar or grant other relief it deems warranted to effectuate the same.

XI.

The record of trial is incomplete because a complete record of pre-referral proceedings is not included in the record of trial.

Additional Facts

"An Article 30a proceeding was held in connection with this case on 28 April 2020." R. at 2, 13. A search and seizure warrant was authorized as part of this proceeding. App. Ex. XVI at

86; App. Ex. XIX at 28-38. That warrant is present in the record of trial, as an attachment to both the Defense Motion to Suppress Digital Evidence Searched & Seized in Violation of the Fourth Amendment and the Government's responsive motion. App. Ex. XV; App. Ex. XVI at 86; App. Ex. XVIII; App. Ex. XIX at 28-38. However, the application for this warrant and accompanying ex parte communications are not included in the record.

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes confinement for more than six months. 10 U.S.C. § 854. Appellant's sentence includes confinement for four years and eleven months, requiring preparation of a complete record of proceedings. R. at 1623. Appellant's record is nonetheless incomplete because there is not a complete record of the Article 30a proceeding which occurred in this case. While the resulting warrant is included in the record of trial, the application for this warrant and accompanying ex parte communications are not included in the record.

The complete Article 30a proceeding was required to be included in the record of trial because Appellant's case was referred to trial. R.C.M. 309(e) ("A separate record of any proceeding under this rule shall be prepared . . . [and] [i]f charges are referred to trial in the case, such record shall be included in the record of trial"). Moreover, the omission is substantial because the warrant authorized in this Article 30a proceeding was a subject at issue in Appellant's trial, App. Ex. XV (arguing warrant was insufficient on several grounds); therefore, the Government was required to provide a record of this proceeding to the military judge in Appellant's case.

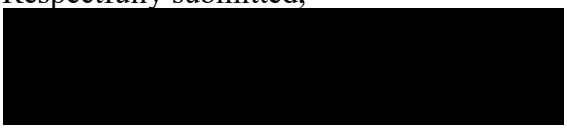
R.C.M. 309(a)(3). And this warrant continues to be at issue during Appellant's appeal. Without the application, this Court and the parties cannot fully assess the issues related to this warrant; therefore, the omission is qualitatively substantial. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). The substantial omission renders the record of trial incomplete and raises a presumption of prejudice that the Government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted).

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. The Court of Appeals for the Armed Forces has defined the "'entire record' to include the 'record of trial,' [and] 'matters attached to the record' pursuant to the Rules for Courts-Martial (formerly known as 'allied papers')." *United States v. Brissa*, No. ACM 40206, 2023 CCA LEXIS 97, at *8-9 (A.F. Ct. Crim. App. Feb. 27, 2023) (unpub. op.) (citing *United States v. Jessie*, 79 M.J. 437, 440-41 (C.A.A.F. 2020)). *See also United States v. Chin*, 75 M.J. 220, 222 (C.A.A.F. 2016) (stating that in conducting this review, the Courts of Criminal Appeals "may not rely on only selected portions of a record").

However, an incomplete record may also be returned to the military judge for correction. R.C.M. 1112(d)(2) ("[a] superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction").

Therefore, this Court may choose to remand this case for correction. If, however, this Court does not remand this case for correction or the record cannot be completed, this Court should set aside Appellant's convictions because the evidence stemming from this incomplete Article 30a proceeding was admitted as evidence for both specifications in Appellant's case. Alternatively, this Court should set aside Appellant's sentence.

Respectfully submitted,



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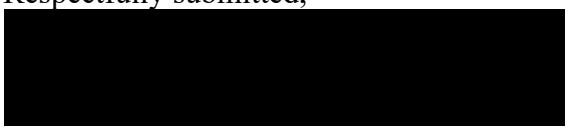
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 January 2025.

Respectfully submitted,



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Appendix A

Appellant raises one issue on appeal under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The search of Appellant's iPhone XR violated his rights under the Fourth Amendment.

The military judge abused his discretion by reconsidering the ruling, contained in Appellate Exhibit XXII, that suppressed evidence derived from the 17 September 2022 search of Appellant's iPhone XR. See App. Ex. XXXI (ruling on motion for reconsideration). The prior military judge's ruling was supported by the lack of evidence in the record, *see* App. Ex. XXII (reasoning the Government "failed to produce evidence that PO1 Agnew was acting pursuant to any search authorization when he was searching the Accused's phone on 17 September 2022"), and there was not sufficient justification to reconsider the ruling, App. Ex. XXXI at 2 (explaining the prior military judge in this court-martial asked trial counsel multiples times "which search authorization [IA] used when he searched [Appellant's iPhone XR] on 17 September 2022").

Additional Facts

The Government was investigating Appellant for possession of child pornography and obtained a search authorization to search Appellant and his residence, and his various electronic devices. *See* App. Ex. XXII at 4 (discussing search authorization). Pursuant to this authorization, the Government seized Appellant's iPhone XR and conducted a forensic extraction of the iPhone. *Id*. at 6 (discussing search and seizure). The Government also obtained a search warrant for various email accounts. *Id*. at 8.

After being seized, Appellant's iPhone was analyzed by IA between April and August of 2020. *Id*. at 10. IA located two images of suspected child pornography on the iPhone XR, in the

Safari web browser directory. *Id*. IA completed a report regarding his analysis on 28 August 2020. *Id*.

On 22 April 2022, the Government was investigating Appellant for "extramarital sexual conduct, indecent language, and indecent conduct, all in violation of Article 134, UCMJ, as well as indecent recording, in violation of Article 120c, UCMJ." *Id*. at 11. The Government obtained another search authorization to search Appellant's iPhone XR for "generic device information including user accounts to identify the primary user of the devices, email messages contained on the devices, WhatsApp messages contained on the devices and any and all picture and video files on the devices." *Id*.

On 17 September 2022, IA was showing the prosecution team what the data on Appellant's iPhone XR looked like, using his forensic tools. App. Ex. XXIII at 3. When IA displayed the Safari temporary directory, "there were hundreds of files that included the word 'BLOB.'" *Id*. "The prosecution asked what those files were and if there was any significance [to them]," and what was contained in the PDF files listed in the same location. *Id*. IA opened the PDF files, locating the visual depictions at issue in this case. *Id*.

During the first motions hearing in this case, the prior military judge "asked the [G]overnment multiple times which search authorization [IA] used when he searched [Appellant's iPhone XR on 17 September 2022." App. Ex. XXXI at 2. The Government never provided this information to that military judge. *Id*. The prior military judge found "the government failed to prove the evidence would have been inevitably discovered, was in plain view, or the good faith exception applied," and the exclusionary rule applied. *Id*.

Standard of Review

This Court reviews the military judge's ruling on a motion to suppress evidence for an

abuse of discretion. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). This Court reviews the military judge's findings of fact for clear error and conclusions of law de novo. *Id*.

Law and Analysis

"[N]o Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV. Evidence obtained in violation of the Fourth Amendment is generally inadmissible. Mil. R. Evid. 311.

The military judge abused his discretion by reconsidering the prior military judge's ruling because the Government was given ample opportunity to answer the military judge's questions during the first motions hearing. At that hearing, the military judge made it clear that he wanted to know what, if any, authority IA was relying on when he searched Appellant's iPhone XR on 17 September 2022. *See* App. Ex. XXXI at 2 (he "asked the [G]overnment multiple times which search authorization [IA] used when he searched [Appellant's iPhone XR on 17 September 2022"). Nevertheless, the Government failed to provide any evidence of what authority IA was relying on. *See id*. Therefore, the prior military judge's ruling to suppress the evidence found during IA's 17 September 2022 search was supported by the lack of evidence. And it was an abuse of discretion to reconsider this ruling because this issue was not a surprise to the Government, the Government had a reasonable opportunity to present its evidence, and the Government provided no reasonable justification for its failure to prove what search authorization IA was relying on. See *United States v. Vangelisti*, 30 M.J. 234, 240 (C.M.A. 1990) (reversing a court of criminal appeals decision that permitted the Government to reopen a suppression motion when there was "no acceptable justification" for trial counsel's failure and the matter at issue was not a surprise). Because there was not an acceptable justification for trial counsel's failure to prove during the motions hearing

what, if any, authority IA had to search Appellant's iPhone XR on 17 September 2022, it was an abuse of discretion to reconsider the military judge's ruling that suppressed the evidence resulting from the search.

Therefore, this Court should set aside the findings and sentence and dismiss the Charge and Specifications.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION TO EXCEED PAGE LIMIT**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	21 January 2025

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

Pursuant to Rule 23.3(q) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for leave to exceed this Court's page limit for Appellant's brief.

Appellant's brief is 58 pages, excluding the title page, table of contents, table of authorities, signature pages, and appendix. The brief exceeds the maximum page limit primarily due to the length and complexity of Appellant's case. The record of trial is 10 volumes and included 1,627 pages of trial transcript, 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. There is good cause to grant this motion because the brief contains numerous quotations from the record and citations to binding precedent while tackling eleven issues.

WHEREFORE, Appellant respectfully requests this motion be granted.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 January 2025.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 22 January 2025, Appellant filed a "Motion for Leave to File to [sic] Motion to Change Panel Assignment." Appellant moves this court to change the panel to which his case is assigned "because Panel 2's impartiality might reasonably be questioned if Appellant's panel assignment is not changed."

Appellant notes that both his case and the related case of *United States v. Master Sergeant Adrienne L. Clark* (MSgt Clark) are assigned to Panel 2. He avers that facts regarding Appellant are part of MSgt Clark's record of trial and not his own. Indeed, he notes that MSgt Clark raised an issue related to "evidence of bad acts committed by [Appellant]" admitted into evidence against her. Appellant cites, *inter alia*, Rule for Courts-Martial (R.C.M.) 902(a), which states "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." Appellant argues "[t]here is a real potential for unintended bias and accidental confusion of the information in each case" and "an objective observer would question the fairness of Appellant's appeal if his panel assignment is not changed to a different panel than *Clark*."

The Government opposes Appellant's Motion to Change Panel Assignment. The Government argues this case presents no concerns about the fairness or impartiality the judges on this panel.

The court has considered Appellant's motions, the Government's opposition, case law, the Rules for Courts-Martial, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 30th day of January, 2025,

ORDERED:

Appellant's Motion for Leave to File Motion to Change Panel Assignment dated 22 January 2025 is **GRANTED**.

Appellant's Motion to Change Panel Assignment dated 22 January 2025 is **DENIED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 22 January 2025, Appellant's counsel submitted a Motion for Leave to File Motion to Seal Pretrial Attachment, requesting Attachment 2 of the 1st Indorsement to the charge sheet, in the pretrial section of Appellant's record of trial, be sealed. Counsel avers Attachment 2 "contained sexually explicit content." The Government agrees and does not oppose the motion. We also agree, and the Clerk of the Court will ensure the attachment is sealed.

Accordingly, it is by the court on this 30th day of January, 2025,

ORDERED:

Appellant's Motion to for Leave to File Motion to Seal Pretrial Attachment dated 22 January 2025 is **GRANTED**.

Appellant's Motion to Seal Pretrial Attachment dated 22 January 2025 is **GRANTED**.

It is further ordered:

The Government shall take all steps necessary to ensure that any documents sealed in Appellant's case in the possession of any Government office, Appellant, counsel for Appellant (trial and appellate), or any other known copy, be retrieved and destroyed if a paper copy, or destroyed if an electronic copy.[*]

However, if appellate defense counsel and appellate government counsel possess any of the sealed documents, counsel are authorized to retain copies of same in their possession until completion of this court's Article 66, UCMJ, 10 U.S.C. § 866, review of Appellant's case, to include the period for

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[*] The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

reconsideration in accordance with JT. CT. CRIM. APP. R. 31. After this period, appellate defense counsel and appellate government counsel shall destroy any retained copies of the sealed documents in their possession.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR LEAVE TO FILE MOTION TO SEAL PRETRIAL ATTACHMENT**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	22 January 2025

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

Appellant hereby moves this Court for leave to file a motion to seal Attachment 2 of the 1st Indorsement, DD Form 458, Charge Sheet, dated 17 November 2022, contained within Volume 5 of Appellant's record of trial. JT. CT. CRIM. APP. R. 23(d). Attachment 2 is a disc containing sixteen subfolders that is titled "Preferral Evidence." 1st Indorsement, DD Form 458, Charge Sheet, dated 17 November 2022; Attachment 2 of the 1st Indorsement, DD Form 458, Charge Sheet, dated 17 November 2022. This Court should seal Attachment 2 because it contains sexually explicit content. *See id*.

Appellant respectfully requests that this Honorable Court seal Attachment 2 of the 1st Indorsement, DD Form 458, Charge Sheet, dated 17 November 2022.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 January 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES'
Appellee,	)	NON-OPPOSITION TO SEAL
	)	PRETRIAL ATTACHMENT
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	29 January 2025

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

The United States does not oppose Appellant's motion for leave to file motion to seal Attachment 2 of the 1st Indorsement, DD FORM 458, Charge Sheet, dated 17 November 2022(Attachment 2). Undersigned counsel confirmed that Attachment 2 contained in the Government's copy of the record of trial and the original record of trial are not sealed. The United States agrees that this Court should seal Attachment 2 because it contains sexually explicit material. For these reasons, the United States does not oppose Appellant's motion to seal Attachment 2.

[redacted]
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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 29 January 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR LEAVE**
Appellee,	)	**TO FILE TO MOTION TO CHANGE**
	)	**PANEL ASSIGNMENT**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	22 January 2025

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

Appellant hereby moves this Court for leave to file a motion to change the panel assigned to Appellant's case. JT. CT. CRIM. APP. R. 23(d). Appellant's case is currently assigned to Panel 2. Panel 2 is currently constituted by Colonel Natalie Richardson, Senior Appellate Military Judge, Colonel Cynthia Kearley, Appellate Military Judge, and Lieutenant Colonel Brian Mason, Appellate Military Judge. Appellant moves this Court to change Appellant's panel assignment to another panel constituted of different appellate military judges because Panel 2's impartiality might reasonably be questioned if Appellant's panel assignment is not changed. R.C.M. 902(a); *see United States v. Wiggers*, 25 M.J. 587, 592-93 (A.C.M.R. 1987) ("R.C.M. 902(a) requires that special caution must be taken by the judge when he has heard a witness' prior testimony in a related case."). The question of this Panel's impartiality stems from the fact that this Panel will be aware of facts regarding Appellant that are not a part of Appellant's record of trial. *See id.* (citing *United States v. Shackelford*, 2 M.J. 17 (C.M.A. 1976) ("unforeseen risks often accompany a judge's refusal to recuse himself once he is on notice of a version of the facts to which the actual fact finders, the court members, are not entitled to be privy)).

This Panel will be aware of facts regarding Appellant that are not included in Appellant's record of trial because *United States v. Clark*, ACM No. 40540, is also assigned to Panel 2 and *Clark* includes information regarding Appellant that was not made a part of Appellant's record of trial. *See* Brief on Behalf of Appellant, 12 December 2024, *United States v. Clark*, ACM No. 40540, at Appendix (arguing pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) that "the military judge erred when he allowed the Government to present evidence of bad acts committed by Master Sergeant Casillas during the merits phase of the court-martial") (cleaned up). The appellant in *Clark* argues within her assignment of error that the Government introduced twenty emails (though it apparently wanted to introduce nine-hundred and eleven emails) to show that the appellant in *Clark* was associated with Appellant. *See id*. at Appendix. These same emails are not a part of Appellant's record of trial. Because these emails, and other potential information regarding Appellant, are a part of the *Clark* record and not Appellant's record, Appellant has not been given an opportunity to challenge their consideration in his case and this information should not be considered during his appeal. Further much like it appears that Appellant was a central figure in *Clark*, the appellant in *Clark* was a central figure in Appellant's court-martial and her credibility was at issue in Appellant's case. *See* R. at 904 (trial counsel discussing the appellant in *Clark* in his opening statement); 946-68 (testimony of the appellant in *Clark*). Therefore, special caution should be taken.

There is a real potential for unintended bias and accidental confusion of the information in each case if Appellant's case is not assigned to a different panel than *Clark*. This is because this Panel will be considering the records in both cases close in time to each other[1] and both

[1] The brief in *Clark* was filed on 12 December 2024 and the brief in this case was filed on 21 January 2025.

cases involve Appellant and his interactions with the appellant in *Clark.* This risk is made more real given the length and complexity of both records and the overlapping conduct at issue in each case.[2]

For the reasons stated above, an objective observer would question the fairness of Appellant's appeal if his panel assignment is not changed to a different panel than *Clark*. Appellant respectfully requests that this Honorable Court change the panel assigned to his case to a panel that is not assigned to *United States v. Clark*, ACM No. 40540.[3]

Respectfully submitted,

[redacted]

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[2] The record in *Clark* is purported to be thirteen volumes, including 1,579 pages of transcript and over 100 exhibits. Government Motion for Enlargement of Time, 6 January 2025, *United States v. Clark*, ACM No. 40540. Comparatively, the record in this case is ten volumes, including 1,627 pages of trial transcript and eighty-eight exhibits.

[3] Separately, Appellant notes his first court-martial (*United States v. Casillas*, No. ACM 40499) was previously assigned to a Special Panel, constituted by Colonel William Annexstad, Senior Appellate Military Judge, Colonel Cynthia Kearley, Appellate Military Judge, and Lieutenant Colonel Brian Mason, Appellate Military Judge. *United States v. Casillas*, No. ACM 40499, is currently remanded for correction of the record. Order, 24 September 2024, *United States v. Casillas*, No. ACM 40499. If Appellant's record in *United States v. Casillas*, No. ACM 40499, is returned to the same Special Panel and Appellant's panel is not changed in this case, a similar question of impartiality would exist because Colonel Kearley and Lieutenant Colonel Mason would be reviewing evidence in Appellant's prior court-martial that was not entered in this case.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 January 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' RESPONSE
Appellee,	)	IN OPPOSITION TO CHANGE
	)	PANEL ASSIGNMENT
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	29 January 2025

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

The United States, pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, submits this response in opposition to Appellant's Motion to Change Panel Assignment.

Appellant believes that the impartiality of the appellate judges currently assigned to Panel 2 might be reasonably questioned if his panel assignment is not changed because information about him is contained in another appellate case, United States v. Clark, ACM No. 40530, also assigned to Panel 2. (App. Mot. at 1.) Appellant states that the Clark record of trial contains facts about him that are not in his record of trial. Thus, Appellant is concerned about unintended bias and accidental confusion of the information. (App. Mot. at 2.) For reasons discussed below, this Court should deny this motion.

Law and Discussion

Whether an appellate military judge must recuse himself or herself from sitting on a given case is assessed according to the standards laid out in R.C.M. 902. United States v. Mitchell, 39 M.J. 131, 142 (C.M.A. 1994). In relevant part, that rule states that "a military judge shall disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned." R.C.M. 902(a) (2019 ed.); *see also* R.C.M. 902(c)(1)

("'Proceeding' includes . . . appellate review . . . ."). However, judges are cautioned not to leave cases "unnecessarily." United States v. Wright, 52 M.J. 136, 141 (C.A.A.F. 1999) (citing R.C.M. 902(d)(1), Discussion).

R.C.M. 902(b) lists five specific grounds requiring recusal:

> (1) Where the military judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> (2) Where the military judge has acted as counsel, preliminary hearing officer, investigating officer, legal officer, staff judge advocate, or convening authority as to any offense charged or in the same case generally.
>
> (3) Where the military judge has been or will be a witness in the same case, is the accuser, has forwarded charges in the case with a personal recommendation as to disposition, or, except in the performance of duties as military judge in a previous trial of the same or a related case, has expressed an opinion concerning the guilt or innocence of the accused.
>
> (4) Where the military judge is not eligible to act because the military judge is not qualified under R.C.M. 502(c) or not detailed under R.C.M. 503(b).
>
> (5) Where the military judge, the military judge's spouse, or a person within the third degree of relationship to either of them or a spouse of such person:
>
> (A) Is a party to the proceeding;
>
> (B) Is known by the military judge to have an interest, financial or otherwise, that could be substantially affected by the outcome of the proceeding; or
>
> (C) Is to the military judge's knowledge likely to be a material witness in the proceeding.

"There is a strong presumption that a judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle, particularly when the alleged bias involves actions taken in conjunction with judicial proceedings." United States v. Quintanilla, 56 M.J. 37, 44 (C.A.A.F. 2001). When appellate military judges err in failing to recuse themselves in a case, the Court tests for prejudice using the factors from Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988): (1) the "risk of injustice to parties in the case"; (2) the "risk that the

denial of relief will result in injustice in other cases"; and (3) the "risk of undermining public confidence in the judicial process." United States v. Rudometkin, 82 M.J. 396, 398 (C.A.A.F. 2022) (citing Liljeberg, 486 U.S. at 864).

Appellant fails to allege any of the identified forms of partiality listed in R.C.M. 902(b). None of the appellate judges assigned to Panel 2 are conflicted under R.C.M. 902(b). Still Appellant asserts that Panel 2 has real potential for unintended bias and accidental confusion of his appeal if his case is not assigned to a different panel than United States v. Clark. (App. Mot. at 2.) Appellate military judges can be trusted with looking at case separately and impartially. Article 66(d) directs Courts of Criminal Appeals to affirm findings of guilt on the basis of the entire record. Thus, when reviewing Appellant's assignments of errors, the appellate military judges must only consider Appellant's record of trial and disregard facts that may be contained in another record of trial.

Recently, our Superior Court discussed circumstances in which an appellate military judge should consider recusal. United States v. Hasan, 84 M.J. 181, 236 (C.A.A.F. 2024). Questions about the impartiality of an appellate military judge may arise when an appellate judge previously acted as a military judge, trial counsel, defense counsel, or staff judge advocate in a case before them on appeal. (Id.) Additionally, the facts and circumstances may call into question the appellate military judge's fairness or impartiality. (Id.) None of these concerns are present in this case.

Appellant failed to articulate how the United States v. Clark record of trial relates to any of his assignments of error. Even if Appellant could demonstrate a potential basis for recusal, he could not demonstrate any prejudice. Appellant fails to meet the high burden of demonstrating a reason for the currently assigned panel to recuse themselves. In sum, Panel 2 should not

unnecessarily excuse themselves. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's Motion to Change Panel Assignment.

[redacted]
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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 29 January 2025.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 21 January 2025, Appellant, through counsel, submitted an assignments of error brief to the court. Appellant alleges, *inter alia*, that trial defense counsel were ineffective. Specifically, Appellant claims trial defense counsel was deficient in that they: (1) "failed to understand binding precedent regarding the 'unit of prosecution' in child pornography cases, and therefore, did not move to dismiss the Charge and Specifications," and (2) "failed to move to dismiss one of the specifications based on multiplicity."

On 29 January 2025, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for an Enlargement of Time. The Government requests this court compel each of Appellant's trial defense counsel, Major Adam M. Merzel and Major Jacob L. Beeman, "to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel." According to the Government, Appellant's trial defense counsel indicated "they would only provide an affidavit or declaration pursuant to an order from this [c]ourt." The Government requests we provide trial defense counsel 30 days to respond to the order. In the motion for enlargement of time, the Government requests we extend time to 14 days after receipt of the responsive documents for the Government to file its answer.

On 30 January 2025, Appellant filed opposition to both motions. In his opposition to the motion to compel, Appellant argues that before we order affidavits or declarations, we must "review[ ] the allegation of ineffectiveness and the [G]overnment response, examine[ ] the record, and determine[ ] that the allegation and the record contain evidence, which if unrebutted, would overcome the presumption of competence . . . ." (Second alteration in original) (quoting *United Staes v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000) (citation omitted)). Appellant further argues that should we find in Appellant's favor on a different raised issue, the issues claiming ineffective assistance of counsel—and thus the affidavits or declarations—could be moot. In his opposition to the

requested enlargement of time, Appellant again takes the position that ordering affidavits or declarations is not ripe. Moreover, Appellant notes the Government essentially requests a 45-day extension of time, which exceeds the 30-day limit in this court's Rules of Practice and Procedure (citing A.F. Ct. Crim. App. R. 23.3(m)(3)).

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and his trial defense counsel. Considering the Government has not had an opportunity to conduct discovery of the facts and circumstances underlying the claims—because trial defense counsel stated they would not provide information except by an order from this court—the court is not disposed to deny the requested enlargement of time. However, the court concludes that 30 days to obtain responsive affidavits or declarations then file an answer brief should suffice.

Accordingly, after considering the Government's motions and the issues raised by Appellant, it is by the court on this 31st day of January, 2025,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Major Adam M. Merzel and Major Jacob L. Beeman are ordered to provide affidavits or declarations to the court with specific and factual responses to Appellant's claims that trial defense counsel were ineffective.

A responsive affidavit or declaration by each counsel will be provided to the court not later than **14 February 2025**. The Government shall also deliver a copy of the responsive documents to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed not later than **2 March 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS** United States Air Force *Appellant.*	)	No. ACM 40551 29 January 2025

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Maj AM and Maj JB, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel. In his assignments of error, Appellant makes the following claims of ineffective assistance of counsel:

1) Whether Appellant was denied effective assistance of counsel when defense counsel failed to understand binding precedent regarding the "unit of prosecution" in child pornography cases, and therefore, did not move to dismiss the Charge and Specifications.

2) Whether Appellant was denied effective assistance of counsel when defense counsel failed to move to dismiss one of the specifications based on multiplicity.

(App. Br. at 1-2.)

On 28 January 2025, Maj AM and Maj JB responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. Appellant is alleging his trial defense counsel were ineffective because they did not

move to dismiss the charge and its specifications and failed to file a motion to dismiss one of the specifications based on multiplicity. (App. Br. at 1-2.) A statement from Appellant's counsel is necessary because the record is insufficient to determine trial defense counsel's strategy and why these motions were not filed. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Court order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel, within 30 days of this Court's order.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to compel declarations.

[redacted]

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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 29 January 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S OPPOSITION TO UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force,	)	No. ACM 40551
Appellant.	)	30 January 2025

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

Appellant opposes the Government's motion to compel declarations because it would be an error for this Court to compel defense counsel to provide affidavits at this point in the appellate proceedings. JT. CT. CRIM. APP. R. 23(c); A.F. CT. CRIM. APP. R. 23.2.

The Government's motion to compel declarations states that "Maj AM and Maj JB . . . would only provide an affidavit or declaration pursuant to an order from this Court." United States' Motion to Compel Declarations, 29 January 2025. When defense counsel does not voluntarily submit an affidavit, the CAAF "set forth a process directing how [this Court] must address ineffective assistance of counsel claims."[1] *United States v. Lewis*, 42 M.J. 1, 6 (C.M.A. 1995). Specifically, until this Court "'reviews the allegation of ineffectiveness and the [G]overnment response, examines the record, and determines that the allegation and the record contain evidence, which if unrebutted, would overcome the presumption of competence,'" this Court will not "compel a defense counsel to justify decisions made at trial." *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000) (quoting *Lewis*, 42 M.J. at 6); *see United States v. Melson*, 66 M.J. 346, 350 (C.A.A.F. 2008) (affirming the process detailed in *Grigoruk* and

[1] Appellant explained this process in his brief. App. Br. at 12.

Lewis). Here, the Government has not responded to Appellant's allegation that he was deprived of the effective assistance of counsel. *See* United States' Motion for an Enlargement of Time, 29 January 2025 (requesting an enlargement of time to respond to his allegations). Therefore, it would be an error to compel defense counsel to provide affidavits at this point in the proceedings. This Court should instead follow the required process.

This Court should also evaluate Appellant's assignments of error before compelling defense counsel to provide an affidavit because if this Court agrees, for example, with Appellant's first assignment of error—that it was plain error to prosecute Appellant twice for the same material—then both of Appellant's allegations of ineffective assistance of counsel would be moot. *See* App. Br. at 4-10.

Appellant respectfully requests this Court deny the Government's motion to compel declarations.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 January 2025.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**UNITED STATES' MOTION**
Appellee,	)	**FOR AN ENLARGMENT**
	)	**OF TIME**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS	)	No. ACM 40551
United States Air Force	)	
Appellant.	)	29 January 2025

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

Pursuant to Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure, the United States respectfully requests an enlargement of time to adequately respond to Appellant's assignments of error in which he alleges two claims of ineffective assistance of counsel against his trial defense counsel. Filed in conjunction with this motion, the United States filed a Motion to Compel Declarations and asked this court to order Appellant's trial defense counsel, Maj AM and Maj JB, to each provide a declaration in response to Appellant's ineffective assistance of counsel claims. The United States seeks a 14-day enlargement of time following the submission of Maj AM's and Capt JB's declarations to respond properly and completely to Appellant's brief.

The United States' Answer to Appellant's Assignment of Errors brief is currently due to the Court on 20 February 2025. Good cause exists to grant this request. Undersigned counsel will require a reasonable amount of time after the submission of declarations to address properly Appellant's ineffective assistance of counsel claims. Thus, the United States believes 14 days is sufficient to prepare a proper and responsive brief on this issue and to secure supervisory review once the ordered declarations are received.

This case was docketed with the Court on 14 December 2023. Since docketing, Appellant has been granted eleven enlargements of time. This is the United States' first request for an enlargement of time. As of the date of this request, 412 days have elapsed. If this Court grants the United States' request, the United States asks that this Court set a specific due date for the brief to avoid any confusion.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

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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 29 January 2025.

VANESSA BAIROS, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S OPPOSITION**
Appellee,	)	**TO UNITED STATES' MOTION**
	)	**FOR AN ENLARGEMENT OF TIME**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	30 January 2025

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

Appellant opposes the Government's motion for an enlargement of time because the Government failed to show good cause with particularity for the requested enlargement of time and failed to comply with this Court's rules. JT. CT. CRIM. APP. R. 23(c); A.F. CT. CRIM. APP. R. 23.2, 23.3(m)(1), 23.3(m)(3), 23.3(m)(5).

The Government failed to show good cause because it would be an error for this Court to compel defense counsel to provide affidavits at this point in the appellate proceedings and the Government's reason for requesting an enlargement of time is to have "a reasonable amount of time after the submission of declarations to address properly Appellant's ineffective assistance of counsel claims." United States' Motion for an Enlargement of Time, 29 January 2025. Furthermore, the Government's motion for an enlargement of time is a de facto request for an enlargement of forty-four days, which exceeds the number of calendar days that "may be granted" under Rule 23.3(m)(3) of this Court's Rules of Practice and Procedure. Lastly, the Government's motion does not comply with Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure.

1. The Government failed to demonstrate good cause because there is a process for compelling a defense counsel to justify decisions made at trial and that process has not yet been followed, therefore, this Court should not compel defense counsel to provide affidavits at this point in the proceedings.

Defense counsel can choose to voluntarily submit an affidavit in response to an allegation of ineffective assistance of counsel. *United States v. Lewis*, 42 M.J. 1, 6 (C.M.A. 1995); *see United States v. Melson*, 66 M.J. 346, 350 (C.A.A.F. 2008) (explaining the United States Court of Appeals for the Armed Forces (CAAF) was not seeking to change the practice of defense counsel voluntarily submitting an affidavit). However, when defense counsel does not voluntarily submit an affidavit, the CAAF "set forth a process directing how [this Court] must address ineffective assistance of counsel claims."[1] *Id*.

Specifically, until this Court "'reviews the allegation of ineffectiveness and the [G]overnment response, examines the record, and determines that the allegation and the record contain evidence, which if unrebutted, would overcome the presumption of competence,'" this Court will not "compel a defense counsel to justify decisions made at trial." *United States v. Grigoruk*, 52 M.J. 312, 315 (C.A.A.F. 2000) (quoting *Lewis*, 42 M.J. at 6); *see Melson*, 66 M.J. at 350 (affirming the process detailed in *Grigoruk* and *Lewis*). Here, the Government has not responded to Appellant's allegation that he was deprived of the effective assistance of counsel. *See* United States' Motion for an Enlargement of Time, 29 January 2025 (requesting an enlargement of time to respond to his allegations). Therefore, it would be an error to compel defense counsel to provide affidavits at this point in the proceedings. This Court should instead follow the required process.

[1] Appellant explained this process in his brief. App. Br. at 12.

This Court should also evaluate Appellant's assignments of error before compelling defense counsel to provide an affidavit because if this Court agrees, for example, with Appellant's first assignment of error—that it was plain error to prosecute Appellant twice for the same material—then both of Appellant's allegations of ineffective assistance of counsel would be moot. *See* App. Br. at 4-10.

2. The Government's request is a de facto request for an enlargement of forty-four days, which is not permitted under this Court's Rules.

The Government's motion for an enlargement in time "seeks a 14-day enlargement of time *following* the submission of Maj AM's and [Maj] JB's declarations" and the Government's motion to compel declarations from Maj AM and Maj JB "requests this Court order each trial defense counsel to provide a declaration . . . within 30 days of this Court's order." United States' Motion for an Enlargement of Time, 29 January 2025 (emphasis added); United States' Motion to Compel Declarations, 29 January 2025. In effect, the Government's motions ask this Court to grant an enlargement of forty-four days. But Rule 23.3(m)(3) of this Court's Rules of Practice and Procedure states "motions for enlargement of time by either party [after the Appellant's first motion which can be granted for up to sixty days] . . . may be granted for periods not to exceed 30 calendar days." A.F. CT. CRIM. APP. R. 23.3(m)(2), 23.3(m)(3). If the Government needs more than thirty days to file it's answer to Appellant's brief, it can file more than one motion for an enlargement of time, with good cause shown with particularity. A.F. CT. CRIM. APP. R. 23.3(m)(3). But it cannot move this Court to grant a de facto enlargement of time that exceeds thirty calendar days. *See* A.F. CT. CRIM. APP. R. 23.3(m)(3).

3. The Government's motion does not comply with Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure.

The Government's motion fails to comply with Rule 23.3(m)(5) because it does not state the number of days that will have elapsed since docketing on the date requested. A.F. CT. CRIM. APP. R. 23.3(m)(5).

Appellant respectfully requests this Court deny the Government's motion for an enlargement of time.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 January 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' MOTION
Appellee,	)	FOR AN ENLARGMENT OF TIME
	)	TO FILE DECLARATIONS
	)	(SECOND)
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS	)	No. ACM 40551
United States Air Force	)	
Appellant.	)	3 February 2025

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

Pursuant to Rule 23.3(m)(5) of this Court's Rules of Practice and Procedure, the United States respectfully requests an enlargement of time to provide the Court with declarations from trial defense counsel. On 31 January 2025, this Court ordered Maj AM and Maj JB to provide affidavits or declarations no later than 14 February 2025. (*Order*, 31 January 2025.) On 31 January 2025, undersigned counsel provided both trial defense counsel this Court's order and highlighted the 14 February 2025 deadline to provide a factual response to Appellant's claims that trial defense counsel were ineffective. Shortly after, Maj AM notified undersigned counsel of his upcoming leave status. From 2 February 2025 to 14 February 2025 Maj AM will be on leave and will not have access to the relevant materials needed to comply with this Court's order. Further, Maj AM stated that he will not have the ability to devote the time to the declaration needed to address the two assignments of error alleging ineffective assistance of counsel. As a result, Maj AM is requesting this Court give trial defense counsel an additional week, 7 days, to respond so that Maj AM and Maj JB can competently comply with this Court's order.

Good cause is shown because as this Court noted, the government "has not had an opportunity to conduct discovery of the facts and circumstances underlying the claims." (*Order*,

31 January 2025.) An enlargement of time provides the declarants sufficient time to set forth facts and circumstances necessary to respond to the underlying claims of ineffective assistance of counsel. A detailed declaration outlining trial defense counsel's understanding of binding precedent, case preparation strategy, and how it relates to the Constitutional doctrine of double jeopardy is necessary to address the two claims alleging ineffective assistance of counsel. Thus, there is good cause to provide trial defense counsel a 7-day enlargement of time, until 21 February 2025, to provide this Court with declarations.

This case was docketed with the Court on 14 December 2023. Since docketing, Appellant has been granted eleven enlargements of time. This is the United States' second request for an enlargement of time. As of the date of this request, 418 days have elapsed. As of the date requested, 21 February 2025, 436 days will have elapsed since docketing. This Court previously granted the United States an enlargement of time of 16 days to file an answer following the Court's receipt of trial defense counsel's declaration.[1] (*Order*, 31 January 2025.) If this Court grants this enlargement of time (second) for 7 days, considering the 16-day enlargement of time already granted by the Court, the deadline to file an answer brief is 9 March 2025 in which 452 days will have elapsed since docketing.

[1] In its initial motion for an enlargement of time, the United States requested an additional 14 days to provide an answer brief. (*United States' Motion for Enlargement of Time,* 29 January 2025.) But in its recent order, this Court concluded that 30 days to obtain responsive affidavits or declarations and then file an answer brief should suffice – essentially resulting in a 16-day enlargement of time to file an answer from the date the declarations are due to the Court – 14 February 2025. (*Order*, 31 January 2025.) Per the Court's order, the United States' answer is currently due no later than 2 March 2025. (Id.)

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

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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 3 February 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S OPPOSITION**
Appellee,	)	**IN PART TO UNITED STATES'**
	)	**MOTION FOR ENLARGEMENT**
	)	**OF TIME**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	3 February 2025

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

The Government's motion for a second enlargement of time requests a seven-day enlargement of time to provide trial defense counsel's declarations.[1] Appellant does not oppose a seven-day enlargement of time for Maj AM to respond. [2]

1. Opposition to enlargement of time for Maj JB's affidavit or declaration.

The Government did not provide good cause to enlarge the time to provide Maj JB's affidavit or declaration. A.F. CT. CRIM. APP. R. 23.3(m)(3). If Maj JB's response is provided on 14 February 2025, in accordance with this Court's order, the Government could at least begin responding to Appellant's allegations that his trial defense counsel were ineffective. *See* Order, 31 January 2025. This would further the Government's brief and lessen Government counsel's delay in obtaining an interval review. Therefore, this Court should maintain the current ordered date for Maj JB's response.

[1] United States' Motion for Enlargment [sic] of Time to File Declarations (Second), 3 February 2025.

[2] While Appellant does not oppose this request for additional time, Appellant maintains his argument in opposition to compelling trial defense counsel's responses. *See* Opposition Motion to United States' Motion to Compel Declarations, 30 January 2025.

2. Opposition to enlargement of time to file answer brief.

Appellant opposes the Government's implied motion for an enlargement of time to file it's answer brief because the Government has not provided good cause for why ten[3] days would not be sufficient to review and incorporate Maj AM's declaration into it's answer brief. A.F. CT. CRIM. APP. R. 23.3(m)(3). Moreover, the Government has not provided any other justification for why more time would be needed, unlike Appellant's motions for enlargements of time.[4]

Appellant respectfully requests this Court deny the Government's motion in part and maintain the deadline ordered for Maj JB's response and the Government's answer brief.

Respectfully submitted,

[redacted]

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[3] The Government would have ten days to file it's answer brief after receiving Maj AM's response because assuming this Court grants a seven-day enlargement of time for Maj AM to provide a response, Maj AM's response would be due on 21 February 2025. Meanwhile, Appellant's brief is due on 2 March 2025. Order, 31 January 2025. 2 March 2025 is a Sunday and therefore, it is not included in the computation of time under this Court's rules, therefore the Government's brief could be filed on 3 March 2025. JT. CT. CRIM. APP. R. 15.

[4] *See*, *e.g.*, Appellant's Motion for Enlargement of Time (Tenth), 27 November 2024.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 February 2025.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 31 January 2025, this court granted the Government's motion to compel declarations and for an enlargement of time. Specifically, we ordered Appellant's trial defense counsel to provide affidavits or declarations responsive to Appellant's claims of ineffective assistance of counsel. This court ordered the affidavits or declarations be provided to the court not later than 14 February 2025, and the Government's answer to Appellant's assignments of error brief be filed not later than 2 March 2025.

On 3 February 2025, the Government filed a Motion for an Enlargement of Time to File Declarations (Second). The Government explained Appellant's trial defense counsel, Major AM, is on leave and will not have the opportunity to provide a declaration by 14 February 2025. In its motion, the Government requested an additional seven days to file Major AM's response to our order. Appellant does not object to this enlargement of time.

The Government presumed it will have a corresponding additional seven days to file its answer brief if we grant its motion. We note that our order did not state the Government had a certain number of days after receipt of the responsive affidavits or declarations to file its answer brief. Appellant's counsel opposed allowing the Government this additional time. Appellant's counsel explained that the Government will have 10 calendar days to file its answer and has not adequately justified its request.

The court has considered the Government's motion, Appellant's partial opposition, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 6th day of February, 2025,

ORDERED:

The Government's Motion for an Enlargement of Time to File Declarations is **GRANTED IN PART**. A responsive affidavit or declaration by each counsel will be provided to the court not later than **21 February 2025**.

The Government's request to enlarge time to answer Appellant's assignments of error brief is **DENIED**.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES' MOTION TO ATTACH**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS** United States Air Force *Appellant.*	)	No. ACM 40551
	)	21 February 2025

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

Pursuant to Rules 23(b) and 23.3(b) of this Court's Rules of Practice and Procedure, the United States hereby moves this Court to attach the following documents to this motion:

- Appendix A – Major AM Declaration, dated 20 February 2025
- Appendix B – Major JB Declaration, dated 21 February 2025

The attached declarations are responsive to this Court's order directing Major AM and Major JB to provide declarations responsive to Appellant's Assignments of Error concerning whether he received ineffective assistance of counsel. (*Court Order*, dated 6 February 2025.)

Our superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached documents are relevant and necessary to address this Court's Order and Appellant's Assignments of Error.

WHEREFORE, the United States requests this Court grant this Motion to Attach Documents.

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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 21 February 2025.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	**UNITED STATES' ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
Nathaniel A. Casillas	)	No. ACM 40551
United States Air Force	)	
Appellant.	)	3 March 2025

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

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS** United States Air Force *Appellant.*	)	No. ACM 40551 3 March 2025

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

ISSUES PRESENTED

I.

WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT REQUIRES DISMISSAL OF APPELLANT'S CONVICTIONS BECAUSE APPELLANT WAS TWICE TRIED FOR THE SAME "MATERIAL," AN IPHONE XR.

II.

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO UNDERSTAND BINDING PRECEDENT REGARDING THE "UNIT OF PROSECUTION" IN CHILD PORNOGRAPHY CASES, AND THEREFORE, DID NOT MOVE TO DISMISS THE CHARGE AND SPECIFICATIONS.

III.

WHETHER THE GOVERNMENT COMMITTED PLAIN ERROR BY PROSECUTING APPELLANT FOR A SECOND TIME, THEREBY SEVERING KNOWN OFFENSES, WITHOUT PROOF OF A MANIFEST INJUSTICE.

IV.

WHETHER THE FINDINGS ARE FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT DID NOT PROVE THAT APPELLANT VIEWED OR POSSESSED CHILD PORNOGRAPHY.

V.

WHETHER THE SPECIFICATIONS OF POSSESSING CHILD PORNOGRAPHY AND VIEWING CHILD PORNOGRAPHY ARE MULTIPLICIOUS.

VI.

WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO MOVE TO DISMISS ONE OF THE SPECIFICATIONS BASED ON MULTIPLICITY.

VII.

THE CONVENING AUTHORITY RECEIVED COURT-MEMBER DATA SHEETS INDICATING THE RACES AND GENDERS OF POTENTIAL COURT MEMBERS, AND THE COMPOSITION OF AT LEAST SOME GROUPS OF DETAILED MEMBERS SHOWS THE CONVENING AUTHORITY CONSIDERED THESE FACTORS. THIS CREATES A PRIMA FACIE SHOWING THAT RACE AND GENDER WERE IMPERMISSIBLY CONSIDERED WHEN SELECTING MEMBERS, GIVING RISE TO A PRESUMPTION THAT THE PANEL WAS NOT PROPERLY CONSTITUTED.

VIII.

WHETHER IT WAS AN ABUSE OF DISCRETION TO ADMIT PROSECUTION EXHIBIT 18 WITH REDACTIONS.

IX.

WHETHER APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE COMPARED TO HIS SENTENCE IN HIS FIRST TRIAL.

X.

WHETHER THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS CORRECTION.

XI.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE A COMPLETE RECORD OF PREREFERRAL PROCEEDINGS IS NOT INCLUDED IN THE RECORD OF TRIAL.

XII.[1]

WHETHER THE SEARCH OF APPELLANT'S IPHONE XR VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant was tried twice for viewing and possessing different images of child pornography. In his first court-martial (Casillas I), which occurred during March 2023, Appellant was convicted of possessing child pornography within his Yahoo.com email account between on or about 16 May 2019 and on or about 7 January 2020. (App. Ex. LI.) A panel of members also convicted Appellant of possessing child pornography located in his iPhone XR between on or about 1 December 2019 and on or about 24 March 2020. (Id.) The panel also found Appellant guilty of viewing child pornography on his iPhone XR between on or about 1 December 2019 and on or about 24 March 2020. (Id.) Unrelated to possessing and viewing child pornography, Appellant was convicted of indecent language, indecent conduct, indecent

[1] Appellant raises this assignment of error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

recording, indecent exposure, and failure to obey general lawful order in violation of Articles 134, 120c, 92. (Id.) A panel sentenced Appellant to two years of confinement and reduction to E-4. (Id.)

Investigative Background

A National Center for Missing & Exploited Children (NCMEC) began an investigation against Appellant for child pornography. (App. Ex. XVI at 2.) Pursuant to lawful search authorizations, law enforcement was authorized to search and seize Appellant's person and residence for child pornography, including his iPhone XR. (App. Ex. XXXI at 3.) Department of Defense Cyber Crime Center (DC3) analyzed Appellant's iPhone XR for forensic analysis. (Id.) Initially, DC3 found two images suspected to be child pornography. Those images became the basis for the offenses in Casillas I. (Id.)

Multiple Article 39(a) sessions in Casillas I, including motions hearing, occurred the week of Monday, 19 September 2022. (*Motion to Attach*, 3 March 2025, Appendix A. at 560.) In preparation, on Saturday 17 September 2022, trial counsel met with Petty Officer First Class (PO1) IA a digital forensic expert. (Id.) PO1 IA had never met with trial counsel before regarding this investigation. (Id.) So PO1 IA showed trial counsel the charged contents located in Appellant's iPhone XR using the forensic tool Cellebrite that allows law enforcement to search through electronic devices. (Id.)

PO1 IA showed trial counsel the Safari web browser temporary directory, where one of the images from Casillas I was stored. (Id.) Located in the same directory were hundreds of files that included the word "BLOB." (Id.) Located within these "BLOB" files were PDF files. (Id.) Trial counsel then asked PO1 IA what those files contained. (Id.) A review of the PDF files showed that they contained child pornography. (Id.) These files were the basis for the

court-martial currently under review (Casillas II). (Id.) Two PDF files contained a total of 13 images of child pornography. (Id.) These images had created and assessed dates of 6-7 January 2020.

Immediately, the prosecution provided written notice of the newly discovered child pornography images to the trial defense team. (Id. at 560.) The prosecution also prepared a new bill of particulars it intended to provide in the event the trial defense counsel did not object to the admissibility of the additional images. (Id.)

During an Article 39(a) session on 24 September 2022, the prosecution moved to make a change to the following specifications – specification 2 of Charge 1 and the additional charge. (Id. at 560-61.)

> Did, at an unknown location, between on or about 1 December 2019 and on or about 24 March 2020, within an iPhone XR, knowingly and wrongfully view child pornography, to wit: a visual depiction of minors, or what appears to be minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

Trial counsel sought to change "visual depiction" to the plural "visual depictions" of a minor or what appears to be a minor – given the discovery of new child pornography images. (Id.) The prosecution argued that the change was a minor change. (Id. at 562.) Trial defense counsel objected on the basis that the proposed changes to the charge sheet was a major change. (Id. at 563.) Since trial defense counsel objected – given that the prosecution cannot make a major change over the objection of the defense – the prosecution withdrew its request to make a change to the charge sheet. (Id.) Instead, the prosecution offered the newly discovered images as Mil. R. Evid. 404(b) evidence. (Id. at 566.) Once again, trial defense counsel objected. (Id. at 578.) Trial defense counsel mentioned that if the prosecution could not get this in as evidence

under Mil. R. Evid. 404(b) the government could seek to use these images in another court-martial to then make it admissible in that case. (Id. at 580.) The military judge in Casillas I excluded the images under Mil. R. Evid. 404(b) due to untimeliness. (R. at 1306-07.)

While Appellant was pending his first court-martial, charges in Casillas II – prosecuting the newly discovered images of child pornography contained in the PDF files – were preferred on 17 November 2022. (*Charge Sheet*, multiple dates, ROT, Vol. 1.) Appellant was not charged with possessing or viewing child pornography on any particular device. Charges were referred 7 February 2023. (Id.) As mentioned, Casillas I occurred in March 2023.

Casillas II – Double Jeopardy

During Casillas II, at an Article 39(a) session on 3 May 2023, the military judge sought clarification from counsel regarding the images charged in Casillas II. (R. at 82-84.) It was brought to the military judge's attention that the images in Casillas II were not admitted in Casillas I, and that they were different images of child pornography. (R. at 82.) The military judge asked, "So just to be clear, Trial Counsel, none of the images charged in this case were encompassed in the charges from the first trial." (R. at 82.) The trial counsel then responded, "Your Honor, not only were they not encompassed, defense also successfully suppressed those images from coming into court due to the timing of the time that those images were found." (Id.)

The military judge noted that his questions related to "double jeopardy concerns." (R. at 84.) The military judge noted that if any party had any concerns with double jeopardy, they could file an appropriate motion. (Id.) At no point during Casillas II did trial defense counsel file a motion to dismiss on double jeopardy grounds. Double jeopardy was not mentioned again in Casillas II. After Appellant entered pleas, the military judge asked trial defense counsel to

confirm that they had no further motions. (R. at 471.) Trial defense counsel confirmed that they did not. (Id.)

Casillas II Results

The prosecution tried Casillas II in June 2023. A panel of members found him guilty of viewing and possessing child pornography between on or about 1 December 2019 to 18 March 2020. (*Entry of Judgment*, 11 August 2023, ROT, Vol. 1.) A panel sentenced Appellant to four years and eleven months of confinement. (Id.)

Trial Defense Counsel Declarations – Double Jeopardy

Trial defense counsel, Maj AM and Maj JB, provided declarations in response to the ineffective assistance of counsel claims alleged in Appellant's brief that offer context to many assignments of error raised in this appeal.

Maj AM understood that in Casillas I, trial defense counsel objected to the post-arraignment addition of the PDF files containing child pornography on the grounds that they were different images than the images already charged. (*Maj AM Declaration*, dated 20 February 2025.) The images in Casillas II were legally distinct from the rest of the contraband charged, in that the date associated with the PDF files was inconsistent with the download and upload dates of the other contraband. (Id.) Maj AM thought that to reverse course in Casillas II to then argue that double jeopardy – claiming that the images were the same –would be misleading to the court. (Id.) For this reason, Maj AM explained that he could not ethically make this argument before the court. (Id.)

Maj AM explained that even if trial defense counsel had filed and prevailed on a motion to dismiss, Casillas II would still proceed to trial because Appellant was also charged with viewing child pornography. Maj AM explained his understanding of Forrester:

> [A] singular "unit of prosecution" do not insulate an appellant from a subsequent charge of viewing contraband material – only possessing it. In other words, winning a motion to suppress on the "unit of prosecution" theory would not have prevented a second conviction or sentence, evidenced by the finding of "guilty" on the "viewing" specification in Casillas II.

(Id.)

Maj JB who represented Appellant in Casillas I explained to Appellant "that the best hope of obtaining an acquittal in Casillas I" was to keep the additional PDF images out of Casillas I. (*Maj JB Declaration*, dated 21 February 2025.) Trial defense counsel in Casillas I objected on the grounds that the 13 additional images were a "wholly different file type in the form of PDFs" and had a different date than the single image charged in Casillas II. (Id.) Appellant was aware of the options and understood that the government could proceed with a second court-martial, "exposing him to additional penalties," if trial defense counsel maintained its objection to keep the PDF images out of Casillas I.

Maj JB explained that while the strategy did not result in an acquittal, it did result in a light sentence in that did not contain a punitive discharge considering the crimes Appellant was convicted of. (Id.) With this said, trial defense counsel were concerned that if they filed a motion to dismiss for double jeopardy, they would lose all credibility with the judge after the defense team in Casillas I objected to join the PDF files. (Id.)

When addressing Forrester, Maj JB mentioned that the opinion "referenced a unit of prosecution for possession, not viewing." In the context of Casillas II, to view the contraband images, one had to simply not just possess the PDF files but to also open each file and view the contraband. (Id.) The PDF files did not have a thumbnail to view, so logically Appellant had to open each PDF file and view the contraband. (Id.) The actus reus of viewing each image was

different than simply possessing a collection of images. "Based on the concerns about the case posture, as well as the potential impact to Casillas I…we assessed it was riskier to file the motion than not. Even if the motion were successful, [Appellant] would have likely faced a second court-martial for viewing the PDF files . . . . " (Id.)

Additional facts relevant to the assignments of error are explained in greater detail below.

ARGUMENT

I.

APPELLANT WAS NOT TRIED TWICE FOR THE SAME ACTS. RATHER, HE WAS TRIED FOR DISTINCT ACTS THAT DID NOT IMPLICATE DOUBLE JEOPARDY.

Standard of Review

R.C.M. 905(b)(1) states that defenses or objections based on defects in the preferral, forwarding, or referral of charges must be raised before pleas are entered. Failure to raise such a motion "forfeits the defenses or objections absent an affirmative waiver." R. C.M. 905(e)(1).

When an issue is forfeited, this Court reviews it for plain error. United States v. Tunstall, 72 M.J. 191, 193 (C.A.A.F. 2013). Under the plain error standard, an appellant "bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right." United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018). "[W]here a forfeited constitutional error was clear or obvious, 'material prejudice' is assessed using the 'harmless beyond a reasonable doubt' standard set out in Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018)).

Law and Analysis

A. Appellant waived his double jeopardy claim at trial.

Appellant waived his right to contest this assignment of error. In deciding whether there was an affirmative waiver, this Court looks to the record to see if a party's statements demonstrate a purposeful decision. United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999). Affirmative waiver means the issue is permanently waived and will be not reviewed for plain error. United States v. Hardy, 77 M.J. 438, 441 (C.A.A.F. 2018) (citing United States v. Swift, 76 M.J. 210 (C.A.A.F. 2017)).

The military judge brought up concerns regarding double jeopardy early on during Casillas II. (R. at 84.) Trial defense counsel at this time agreed with trial counsel that the images in Casillas II were not admitted in Casillas I, and that they were distinct and different images. (R. at 82-84.) When the military judge relayed to the parties his double jeopardy concerns, neither party objected nor indicated any reservation that the images in Casillas II were admitted in Casillas I, triggering the double jeopardy clause. The military judge invited the defense to file a double jeopardy motion earlier in the trial. But after pleas, when directly asked by the military judge, the defense confirmed they had no other motions to file. This constituted a purposeful decision and ultimately waived the issue. *See* Smith, 50 M.J. at 456.

Trial defense counsel's lack of objection is further explained in the declarations provided by Maj AM and Maj BM. Given that the images in Casillas I were legally distinct and had different download and upload dates, there were no grounds to dismiss the charges under the double jeopardy clause. (*Maj AM Declaration*, 20 February 2025) (*Maj JB Declaration*, 21 February 2025.) Accordingly, trial defense counsel made a purposeful decision not to move to dismiss on double jeopardy grounds. For these reasons, Appellant waived this issue at trial.

If this Court finds that Appellant did not waive this issue, Appellant nonetheless fails to meet his burden to prove under the plain error standard that the government erred in trying him twice.

B. Appellant is not entitled to relief under the double jeopardy clause.

The Fifth Amendment of the United States Constitution states, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. And Article 44, UCMJ, codifies the prohibition against double jeopardy for military members: "no person may, without his consent, be tried a second time for the same offense." It was not error, and unquestionably not plain or obvious error, to try Appellant a second time for distinct crimes – viewing and possessing child pornography. Therefore, the double jeopardy clause did not apply, and this Court should deny Appellant's claim.

1. The prosecution did not plainly err when it charged different acts under Article 134, UCMJ in Casillas II.

Our criminal jurisprudence under the multiplicity doctrine, "a concept grounded in double jeopardy, is designed to prevent multiple convictions and punishments under different statutes for the same act or course of conduct." United States v. Teters, 37 M.J. 370 (C.M.A. 1993). There is nothing in our jurisprudence that prohibits the government from charging different acts under the same statute. "The double jeopardy prohibition applies only where 'the same act or transaction' is involved." United States v. Rice, 80 M.J. 36, 40 (C.A.A.F. 2020) quoting Blockburger v. United States, 284 U.S. 299, 304 (1932).

A digital forensic expert located additional – different – images that formed the basis of the offenses in Casillas II. Appellant does not dispute that the images charged in Casillas II were not the same images charged in Casillas I. Appellant argues as discussed in greater detail below that he could not be charged twice for images found in his iPhone XR. But Appellant fails to

grasp that he could be charged twice for separate and distinct acts even though all images were contained in his iPhone XR. Our Superior Court has long held that "[i]f it is a distinct or discrete-act offense, separate convictions are allowed in accordance with the number of discrete acts." United States v. Neblock, 45 M.J. 191, 197 (C.A.A.F. 1996).

The doctrine of multiplicity or double jeopardy "has no application in which two counts are based on 'two distinct sets of conduct.'" United States v. Benoit, 713 F.3d 1, 16 (10th Cir. 2013) (internal citations omitted). Simply put, possessing, receiving, or viewing different images of child pornography constitute separate offenses. In United States v. Rector, the defendant was charged with multiple counts of possessing and receiving child pornography on separate dates on the same device. 2013 U.S. Dist. LEXIS 156937 at *30 (W.D. Ark. 1 Nov. 2023). The court held that there was no double jeopardy because the counts involved different images and therefore were not the same crimes. Id. at *31. Same can be said in Appellant's case.

Also instructive is United States v. Fall, 955 F.3d. 363 (4th Cir. 2020). In that case the defendant was convicted of possessing child pornography on different dates. Id. at 373. Because these convictions involved different conduct on different dates the counts – charging each possession date as a separate crime – were not multiplicious and therefore there was no double jeopardy. The same can be said for Casillas II because as trial defense counsel explained the images in Casillas II were legally distinct from Casillas I given that the dates associated with the PDF files were inconsistent with the download and upload dates of the other contraband charged in Casillas I. (*Maj AM Declaration*, 20 February 2025) (R. at 82.)

Appellant failed to meet his burden that it was plain error to try him for a second time. Tunstall, 72 M.J. at 193. Appellant was only charged at his first court-martial with possessing child pornography specifically on an iPhone XR. Since the specifications were different in

Casillas I and Casillas II, Appellant would need to point to the evidence introduced to show that he was prosecuted twice for the same misconduct. But Appellant has not pointed to any evidence in the record that showed that he was tried twice for viewing and possessing the same images of contraband. To the contrary, the record demonstrated that Casillas II charged distinct images. (R. at 82-84.)

In sum, it was not plain error to try Appellant for a second time for discrete acts – different images of child pornography. Appellant was not tried more than once for the same offense.

2. Appellant misreads United States v. Forrester.

Appellant claims that it was plain error to prosecute him twice for the same offenses. (App Br. at 5.) Appellant asserts that the offenses in Casillas 1 and Casillas 2 came from his iPhone XR, and therefore the prosecution tried him twice for the same "material." (App. Br. at 6.) Appellant relies on our superior Court's decision in United States v. Forrester, 76 M.J. 479, 486 (C.A.A.F. 2017) to support this claim. (App. Br. at 5-6.) Appellant misapprehends Forrester.

Forrester stands for the proposition that separate materials – phones, laptops, hard drives etc. – can reflect a discrete and separately punishable units of prosecution. 76 M.J. at 486. Appellant takes this holding and incorrectly assumes that all depictions of child pornography derived from the same unit of prosecution equate to one offense. (App. Br. at 7.) With this logic in mind, Appellant maintains that he was tried twice for the same offense in violation of the Fifth Amendment double jeopardy clause because all charged conduct in both prosecutions came from the same unit of prosecution – the iPhone XR. This is not what Forrester stands for. Forrester allows the government to charge multiple specifications of possession of child pornography for

different units of prosecutions even if they all contain the same images of child pornography. 76 M.J. at 487. The inverse is not true – that all depictions derived from the same material must all be charged as one offense. Our superior Court did not embrace Appellant's interpretation of Forrester. In fact throughout the Forrester opinion, CAAF repeatedly stated that separate convictions are allowed in accordance with the number of discrete acts. Id. at 486. In other words, if there is a distinct actus reus it qualifies as a separate offense. Id.; s*ee also* Neblock, 45 M.J. at 197; Fall, 955 F.3d. at 363.

Casillas II charged separate and distinct images than Casillas I even though the images came from the same unit of prosecution– contraband images embedded in PDFs. But Forrester did not preclude the government from prosecuting Appellant for a second time. Appellant's reliance on Forrester is misplaced.

3. Appellant suffered no prejudice.

Assuming error, Appellant did not suffer prejudice. Appellant claims that the error in prosecuting him for the second time subjected him to the hazards of trial and forced him to endure the "personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." (Appellant Br. at 7.) This argument fails. Appellant had the opportunity to endure only one court-martial but his choice to keep the images out of Casillas I left the government with the viable option to pursue a second court-martial. (*Maj JB Declaration*, dated 21 February 2025.) Prosecuting Appellant for different offenses was not error and certainly did not prejudice Appellant given that it was his choice not to join the newly discovered images to a specification already referred in Casillas I. For these reasons, error, assuming any, was harmless beyond a reasonable doubt. Society had an interest in holding

Appellant accountable for his crimes even if he had to endure a second trial. This Court should deny this assignment of error.

II.

TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE GIVEN THAT THERE WAS NO BASIS TO MOVE TO DISMISS THE CHARGE AND SPECIFICATIONS UNDER DOUBLE JEOPARDY GROUNDS.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. United States v. Tippit, 65 M.J. 69, 76 (C.A.A.F. 2007).

Law and Analysis

As described in Appellant's first assignment of error, it was not error to prosecute Appellant twice for possession and viewing child pornography given that each image was a distinct image of contraband. As a result, Appellant did not receive ineffective assistance of counsel when trial defense counsel failed to move to dismiss the charge and its specifications on double jeopardy grounds. Such motion would have been denied. Trial defense counsel not only understood binding precedent, but also articulated strategic reasons why they did not object to dismiss the charge and its specifications for double jeopardy. Thus, Appellant failed to show that he received ineffective assistance of counsel.

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI. In assessing the effectiveness of counsel, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

Military courts apply the following three-part test in assessing whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions"; (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance…[ordinarily expected] of fallible lawyers"; and (3) if defense counsel were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689).

This Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." United States v. Thompson, ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."

United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

A. Appellant did not receive ineffective assistance of counsel because trial defense counsel knew that the charge and specifications in Casillas II were properly referred to the court-martial.

Both trial defense counsel explained that the defense's position in Casillas I – that the 13 PDF files should not be joined because it was a different type of file with a different date than the charged contraband in Casillas I – would undermine its double jeopardy argument in Casillas II. As a result, trial defense counsel did not move to file a motion on double jeopardy grounds because trial defense counsel understood that the 13 PDF files were separate and distinct images from Casillas I and had been properly brought to trial. This was a reasonable explanation for counsel's actions in not raising the motion contested in this assignment of error. *See* Gooch, 69 M.J. at 362.

Trial defense counsel's level of advocacy did not "fall measurably below the performance…[ordinarily expected] of fallible lawyers." *See* id. Maj JB stated that in Casillas I counsel explained to Appellant the ramifications of objecting to joining the PDF files post arraignment. (Id.) Appellant nonetheless chose to proceed without joining the additional images, knowing that the government could pursue a second court-martial. (Id.) The strategy in Casillas I was to limit the number of images at stake. Although this did not result in an acquittal, it did result in a favorable sentence that did not include a punitive discharge. (Id.) With this said, trial defense counsel made a strategic decision with a favorable outcome that should be virtually unchallengeable on appeal. *See* Dewrell, 55 M.J. at 133.

Appellant claims that trial defense counsel did not understand binding precedent regarding the unit of prosecution in child pornography cases. (App. Br. at 11.) As explained in

assignment of error I, Appellant misapprehends Forrester. Appellant did not meet his burden of proving that his trial defense counsel did not understand the law and therefore he received ineffective assistance of counsel. If anything his trial defense counsel understood that the government could properly charge Appellant for a second time for different acts, such as possessing and viewing different images of child pornography that required factual proof not required in Casillas I. (*Maj AM Declaration*, 20 February 2025); (*Maj JB Declaration*, 21 February 2025.)

Trial defense counsel had strategic, ethical, and legal reasons for why they did not raise a double jeopardy motion – all of which resulted in a favorable sentence that did not contain a punitive discharge for heinous crimes of child pornography. Trial defense counsel's decisions at the time of trial "should not be colored by the distorting effects of hindsight." Alves, 53 M.J. at 289. In sum, trial defense counsel understood precedent and made strategic decisions that proved beneficial to Appellant. He did not receive ineffective assistance of counsel.

B. Trial defense counsel's representation did not result in any prejudice to Appellant.

The lack of objection from trial defense counsel did not result in prejudice. Trial defense counsel's strategy was to limit the amount of child pornography images before the factfinder. (*Maj JB Declaration*, 21 February 2025.) This strategy worked in that Appellant's court-martials did not result in a punitive discharge for heinous crimes of possessing and viewing child pornography – a favorable result considering the crimes committed. Notably, Appellant requested more confinement in lieu of a punitive discharge to ensure the possibility that his family receive benefits from his military retirement. (R. at 1368-1371.)

Further, Appellant understood the punitive exposure in objecting to join the PDF images and knew that the government would pursue a second court-martial. (*Maj JB Declaration*, dated

21 February 2025.) Appellant agreed that the best strategy would be to object to the joinder of additional images. (Id.) Although Appellant was convicted at both court-martials, the strategy did however result in a favorable sentence which did not include e a punitive discharge. (Id.)

For these reasons, Appellant suffered no prejudice, and this Court should deny this assignment of error.

III.

IT WAS NOT PLAIN AND OBVIOUS ERROR TO PROSECUTE APPELLANT FOR A SECOND TIME.

Standard of Review

When an issue is forfeited, this Court reviews it for plain error. Tunstall, 72 M.J. at 193.

Under the plain error standard, an appellant "bears the burden of establishing: (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right." United States v. Robinson, 77 M.J. 294, 299 (C.A.A.F. 2018). To establish plain error, "all three prongs must be satisfied." United States v. Gomez, 76 M.J. 76, 79 (C.A.A.F. 2017) (internal quotation marks omitted) (quoting United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006)). The third prong is satisfied if the appellant shows "a reasonable probability that, but for the error [claimed], the outcome of the proceeding would have been different." United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017) (citation omitted) (internal quotation marks omitted).

Law and Analysis

A. Appellant failed to establish that it was plain and obvious error for the government to try him a second time for different offenses than Casillas I.

The convening authority has discretion to refer two or more offenses charged against an accused to the same court-martial. R.C.M. 601(e)(2). "Ordinarily, all known charges should be referred to a single-court-martial." R.C.M. 601(e)(2), Discussion. But "should be" does not

mean mandatory, and this language is in the non-binding discussion portion of the Rules for Courts-Martial. Importantly, the Rules for Courts-Martial do not mandate that all known offense *must* be tried in a single court-martial. R.C.M. 601(e)(2) (emphasis added).

It was not error, and certainly not plain or obvious error, for the government to court-martial Appellant for a second time. The government did in fact, per the Rules for Courts-Martial, request to bring all known offenses to a single court-martial. (Motion to Attach, 3 March 2025, Appendix A. at 560-61.) The government acted in good faith in bringing the newly discovered evidence to the attention of trial defense counsel. (Id.) The prosecution then asked to make a change to the charge sheet or in the alternative admit the evidence as Mil. R. Evid. 404(b). (Id. at 566.) Both attempts to introduce the evidence in one court-martial were unsuccessful. As a result, to promote justice and to hold Appellant accountable for the atrocious crimes of viewing and possessing child pornography, pursuing a second court-martial was not plain error and well within the discretion of the convening authority. R.C.M. 601(e)(2).

Appellant makes various arguments that the government could have tried all known offenses at a single court-martial. Per Appellant, the government could have dismissed the charges in Casillas I and re-prefer those charges along with the additional specifications, which would been a proper purpose for dismissing and re-preferring charges. (App. Br. at 14.) To support these arguments Appellant relies on United States v. Leahr, 73 M.J. 364 (C.A.A.F. 2014) and United States v. Underwood, 50 M.J. 271, 276 (C.A.A.F. 1999). Although those cases do support that the government can withdraw and dismiss charges to then re-refer all known offenses into one court-martial, these cases are not persuasive here. Leahr and Underwood demonstrate circumstances under which a convening authority *can* withdraw and re-prefer. These cases do not set out circumstances in which a convening *must* withdraw and re-prefer all

known offenses to one court-martial. There is no requirement under the Manual for Courts-Martial nor any binding precedent that mandates that a convening authority must re-prefer all known offenses to one court-martial. Casillas II presents a unique situation in which the prosecution wanted to prosecute all known misconduct in one court-martial. Such a request was denied, leaving the government with the viable option to pursue a second court-martial and keep Casillas I as scheduled.

Next, Appellant avers that referring the Charge and Specification in Casillas II had the effect of severing known offenses without proof that severance was necessary to prevent manifest injustice. (App. Br. at 18.) To support this argument, Appellant cites United States v. Buhl, 84 M.J. 501 (A. Ct. Crim. App. 2023). But Buhl is not persuasive here. In Buhl, the government "overreached in its second prosecution – after a general court-martial acquitted appellant *of the same act charged under a different article*." Id. at *1 (emphasis added). The government, after the appellant's acquittal, offered nonjudicial punishment which the appellant turned down. Id. at *2. The convening authority then referred the case to a special court-martial. Id. The court found that the government offered no reason why it failed to follow R.C.M. 906(b)(10)(A) that offenses should only be severed to prevent manifest injustice. Id. at *10. A service member's rejection of the nonjudicial forum did not give the convening authority the ability to abuse his discretion and refer a second court-martial. Id. at *9-10.

The facts here are distinguishable from Buhl. Here, the government did not refer a second court-martial for the same acts charged in Casillas I. The government prosecuted Appellant for new and different images of child pornography that the defense successfully prevented from being prosecuted at his first court-martial. To the extent any charges were

severed from the first court-martial, they were severed at the request of Appellant. The convening authority did not abuse his discretion in referring a second general court-martial.

Appellant mentions that the government effectively severed offenses without proof that this severance was necessary to prevent a manifest injustice. (App. Br. at 15.) The term manifest injustice is "an outcome that is plainly and obviously unjust." Manifest Injustice, MERRIAM WEBSTER DISCTIONARY (Online Ed. 2025). But again, the charges were only "severed" because Appellant did not want the new images to be prosecuted at his first court-martial. Appellant had no ability to prevent the government from *ever* prosecuting this separate misconduct It would have been a manifest injustice had the government not referred charges to a second court-martial against Appellant, and allowed him to escape punishment entirely The bulk of Appellant's misconduct regarding the viewing and possession of child pornography was reflected in Casillas II. For these reasons, it was not error, and certainly not plain or obvious error to try Appellant a second time.

B. Appellant did not establish that his second prosecution was prejudicial.

Assuming error, Appellant makes various claims as to why the government's actions to try him a second time resulted in prejudice. (App. Br. at 19.) Appellant claims that he "endured successive prosecutions," but this alone did not establish prejudice. (Id.) Our adversarial military justice system allows a defendant to be prosecuted multiple times for different offenses. While the prosecution was ready to proceed with all charges during Casillas I, the government had no means to amend the charge sheet or admit additional evidence given the military judge's rulings and trial defense counsel's objections. A second prosecution was a justifiable mean to hold Appellant accountable for his crimes.

Next, Appellant argues that the prosecution used conduct from Casillas I as Mil. R. Evid. 404(b) evidence, and therefore that was prejudicial. (App. Br. at 19-20) Appellant mentioned that had all known offenses been tried all together, the government could not have the charged conduct as 404(b) evidence, and the government circumvented this rule by trying him a second time to use his first court-martial convictions to bolster his second court-martial. (App. Br. at 20.) Appellant's argument fails because he chose not to join the additional images in Casillas I leaving the government with the viable option to prosecute him a second time.

Appellant next argues that the government used his convictions from Casillas I in pre-sentencing, and therefore the members sentenced him to a harsher punishment because of his prior convictions. (App. Br. at 20-21.) But as Appellant correctly pointed out, the Rules for Courts-Martial allow the prosecution to admit prior convictions during pre-sentencing proceedings. R.C.M. 1001(b)(3)(A). The military judge instructed the members that Appellant was only to be punished for the offenses he was convicted of in Casillas II. (R. at 1539.) Members are presumed to follow the military judge's instructions, and Appellant failed to provide any indication otherwise that he was sentenced to a harsher sentence the members also intended to punish him for his previous crimes. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000) ("Absent evidence to the contrary, this Court may presume that members follow the military judge's instructions.").

Appellant makes a point that his trial was tainted with an air of suspicion because he wore the rank of Senior Airman. (App. Br. at 19.) Appellant failed to show how his reduction in rank was prejudicial. Given that the members were aware of his previous court-martial it would be a reasonable inference to conclude that Appellant was reduced in rank. His pay grade had no nexus to the crimes in which the panel convicted him of. Even if it did, Appellant himself fought

to disallow the prosecution to prosecute this misconduct during his first court-martial, knowing that would allow the government to prosecute him again. Appellant put himself in this situation. Thus, suspicion about how the members viewed his reduction in rank do not equate to prejudice warranting relief.

Lastly, the government did not force consecutive sentencing. (App. Br. at 21.) As mentioned throughout this answer, double jeopardy did not apply in Appellant's case, and the government lawfully prosecuted Appellant for a second time. The government's failure to dismiss and re-refer all known charges in a single court-martial did not result in prejudice. As explained above, it was not plain and obvious error to try Appellant a second time. This court should deny this assignment of error.

IV.

APPELLANT'S CONVICTIONS ARE FACTUALLY SUFFICIENT.

Standard of Review

This Court reviews issues of factual sufficiency de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law[2]

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence

[2] Because Appellant's offenses occurred prior to 1 January 2021, the prior factual sufficiency review standards under Article 66 apply.

admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

In the performance of this review, "the Court of Criminal Appeals applies neither a presumption of innocence nor a presumption of guilt." Washington, 57 M.J. at 399. While this Court must find that the evidence was sufficient beyond a reasonable doubt, it "does not mean that the evidence must be free of conflict." United States v. Galchick, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

Additional Facts

Investigation on this case began on 7 January 2020 when Yahoo flagged emails sent from the email account "applejacks69612@yahoo.com" ("applejacks") to the email account "luckymango69612@yahoo.com" ("luckymango").

- ***AB AC's Testimony and "applejacks" and "luckymango" emails***

AB AC testified that she created the "applejacks" and "luckymango" email accounts while she and Appellant were both TDY in Washington, DC in May 2019. (R. at 949.) At the time, she was stationed at Aviano AB, Italy and Appellant was stationed in Korea. (R. at 949.) AB AC agreed that the accounts were created so the couple could maintain contact with each other despite being geographically separated. (Id.) The two had met in 2012 and shared a child together. (R. at 947.)

AB AC said she sent emails from the "applejacks" account and that Appellant used the "luckymango" account. (R. at 952, 955.) AB AC agreed that part of the couple's sexual relationship included sending messages back and forth about fantasies. (R. at 960.)

On 16 September 2019, the "luckymango" account sent an email to the "applejacks" account with the subject line "Dream 1." (Pros. Ex. 3.) AB AC said Appellant sent this email.

(R. at 952-53.) In the email, Appellant detailed a dream he had where he had sex with Mr. MB's wife and recorded it so he and AB AC could watch later. (Pros. Ex. 3.) Appellant also said in the dream he set up a camera to spy on Mr. MB's 11-year-old daughter while she showered, and how he and AB AC then had sex while watching the 11-year-old.[3] (Pros. Ex. 3.)

AB AC testified that Mr. MB and his family were friends of Appellant's family, that Mr. MB had a daughter, and that Appellant was the child's godfather. (R. at 953.) AB AC said that within the month prior to this email being sent, Appellant had been to Mr. MB's residence. (R. at 954.)

Three days later, Appellant, using the "luckymango" account send another email to AB AC where he stated, "So yesterday in the orthodontist office I pictured you [AB AC] getting up from the waiting room where we were sitting and walking away." (Pros. Ex. 4.) Appellant continued, "When you got back you showed me your phone. You snuck into an exam room where this young girl was getting work done and took pics for me as she was laying there." Appellant continued, "You took pics of her cute feet, up her skirt and even moved her panties to the side exposing her pussy." Appellant concluded the email, "You made my dick hard and started sucking it there in the waiting room." (Id.)

- ***The Investigation and Cell Phone Analysis***

Air Force Office of Special Investigation (AFOSI) Special Agent (SA) EP became involved in this case when he received the NCMEC cybertip through AFOSI headquarters. (R. at 915.) SA EP said Yahoo emails sent on 7 January 2020 from the "applejacks" account had been flagged by Yahoo for containing child pornographic material and the potential owner of the

[3] While Appellant's email does not discuss the child's age, later testimony showed Mr. MB's daughter had just turned 11-years-old on 14 September 2019, two days before Appellant's email. (R. at 1092.)

account was Appellant. (R. at 915-16, 931.) Further investigation showed indications that the another individual, AB AC, operated the "applejacks" Yahoo email account that had sent the email. (R. at 916, 931.)

AFOSI interviewed Appellant and seized his cell phone, an Apple iPhone XR. (R. at 916-17, 920.) The phone was sent to DC3 for analysis. (R. at 921.) SA EP said Appellant, during his AFOSI interview, provided no explanation as to why child pornography would be found on his cell phone. (R. at 928.)

PO1 IA, a forensic examiner at DC3 who was recognized as an expert in the field of digital forensics, analyzed Appellant's iPhone. (R. at 975-76, 979.) PO1 IA said he found suspected images of child pornography on Appellant's iPhone. (R. at 980.)

Prosecution Exhibit 6 is a DVD containing a listing of the Safari temporary directory from Appellant's iPhone. (R. at 983.) PO1 IA explained the Safari temporary directory as follows:

> So, Safari is the default web browser for iPhones. The temporary directory is utilized by the application to preload data on the pages that you are viewing as well ***as any kind of documents that you had opened up*** within the browser. This is done to help make the user experience easier. So that way, as you scroll through the page the image is already loaded for you, as I've had to wait and have to wait for the image to load like we used to back in the day.

(R. at 991.) (emphasis added.) PO1 IA said inside this folder were 13 PDF documents that contained suspected child pornography. (R. at 1027.)

Prosecution Exhibit 8 is a summary of events for 6-7 January 2020. (R. at 1000.) The record shows when each of the PDFs in question in this case was stored in the Safari temporary directory on Appellant's iPhone XR. (Pros. Ex. 8.) Prosecution Exhibit 9 is an Extraction Report for Appellant's iPhone, which is similar to the report found in Prosecution Exhibit 6 but

without thumbnails or images. (R. at 1004-5.) On page 2 of the report is a section entitled "Data Files" that contains 32 items, 19 of which are contained in a section entitled "Documents." (Pros. Ex. 9.) The 13 PDF documents containing child pornography are at Items 2, 3, 5, 6, 8, 9, 10, 11, 13, 14, 15, 17, and 19. (*See* App. Ex. L at 4.)

When a member asked PO1 IA, "If you view a PDF on the internet and open it, can it get into your temp cache as a PDF without you downloading it, PO1 IA responded, "Yes, that is one way." (R. at 1269.) When asked if someone would have to download a PDF for it to save in the temporary cache, PO1 IA said that "in general with a website, you don't necessarily have to download a PDF." (R. at 1271.) When then asked if one "only need to click open for it to save in the temporary cache as a PDF," PO1 IA replied, "by clicking open that is a way that only saves with cache." (Id.)

Cross referencing information from Prosecution Exhibit 9 for these PDF documents with the information contained in Prosecution Exhibit 8, along with PO1 IA's testimony about how clicking on a PDF document would result in that file being in the Safai temporary director, the summary shows Appellant began to view PDF documents containing child pornography on 6 January 2020 at 0539 UTC, or 1439 in Korea. Appellant clicked nine PDF documents containing child pornography in an approximate 45 minute time span. The following morning, on 7 January 2020 at 0832 hours in Korea (or 2332 UTC on 6 January 2020), Appellant clicked on another PDF document containing child pornography. Finally, later that afternoon, at 1410 hours in Korea (or 0510 UTC), Appellant clicked on two more PDF documents containing child pornography. (*See* Pro. Exs. 8-9.)

PO1 IA said he was unable to find any the Safari web browser history for November 2019 through February 2020 on Appellant's iPhone. (R. at 1011.)

PO1 IA agreed that generally when a user clicked a link for a file, the file would end up in the browser's temporary folder. (R. at 1018-19.) When asked if he was aware of any websites that "just saved child pornography to a user's temporary cache," PO1 IA replied, "No, sir," and agreed that he had never heard of that. (R. at 1033.) PO1 IA agreed that if a user had gone to a website and all PDFs found on Appellant's phone were contained on that website, he would expect all of the PDFs would have had a created, modified, and accessed dates that were "very close in time." (Id.) However, PO1 IA noted in this case that the created, modified, and accessed dates for the PDFs found on Appellant's iPhone were "dispersed throughout a 24-hour period." (R. at 1034.)

PO1 IA testified that he was not sure about the source of any of the child pornography material found on Appellant's iPhone. (R. at 1030.) At one point, PO1 IA stated that he "did not see any of those files in emails." (R. at 1030.) However, as the defense was well aware, PO1 IA was only talking about the "applejacks" account, not the "luckymango" account.[4]

PO1 IA also agreed that if a PDF was opened in Safari web browser tab, that is would remain open and viewable if the user navigated away from that tab or opened a new tab. (R. at 1272.)

- ***Government Theories of Appellant's Viewing and Possession of Child Pornography***

During closing argument, the Government provided the members multiple theories on how Appellant viewed and possessed the child pornography. The trial counsel argued as follows:

> The simplest and most logical explanation is simply that [Appellant] was doing something on his phone, like viewing on a webpage or he

[4] During motions practice, Appellant's defense counsel agreed that no emails were retrieved from the "luckymango" account and that all the email evidence in this case was based on information pulled from the "applejacks" account. (*See* R. at 85.)

> had them saved to his phone and he was getting ready to send them off to someone else, or that he was accessing them in some manner using that Safari browser. That's the simplest and most logical explanation for why those are in the Safari temporary directory on his phone.

(R. at 1138.) The trial counsel continued in rebuttal:

> The defense counsel talked about [Appellant] facing a charge that he possessed files in a temporary directory. That's overly simplistic view of what we're talking about here. Because if he had the files, if he had those PDF's on this phone and was sending them via the web browser, or had downloaded them from the Safari web browser on his phone, and then finds out oh, [AB AC] is not being investigated. There's this NCMEC report about yahoo's reporting what she had sent. Well, of course, he deletes and removes that from his phone, and then he had it on his phone. He was possessing it. He was exercising possession and control, even though he can't actually access what's on the temporary directory. So, it's not that he could manipulate what was in the temporary directory. [PO1 IA] explained that he couldn't himself have gone in, and you know, access those files. But its how those files got there that demonstrate that he was possessing them.

(R. at 1165.)

Analysis

The panel at Appellant's court-martial correctly found him guilty of possessing and viewing child pornography, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

To begin, while the Government offered various theories on how the 13 PDFs documents came to reside in the Safari temporary directory of Appellant's iPhone XR, the prevailing two theories were as follows:

- Theory 1: On 6 or 7 January 2020, the 13 PDF documents were saved within Appellant's "luckymango" Yahoo email account, and throughout the next 24 hours, Appellant, using

his Safari web browser, Appellant accessed his "luckymango" account and opened those 13 PDF documents, therein causing the 13 PDF documents to be saved in Safari temporary directory

- Theory 2: On 6 or 7 January 2020, Appellant had the 13 PDF documents saved on his iPhone in an accessible place, uploaded those documents to his Appellant's "luckymango" Yahoo email account, and throughout the next 24 hours, Appellant, using his Safari web browser, Appellant accessed his "luckymango" account and opened those 13 PDF documents, therein causing the 13 PDF documents to be saved in Safari temporary directory

Notably, Appellant's temporary directory had no images saved to the temporary directory on either 6 or 7 January 2020, which shows that Appellant on these days was not browsing the internet. If he had been browsing the internet those days, PO1 IA's testimony about preloaded images indicates Appellant's temporary directory would have been full of images on that dates. However, there are no images in the directory that were created on either 6 or 7 January 2020. This lack of any images, preloaded or not, appearing in his temporary directory show Appellant was not browsing the internet through the Safari browser at all on 6 or 7 January 2020.

Both of these theories would explain this lack of images found in Appellant's temporary directory on 6 and 7 January 2020. Here, Appellant was not browsing the web, but instead was using the Safari browser solely to access the PDF documents either within his "luckymango" email account on his phone or that were saved on his phone. In either case, this evidence shows Appellant viewed the PDF documents by opening them within the Safari browser. As PO1 IA testified, one would have to actually click on a PDF document to see its contents. Further, PO1 IA testified that one would have to open the PDF documents for them to appear in Safari's temporary directory. Thus, this Court knows Appellant clicked on those 13 PDF documents because that is what made those files be created in Safari's temporary directory. (*See* R. at 1271.) Indeed, as PO1 IA testified, while the temporary directory preloads images as you scroll

a webpage, the temporary director also houses "any kind of documents that you had *opened up*." (R. at 991.) (emphasis added.)

Further, evidence showed Appellant's Safari internet browsing history contained nothing from November 2019 through February 2020, creating a strong indication that Appellant deleted this information from his iPhone. (R. at 1011.) Additionally, the record shows that no emails were recovered from the "luckymango" account, which, as the trial counsel argued in closing, is again a strong indication that Appellant deleted these emails once AB AC, his adulterous lover, had her own Yahoo email account flagged for child pornography material.

As the trial counsel argued, once Appellant became aware of AB AC's "applejacks" account being flagged, he took action to delete his own nefarious actions, including his "luckymango" emails and his Safari web browsing history, both of which are circumstantial evidence that he both knew how to delete files from his phone and email account and, in fact, actually did delete them. While Appellant was unable to access and, thus, unable to delete the 13 PDF documents from the Safari temporary folder, this circumstantial evidence shows Appellant possessed these 13 PDF documents either within his "luckymango" account or on an accessible part of his iPhone on 6 and 7 January 2020 and then deleted those 13 PDF documents at some point after AB AC's account was flagged by Yahoo. This explains why these 13 PDF documents were not found on an accessible portion of Appellant's iPhone or within his "luckymango" account, but also proves why he still possessed them on the days in question.

In addition to this evidence showing Appellant viewed and possessed these 13 PDF documents, this Court also knows that Appellant had a pre-existing and strong desire both for young girls and for child pornography. In September 2019, Appellant sent AB AC, with whom he was having an adulterous affair, fantasies of spying on his own 11-year-old goddaughter in

the shower and of looking at sexually explicit pictures of another young girl. (Pros. Exs. 3-4.) Then, in December 2019, Appellant viewed and possessed separate images of child pornography and child erotica on the same iPhone XR.

Here, Appellant's prior actions show he had a clear motive and desire for young girls and child pornography. This, along with the evidence in this case concerning the 13 PDFs at issue which contained child pornography, conclusively prove Appellant knowingly and wrongfully possessed and viewed child pornography.

Still, Appellant claims error.[5] First, he claims the Government did not prove he viewed the child pornography, stating that there is a "real possibility that [Appellant] did not view the thirteen PDF files located in the Safari temporary directory because [PO1] IA admitted that the presence of the files in the temporary directory did not mean that the files were viewed on the iPhone's screen." (App. Br. at 26, *citing* R. at 1026.) Appellant further claims that PO1 IA "made clear" that "Appellant could have visited a website that included the thirteen files without seeing them because the files could have preloaded to his temporary directory, even if Appellant did not scroll to view them." (Id., *citing* R. at 1023, 1025-26, 1061-62.)

However, in making this argument, Appellant misunderstands PO1 IA's testimony. On page 1026 of the transcript, PO1 IA did testify that *images* could preload on a webpage depending on how the webpage was coded. However, PO1 IA never said anything about *documents* preloading on a webpage, and certainly not PDF documents.[6]

[5] In his claim, Appellant never questions whether or not the 13 PDF documents contained child pornography. Instead, Appellant only claims he did not view or possess the documents.

[6] A review of PO1 IA's testimony on pages 1023, 1025-26, and 1061-62 show his testimony on these pages was centered on images, not documents.

Instead, PO1 IA testified that documents would end up in the temporary directory after a user had opened them up, stating, "The temporary directory is utilized by the application to preload data on the pages that you are viewing as well ***as any kind of documents that you had opened up*** within the browser." (*See* R. at 991.) (emphasis added.) Further, specific to how PDF documents would come to be housed in the temporary directory, a panel member asked if a user "only need to click open for it to save in the temporary cache as a PDF." (R. at 1271.) PO1 IA replied, "by clicking open that is a way that only saves with cache." (Id.)

Contrary to Appellant's claim, PO1 IA never testified that documents would either preload on a webpage or automatically open when scrolling. Instead, to actually see the contents of a PDF, one would actually have to click on that file. Further, PO1 IA testified that a document would only be in the temporary directory after a user opened it. Thus, this Court knows Appellant actually clicked on those files because, per PO1 IA, that is what caused them to be saved into Safari's web browser. Putting all of PO1 IA's testimony together, this Court knows Appellant not only clicked the PDF documents, but that those PDF documents were then specifically opened, allowing Appellant to see the full contents of that PDF document.

Moreover, the contents of the Safari temporary directory on Appellant's iPhone XR show that Appellant's argument about preloaded images is not even at issue. Indeed, if, as Appellant alleges, he was actually on a website that preloaded numerous images – so many, in fact, that he did not see all of them – then the temporary directory would have been filled with such images.

However, as shown in Prosecution Exhibit 9, the temporary directory was not filled with hundreds of preloaded images. Instead, for the days in question – 6 and 7 January 2020 – Appellant's Safari temporary directory had *zero* images. Moreover, when asked if he was aware

of any websites that "just saved child pornography to a user's temporary cache," PO1 IA replied, "No, sir," and agreed that he had never heard of that. (R. at 1033.)

Here, no images, and certainly no images of child pornography, appeared on Appellant's phone simply due to scrolling on the days in question. Further, PO1 IA's testimony shows that a user had to actually click and open PDF documents for that document to show up in the temporary directory. Again, these facts show Appellant purposefully clicked on those 13 PDF documents over the course of 24 hours and viewed the contents of each of those documents.

To this point, the lack of images on the dates in question show two things. First, as noted above, nothing was "preloaded" so as to have been in Appellant's directory without him seeing the contents. Second, as already discussed above, the lack of other images in the directory from either 6 or 7 January 2020 demonstrates that Appellant was thoroughly familiar with how he was accessing these PDF documents containing child pornography. The temporary directory's contents for those days show Appellant was not just aimlessly browsing the internet or that the unintentionally stumbled upon multiple PDFs containing child pornography. Instead, the directory shows Appellant knew exactly where to access this material to both view and possess.

Appellant next claims that he "did not click on the files to download them because, if that occurred, the PDF files would have been saved in the downloads folder and not in the temporary directory." (App. Br. at 27.) However, this argument does not help his case since PO1 IA's testimony made clear that a user could open a PDF to view it without also having to download it to a downloads folder. Moreover, evidence shows Appellant took steps following AB AC's email being flagged to delete items from both his iPhone and from his "luckymango" account. Thus, it is perfectly reasonable for the panel to have believed Appellant had the PDF documents downloaded onto his iPhone and then took steps to delete them once AB AC's email was

flagged. Here, just because these 13 PDF documents were found in Appellant's temporary directory versus a download folder does not mean he did not open and view the files.

Next, Appellant claims there was "no evidence that Appellant viewed these files in an email within his web browser," adding that PO1 IA "did not see any of the thirteen PDF files in Appellant's sent or received emails." (App. Br. at 27, *citing* R. at 1030, 1061.) Again, Appellant misunderstands PO1 IA's testimony. A review of this testimony shows PO1 IA was talking about AB AC's "applejacks" email account, not Appellant's "luckymango" account. Indeed, as Appellant's trial counsel readily admitted at trial, no emails were recovered from the "luckymango" account, thus it was not possible for PO1 IA to review either Appellant's sent or received emails, let alone testify that he did not see any of the 13 PDF files in those folders. (*See* R. at 85.)

Next, Appellant claims he could not have viewed the files that were actually stored in the Safari temporary directory because he could not access them. (App. Br. at 28.) Appellant's contention here is irrelevant because this t has never been at issue – in fact, the Government openly acknowledged in closing argument that Appellant could not access the temporary directory. (*See* R. at 1165.) The Government's theory was never that he accessed the files in the temporary directory. Instead, the Government theory was that Appellant possessed and opened these files from another source (either an accessible part of his iPhone or from his "luckymango" email account) through his Safari web browser, and his opening of those files is what caused the files to then be saved in the temporary directory.

Additionally, to the extent that Appellant claims he did not view the PDF documents and, thus, did not know they contained child pornography, this Court should ask one question – why did he continue to download PDFs containing child pornography over the course of 24 hours?

This is certainly not a case where all 13 documents were accessed at the same time. Instead, they were spread over the course of 24 hours, indicating, contrary to Appellant's contention, this was not an isolated visit to some random website that was unintentional.

Further, the evidence shows Appellant had to have clicked the links for all 13 PDFs for them to show up in his temporary directory. Perhaps after clicking the first one or two PDF documents, Appellant could argue he did not know they would contain child pornography. However, Appellant clicked on *nine* documents during that first 45 minute session. Then, the next morning, he clicked on another. Then, that afternoon, he clicked on two more.

Here, Appellant knew exactly what was in those PDFs. The evidence firmly shows Appellant viewed the PDFs in question and, thus, is guilty of viewing child pornography.

Finally, as to the possessing specification, Appellant claims he did not "knowingly and consciously possess[] the thirteen PDF files in the Safari temporary directory," because "there was no evidence that Appellant knew about his Safari temporary directory at all" and there "was no evidence that Appellant could access his temporary directory or that he ever had." (App. Br. at 29.)

Again, Appellant is confused. As detailed above, the Government's theory was not that he possessed the 13 PDF documents found in the Safari temporary folder. Instead, the Government's theory was that Appellant possessed these files in some other location, namely either an accessible part of this iPhone or within his "luckymango" account, and then deleted those files once AB AC's email was flagged and the investigation into both Appellant and AB AC commenced.

As already detailed above, the direct evidence of Appellant's activity with the Safari browser on 6 and 7 January 2020, along with the litany of circumstantial evidence, shows (1)

Appellant had a penchant for both child pornography and young girls; (2) Appellant opened those 13 PDF documents on 6 and 7 January 2020; and (3) Appellant deleted the files from either his "luckymango" email account or an accessible part of his iPhone once AB AC's email was flagged. This evidence provides clear proof that Appellant possessed those 13 PDF documents in a place other than that temporary directory on 6 and 7 January 2020.

All told, when weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced beyond a reasonable doubt that the evidence is factually sufficient to sustain Appellant's convictions for possessing and viewing child pornography. The panel correctly found Appellant guilty of these offenses, and the United States is confident on this record that this Court will reach the same conclusion.

V.

APPELLANT WAIVED THIS ISSUE OR, IN THE ALTERNATIVE, HAS FAILED TO SHOW THE SPECIFICATIONS ARE MULTIPLICIOUS.

Additional Facts

During motions practice, the military judge and the parties discussed what child pornography images were charged in this case and what images had been charged in Appellant's first trial. (R. at 84.) The military judge wanted to ensure there were no "double jeopardy concerns." (Id.) Both the Government and Appellant's trial defense counsel confirmed that the "iPhone XR image that is uncharged in this case" was charged in the first case. (R. at 84.) The military judge also asked, "So just to be clear, Trial Counsel, none of the images charged in this case were encompassed in the charges from the first trial." (R. at 82.) The trial counsel responded, "Your Honor, not only were they not encompassed, defense also successfully suppressed those images from coming into court due to the timing of the time that those images

were found." (Id.) Appellant's defense counsel then agreed that the charged images in this case were not introduced as evidence in either findings or sentencing in Appellant's first trial and that they were excluded from that trial in their entirety. (R. at 83-84.)

Despite this discussion regarding double jeopardy, neither Appellant nor his counsel ever raised the issue of multiplicity. With regard to the specifications at issue in the first trial, the defense never claimed the two iPhone XR child pornography specifications in his first trial were multiplicious to the two specifications in this trial. With regard to the two specifications in this trial, the defense never claimed the viewing specification in this trial was multiplicious to the possession specification in this trial.

In his brief to this Court, Appellant alleged his counsel were ineffective in not raising the multiplicity issue. (App. Br. at 32.) In response to those claims, both counsel explained why the issue was not raised. To start, based on their knowledge of the multiplicity issue, Maj AM stated that "the Defense did not view this as a winning motion." (Maj AM Declaration, dated 20 February 2025.) On top of this concern, simply raising the issue had potential negative consequences for the defense. Maj JB explains that the defense "could tell that the Government was unaware of where the PDF files originated from," which the defense felt was a weakness for the Government in the case. (Maj JB Declaration, dated 21 February 2025.) This created two options for the defense – either file a multiplicity/unreasonable multiplication of charges (UMC) motion and force the Government to articulate how Appellant exercised control over the files, or attack whatever theory the Government presented at trial.

Maj JB then detailed the potential ramifications of filing a UMC motion, explaining that filing such a motion would "put the Government on notice that they had a deficiency in their case" and allowed the Government to "work[] to shore it up." (Id.) Maj JB was also concerned

that if the motion was unsuccessful, the Government would likely form a theory on how the members could infer that Appellant exercised control over the images.

Finally, Maj JB stated that the defense was aware that "viewing and possessing child pornography have distinct elements and in [this case], allegations of distinctly separate acts." (Id.) Maj JB also stated his knowledge that "Courts have ruled that possession and viewing of child pornography are not necessarily multiplicious, depending on the fact pattern." (Id, *citing* United States v. Ramos, No. ACM 38619, 2015 CCA LEXIS 362, (A.F. Ct. Crim. App. 31 August 2015).

Maj AM, Appellant's other trial defense counsel, expressed similar concerns about raising a multiplicity motion. (Maj AM Declaration, dated 20 February 2025.) Maj AM stated the "Defense's understanding is that offenses are not multiplicious when proof of one requires proof of some fact which the other does not." (Id., *citing* United States v. Smith, 50 M.J. 813, 814 (A.F.C.M.R. 1999)). Maj AM highlighted that "viewing electronic contraband files requites an additional affirmative step beyond possessing the files," and, because of this, the "Defense did not view this as a winning motion." (Id. at 2.) Maj AM continues, "While cases like Ramos suggest that specifications of possessing and viewing the same child pornography *can be* multiplicious, courts (including the Ramos court itself) have consistently upheld convictions on facts similar to those in this case." (Id.)

Finally, Maj AM stated, "Even if the Defense had prevailed on a multiplicity motion, it would not have appreciably altered the landscape of the case." Maj AM stated that while "fighting one specification is preferable to fighting two specifications . . . because of unitary member sentencing, I did not assess there to be a significant windfall even if the Defense had won a multiplicity motion . Maj AM noted that "the lack of a punitive discharge for a

second child pornography conviction suggests that [Appellant's] sentence was not exacerbated because there were two specifications rather than one." (Id.)

Standard of Review and Law

Per R.C.M. 905(b)(2), defenses or objections based on defects in the charges and specifications must be raised before a plea is entered. A failure to raise such a motion "forfeits the defenses or objections absent an affirmative waiver." *See* R.C.M. 905(e)(1).

Determining whether an accused has waived an issue is reviewed de novo. United States v. King, 83 M.J. 115, 120 (C.A.A.F. 2023) (citation omitted). "In making waiver determinations, [this Court] look[s] to the record to see if the statements signify that there was a 'purposeful decision' at play." United States v. Gutierrez, 64 M.J. 374, 377 (C.A.A.F. 2007) (*quoting* United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999)).

If the issue is not waived, this Court reviews claims of multiplicity for plain error. United States v. Lloyd, 36 M.J. 19, 22 (C.A.A.F. 1997). Plain error "occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." United States v. Fletcher, 62 M.J. 175, 179 (C.A.A.F. 2005) (citation omitted). "The burden of proof under a plain error review is on the appellant." United States v. Voorhees, 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted).

Multiplicity, in violation of the Double Jeopardy Clause of the Constitution, occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct . . . ." United States v. Coleman, LJ. 100, 103 (C.A.A.F. 2019) (*quoting* United States v. Roderick, 62 M.J. 425, 431 (C.A.A.F. 2006)) (emphasis omitted).

When determining whether two charges are multiplicious, this Court must first determine whether the charges are based on separate acts. Coleman, 79 M.J. at 103. "If so, the charges are not multiplicious because separate acts may be charged and punished separately." Id.

Analysis

Due to Appellant not bringing this motion at trial despite the issue of Double Jeopardy being raised, and because this Court now affirmatively knows Appellant's defense counsel expressly and purposefully did not raise a multiplicity motion at trial, Appellant waived this issue at trial. Maj JB plainly states the defense strategically did not raise this issue, despite fully knowing about it, for the expressed purpose of not putting the Government on notice about an alleged deficiency in its case. Maj JB explains that raising the issue would have countered the defense's strategy in the case and allowed the Government to "shore up" the issue.

Here, Appellant's defense team explicitly did not want to raise this issue because it would hinder and prejudice Appellant's defense. Completely understanding the different options they had in either raising or not raising the issue, recognizing the negative consequences Appellant would face if the multiplicity issue was raised, and explicitly not wanting to "put the Government on notice" of the issue and allow the Government to "shore it up," Appellant's defense team made the conscious decision to not raise the multiplicity issue. Given these circumstances, Appellant waived this issue at trial.

However, even if this Court finds Appellant did not waive the issue, there is no error here, let alone plain error. To start, the specifications at issue allege two distinct offenses. As defined by the military judge, "possessing" child pornography is different from "viewing" it. As the military judge instructed, "Possessing" means exercising control of something. Possession may be direct physical custody like holding an item person who hides something in a locker or a car

to which that person may return to retrieve it." (R. at 1123.) Thus, "possession," as both of Appellant's trial defense counsel recognized, is a distinct element and separate act and offense from "viewing." There is no plain error here.

Yet, Appellant claims otherwise by citing this Court's unpublished opinion in United States v. Matthew, No. ACM 39796 (reh), 2024 CCA LEXIS 460, at *12-13 (A.F. Ct. Crim. App. 31 October 2024). However, that case dealt with the offenses of distribution and possession of child pornography. Id. at *11. While this Court noted the two specifications in that case identified "identical locations and times spans for the alleged offenses," this Court also highlighted that "in order to 'distribute' child pornography—*i.e.*, to deliver it to the possession of another—it is necessary to exercise some control over it either physically or constructively—*i.e.*, to 'possess' it." Id. at *12. In other words, one cannot distribute child pornography without first possessing it.

Here, however, one does not have to "view" child pornography in order to "possess" it, and, likewise, one does not have to "possess" child pornography to "view" it, and Appellant has failed to cite to any precedent standing for such an argument. Further, Appellant's contention is counter to the military judge's instructions to the members, which did not require that a person had to "view" child pornography to "possess" it, or vice versa. Again, this is in contrast to the offenses of "distributing" and "possessing," where an offender must "possess" the child pornography before they can distribute it. *See* Matthew, at *12-13.

Appellant also attempts to argue otherwise by stating, "Appellant cannot know that he possesses visual depictions of minors, or what appear to be minors, without viewing the depictions." (App. Br. at 31.) However, such an argument ignores the instruction provided by the military judge to the members that states "[k]nowledge may be inferred from circumstantial

evidence, such as the name of a computer file or folder, the name of the host website from which a visual depiction was viewed or received, search terms used, and the number of images possessed." (R. at 1124.) Nothing requires an appellant to actually view child pornography in order to possess it and Appellant's cites to no case law or precedent standing for such a proposition.

Instead, as the military judge's instructions provide, an appellant can be shown to have knowledge that the document he possesses includes depictions of minors by circumstantial evidence such as, in this case, the fact that Appellant clicked on 13 different PDF documents that contained child pornography. Appellant perhaps could claim that he did not know the first, or perhaps the second PDF document he clicked on would contain child pornography. However, by the time he got to the 11th, 12th and 13th click, whether Appellant actually viewed those PDFs or not, he knew they contained child pornography. The circumstantial evidence in this case shows Appellant knew those PDFs contained child pornography whether he viewed them or not, and highlights exactly why there is no *per se* requirement that a person has to actually view child pornography before they can possess it.

Next, Appellant cites to this Court's unpublished opinion in Ramos, where, in dicta, this Court stated that "possession and viewing of child pornography may, in some circumstances, be multiplicious offenses or lesser included offenses of each other." (App. Br. at 30, *citing* Ramos, at *16.) First, Appellant omits the ending of that sentence, which reads, "the facts of this case preclude such a conclusion here." Ramos, at *16. However, that is not this case since the Government's theory was not that Appellant both "viewed" and "possessed" the PDF documents as a result of one act – that being him opening the PDF documents. If that had been the Government's theory – essentially that Appellant opening the document led to him both (1)

viewing the PDF and (2) possessing the document because it automatically saved to his temporary directory – then Appellant's claim might be closer to what this Court in Ramos envisioned as a possible circumstance where "possession and viewing of child pornography may, in some circumstances, be multiplicious offenses." Ramos, at *16.

However, that was not the Government's theory. Instead, as explained in Issue IV above, the Government's theory was that Appellant, on 6 or 7 January 2020, possessed these files in some other location, namely either an accessible part of this iPhone or within his "luckymango" account, and then, throughout the next 24 hours, took the additional step of opening those saved PDF documents through his Safari web browser and viewing them. This theory, explained by trial counsel in closing arguments, required Appellant to "take an additional affirmative step beyond possessing the files." *See* Ramos, at *17. This theory also shows Appellant's possessing and viewing of these 13 PDF documents were separate and distinct acts and were not based on just one sole act by Appellant.

Moreover, Appellant fails to cite to a case where this Court has made such a ruling, especially under a plain error analysis. Considering the circumstances of this case where Appellant's counsel purposefully and deliberately did not raise the issue, and under a plain error analysis, this Court should deny Appellant's claim.

Yet, even assuming the issue was not waived and assuming plain error on the part of the military judge for not *sua sponte* declaring the two specifications in this case multiplicious, Appellant's claim still fails because he has shown no prejudice. As explicitly stated by Appellant's own counsel, raising a multiplicity motion would have been detrimental to Appellant's overall defense as it would have allowed the Government to further fine tune its

theory that Appellant exercised control over the PDF documents, which Appellant's counsel believed was deficient in the case.

Moreover, as the defense team recognized, the outcome of Appellant's trial – namely the sentence – was not impacted by Appellant being convicted of both viewing and possessing the 13 PDFs of child pornography. As explained in more detail in Issue IX below, despite being convicted yet again for child pornography offenses, which were separate and apart from any child pornography images at issue in his first court-martial, Appellant still was not adjudged a punitive discharge. As Appellant's own trial defense counsel highlights, there would not have been a "significant windfall" even if the defense had won a multiplicity motion. While Appellant's maximum punishment exposure was higher for two specifications rather than one, Appellant's focus during sentencing was not focused on limiting confinement exposure, or even limiting his confinement sentence. Instead, as discussed more in Issue IX below, Appellant's sole focus in sentencing was to not have a punitive discharge be adjudged against him. In fact, Appellant went so far as to ask for more confinement time in exchange for him not receiving a punitive discharge. (*See* R. at 1371.) Thus, Appellant's counsel did not believe the multiplicity motion, even if it was won, would result in a "significant windfall" because a punitive discharge was a possible punishment whether there was one specification or two. Moreover, as discussed in Issue V below, this strategic decision ultimately led to what Appellant wanted from the start – to not be adjudged a punitive discharge. As Maj AM correctly notes, "the lack of a punitive discharge for a second child pornography conviction suggests that [Appellant's] sentence was not exacerbated because there were two specifications rather than one." (Maj AM Declaration, dated 20 February 2025.) Accordingly, this Court should find that Appellant has failed to show any material prejudice to a substantial right and deny Appellant's claim.

In sum, Appellant waived this issue. However, even if this Court does not find waiver, Appellant has failed to show plain error or prejudice. Thus, Appellant's claim must fail.

VI.

APPELLANT'S TRIAL DEFENSE COUNSEL WERE NOT INEFFECTIVE.

Standard of Review and Law

The standard of review and law concerning ineffective assistance of counsel claims for this issue is the same as that in Issue II above.

Analysis

In his brief, Appellant fails to cite Strickland or any case law related to the issue of ineffective assistance of counsel. Instead, Appellant simply argues that his counsels' failure to raise a multiplicity motion "demonstrates an ignorance of the law that fell measurably below the standard of performance expected of fallible lawyers," and that this "prejudiced Appellant because the only remedy for multiplicity is the dismissal of one of the multiplicious specifications." (App. Br. at 32.) Appellant believes that there was a "reasonable probability that had defense counsel understood the applicable law and raised a motion to dismiss one of the specifications in [this case], a specification would have been dismissed because that is the only permissible remedy for multiplicity." (Id. at 33.)

As shown by both Maj JB's and Maj AM's declarations, Appellant's assertion that his counsel were "ignoran[t] of the law" and did not understand it is incorrect. Both Maj JB and Maj AM were well aware of the law surrounding multiplicity and also understood the potential for raising a multiplicity motion in this case. However, both understood the risks of bringing such a motion. Maj JB's declaration in particular discusses how the defense team weighed the pros and cons of bringing this motion (including weighing the chances of winning the motion at all),

showing not only a thorough understanding of the law, but also that the defense had a sound and reasonable strategy in deciding to not raise the motion. Here, Appellant's counsel feared raising this issue would highlight a perceived weakness in the Government's case – namely how Appellant exercised control over the PDF documents. Had the Government been alerted to the issue, Appellant's counsel believed the Government could have strengthen its case articulating more fully a theory on the control issue, a move that could have had detrimental impacts on both Appellant's findings case and, more importantly (considering the overall focus of the defense's strategy) his sentencing case.

Considering the reasonable explanations for their strategic and tactical decisions, this Court should not second guess them now. *See* Morgan, 37 M.J. at 153. Moreover, considering both their knowledge of the law and their strategy on how to deal with the issue, the counsels' advocacy did not fall measurably below the performance ordinarily expected of fallible lawyers. Indeed, though Appellant was convicted in this court-martial for additional child pornography offenses that were separate, apart, and distinct from his first court-martial, Appellant's counsel still were able to convince the panel at Appellant's second court-martial to not adjudge a punitive discharge – a truly astonishing feat on their part.

Appellant should be thanking his counsel for successfully doing exactly what Appellant prayed for during his unsworn statement – successfully saving him from receiving a punitive discharge. Instead, Appellant now questions and invites this Court to second-guess the very decisions that led to him not being adjudged what would have been a well-deserved punitive discharge. This Court should decline that invitation.

Here, each of Appellant's trial defense counsel show they well understood the multiplicity issue. The team recognized the dangers of raising a multiplicity motion and made a sound, strategic decision to avoid such a situation.

Appellant fails to recognize the pitfalls his counsel recognized at trial, let alone explain why his defense team's strategy to avoid these pitfalls was unreasonable or somehow fell measurably below the performance ordinarily expected of fallible lawyers. Instead, Appellant simply asserts that his trial defense counsel did not understand the law surrounding multiplicity. However, as shown in the counsels' declarations, the defense team was well aware of the issue and had a very sound strategy for not pursing the option.

The statements from Appellant's trial defense counsel demonstrate a sound approach to Appellant's defense, and a reasonable, "tactical decision[] made at the trial." Mansfield, 24 M.J. at 617. Thus, Appellant's trial defense counsel did not perform deficiently, and their decision to not pursue a multiplicity motion does not overcome the "strong presumption" that their conduct was within the "wide range of reasonable professional performance." Strickland, 466 U.S. at 689. Additionally, because this was a tactical decision and this Court should not second-guess strategic or tactical decisions on review, Appellant's ineffective assistance of counsel claim must fail. Strickland, 466 U.S. at 689; Morgan, 37 M.J. at 410.

Likewise, Appellant has failed to show any prejudice because there is no reasonable probability that, absent any alleged errors, there would have been a different result. First, as detailed in Issue V above, Appellant would have lost any multiplicity motion at trial. Both of Appellant's counsel recognized this possibility. They also recognized that raising the issue would have allowed the Government to further strengthen their case against Appellant on the merits. Thus, there is no reasonable probability of a different result in the findings portion of

Appellant's trial (that being the specification either being dismissed) if the motion had been raised. In fact, the circumstances show that if the motion had been raised, a specification would not only have not been dismissed, but that the Government may have had an even stronger case against Appellant. Both of these outcomes are extremely negative towards Appellant, which his counsel well knew. Thus, there is no prejudice as to the findings portion of this case.

As to sentencing, the sole focus and concern for Appellant regarding his sentence was not receiving a punitive discharge. As discussed in Issue IX below, Appellant specifically asked in his unsworn statement for *more* confinement in exchange for the members not sentencing him to a punitive discharge. And that is exactly what the members returned in their adjudged sentence. Thus, whether sentencing him for one or two specifications, the goal of the defense team and of Appellant – to avoid a punitive discharge at all costs – was met. While Appellant states that he was "sentenced for two specifications," the fact remains the ultimate outcome is exactly what Appellant wanted – no punitive discharge, which would have been the outcome whether he was sentenced to two specifications (which is what happened) or just one specification (which is what Appellant says should have happened). Again, as there is no reasonable probability for a different result in Appellant's sentencing, there is no prejudice.

As discussed above, the declarations from his trial defense counsel show how Appellant's defense team protected their client by not raising the multiplicity issue at trial. His trial defense counsel were not ineffective, and Appellant cannot show a reasonable probability that but for their strategic choices, the result of his trial would have been different. Thus, Appellant's claim must fail.

VII.

APPELLANT HAS NOT MADE A PRIMA FACIE SHOWING THAT THE CONVENING AUTHORITY CONSIDERED RACE OR GENDER AND IS THEREFORE UNENTITLED TO A PRESUMPTION THAT THE PANEL WAS IMPROPERLY CONSTITUTED.

Additional Facts

Between referral of charges in February 2023 to the commencement of Appellant's trial on the merits in June 2023, the convening authority detailed members to court-martial duty on three different convening orders.[7] When detailing members, the convening authority received a list of proposed members and their data sheets, which included copies of each nominee's personnel data in a Single Unit Retrieval Format (SURF). (*See Pretrial Advice*; Court Member Data Sheets.) The Pretrial Advice provided to the convening authority stated, "In accordance with Article 25, UCMJ, members detailed to a court-martial shall be those persons who you determine are best qualified by reason of their age, education, training, experience, length of service, and judicial temperament." (Id.) In his First Indorsement to the Pretrial Advice, the convening authority stated, "By reason of age, education, training, experience, length of service, and judicial temperament under Article 25, UCMJ, I detail the following individuals to serve as members in the court-martial of United States v. [Appellant]." (First Indorsement, Pretrial Advice.)

The original convening order, dated 7 February 2023, detailed 16 officer members. (Special Order A-7.) During a 5 March 2023 hearing, neither Appellant nor his counsel objected

[7] (Special Order A-4, 7 February 2023; Special Order A-8, 7 June 2023; Special Order A-9, 22 June 2023.)

to the court-martial composition of members. During both that hearing and a subsequent hearing on 3 May 2023, Appellant deferred his choice of forum selection. (R. at 9, 25.)

On 7 June 2023, the convening authority excused nine officer members and detailed nine additional officer members and eight enlisted members to the court-martial panel. (Special Order A-8.) On 20 June 2023, Appellant elected to be tried by officer members. (R. at 229.) A discussion then ensued about the convening authority's intent, as stated in the First Indorsement to the Pretrial Advice, that all enlisted members would be excused if Appellant's elected to be tried by officer members. (R. at 232-36.) Appellant then affirmatively waived any issue related to enlisted members not being on his court-martial panel. (R. at 235-36.)

At no point did the defense file any motions regarding court-martial composition. Notably, at the beginning of the 20 June 2023 session, the military judge provided a summary of the parties' R.C.M. 802 sessions and highlighted that the parties "talked about the convening orders and the first endorsements." (R. at 223.) Again, despite these discussions, neither Appellant nor his defense counsel ever objected or filed motions regarding court-martial composition.

Standard of Review

When no objection is made at the trial level, this Court reviews court-martial composition issues for plain error. United States v. King, 83 M.J. 115, 121 (C.A.A.F. 2023). Under plain error review, Appellant bears the burden of establishing that (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right. Id. at 123 (citation omitted). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law & Analysis

Pursuant to Article 25, "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C.S. § 825(e)(2). Absent contrary indication, military appellate courts presume that the convening authority acted in accordance with Article 25, UCMJ, in "carr[ying] out the duties imposed upon him by the Code and the Manual." United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020) (*citing* United States v. Wise, 6 C.M.A. 472, 478, 20 C.M.R. 188, 194 (1955)). -

Here, Appellant contends that "impermissible criteria influenced member selection" in his court-martial, and points to the presence of race and gender identifiers on prospective court members' data sheets. (App. Br. at 38-39.) Appellant is incorrect. Even assuming this Court can consider the court member data sheets at Appendix B of Appellant's 21 January 2025 Motion to Attach Documents,[8] Appellant has failed to demonstrate clear or obvious error related to the court-member selection process and is therefore unentitled to relief.

To start, until Appellant raised his issue before this Court last month, Appellant had never claimed any issue with the composition of his court-martial, let alone that it was marred by an alleged impermissible use of race and gender. Indeed, as noted above, there were no motions about improper panel constitution, nor were there any related objections at trial. Nowhere in the

[8] While the Government recognizes this Court, in United States v. Patterson, ACM 40426, 2024 CCA LEXIS 399 (A.F. Ct. Crim. App. 27 September 2024, found that the Court could consider the data sheets in accordance with United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020), the Government still maintains this Court cannot consider those data sheets because they are not "necessary to resolve an issue raised by the record." *See* Jessie, 79 M.J. at 444. However, because this Court can dispatch of Appellant's claim irrespective of the data sheets, the Government will address this issue assuming this Court can consider the data sheets.

transcript does the word "race" appear. (*See generally* R. 1-1627.) Similarly, the word "gender" only appears once—when the military judge asked a member during voir dire the gender of their children—and was never used in relation to panel constitution. (R. at 599.) And before trial on the merits, the defense confirmed that they had no objections to convening orders or the member selection process. (R. at 450.) Indeed, Appellant cannot point to anything in the transcript, exhibits, or allied papers that even *hints* at this issue.[9]

Still, Appellant now believes "impermissible criteria," namely race and gender, "influenced member selection" in his case and that he has made a prima facia showing that these factors played a role on member selection. (App. Br. at 38.) Appellant is wrong on both counts.

In detailing prospective members to court-martial duty, the convening authority may not "exclude or intentionally include prospective members based on their race." Jeter, 84 M.J. at 73. Thus, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." Id. at 70. Citing the presence of racial identifiers on certain member data sheets and SURFs, as well as the fact that Jeter had not been decided at the time of his court-martial, Appellant asserts that he has made such a showing. This Court should be unpersuaded.

"Prima facie" means "at first sight" or "on first appearance." Black's Law Dictionary (4th pocket ed. 2011). Here, there is nothing that suggests "at first sight" that either race or gender "played a role in the panel selection process." Jeter, 84 M.J. at 69. The mere presence of

[9] While United States v. Jeter, 84 M.J. 68, 73 (C.A.A.F. 2023) was released following Appellants' trial, the trial participants in Jeter still litigated the issue of "systematic exclusions of members based on race and gender" at the trial level nonetheless. *See* Jeter, 84 M.J. at 71. Appellant, however, did not, which proves fatal to his claim.

racial or gender identifiers and timing of a court-martial—without more—is insufficient to make this showing.

First, military courts "will not presume improper motives from inclusion of racial … identifiers on lists of nominees for court-martial duty." Loving, 41 M.J. at 285. This holds true even after Jeter, in which our superior Court confirmed that "racial identifiers are neutral." 84 M.J. at 74. In Jeter, the solicitation of racial identifiers was but *one* of the conditions which justified a presumption that race entered the selection process. Id. In finding that the appellant had made the required prima facie showing, the Court of Appeals for the Armed Forces specifically noted the existence of evidence that "two African American members on the original convening order were subsequently removed pursuant to the first amendment to the convening order; and three other courts-martial with African American accuseds were convened by this convening authority before all-white panel members." 84 M.J. at 74.

This demonstrates that it was not the racial identifiers, standing alone, which established the prima facie case in Jeter. Rather, it was the fact that "the effect of the subsequent amending convening orders replacing the original panel of ten members with nine all-white members *at least has the appearance of excluding members of Appellant's cognizable racial group* from his court-martial panel." United States v. Jeter, 81 M.J. 791, 796-97 (N-M Ct. Crim. App. 2021) (emphasis added). In this context, the racial identifiers were a pertinent factor because they might have been used to contribute to that perceived exclusion. *See* Jeter, 84 M.J. at 74 ("Although racial identifiers are neutral, they are capable of being used for proper as well as improper reasons.")

Jeter is clear that a prima facie showing is one where the appellant demonstrates, at a minimum, an *appearance* that race "played a role" in court-martial composition. 84 M.J. at 69.

Appellant has not made that showing. He has not pointed to anything about his court-martial's composition that suggests the racial identifiers on the court member data sheets "played a role in the panel selection process." Jeter, 84 M.J. at 69. He also has not provided any evidence akin to that in Jeter which even remotely suggests that the convening authority detailed members based on their race—likely because there is nothing to point to.

Appellant also contends that gender was impermissibly used to detail members to his court-martial. (App. Br. at 38-39.) Even assuming that Jeter applies the same principles to gender as it does to race,[10] Appellant's claim still fails because he has failed to make a showing that gender played a role in the court-martial composition process.

In asserting that the convening authority impermissibly considered gender, Appellant points to the fact that the convening authority excused five females and four males and then replaced them with the same number of females and males. (App. Br. at 38, *citing* Special Order A-8.) According to Appellant, this "demonstrates a deliberate effort to balance the gender composition of the detailed members." (R. at 38.)

Yet, Appellant offers zero authority for this proposition. In effect, he asks this Court to presume that instead of selecting members who were "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," the convening authority simply tried to "balance the gender composition of the detailed members." (Id.) But as discussed *supra*, this Court presumes the opposite—that convening authorities act in accordance with Article 25, UCMJ—absent evidence to the contrary. Bess, 80 M.J. at 10. Just as "a prima facie claim of discrimination is not established by the absence of minorities on a single panel," Loving, 41 M.J. at 286, neither is a prima facie claim of discrimination established by the

[10] *See* Patterson, at *20-21.

detailing of specific genders to a particular panel.

Further, our superior Court's decision in Jeter dealt with the issue of "systemic *exclusion* of members based on race and gender." *See* Jeter, 84 M.J. at 71. (emphasis added.) There, the Court was concerned with the *exclusion* of African American members. Here though, there is no exclusion, let alone systemic exclusion, of any race or gender. Jeter is simply inapplicable to Appellant's case.

Finally, this Court recently denied relief for this exact issue in Patterson. There, like Appellant here, an appellant contended that his court-martial panel was improperly constituted because the convening authorities inappropriately considered race and gender in selecting members. Id. at *19. The appellant cited that, as in Jeter, racial and gender identifiers for prospective court members were provided to the convening authorities, and that at the time applicable precedent did not prohibit the consideration of race or gender. Id. That appellant, like Appellant here, noted an instance of choosing a particular set of females and males, calling it "highly unlikely" unless the convening authority considered gender. Id.

This Court was not persuaded that the appellant had met his burden to demonstrate "clear" or "obvious" error in the selection process. Id. at *21. This Court first agreed with the Government's argument, as also made in this case, that the routine provision to the convening authority of professional and personal information including race and gender does not in itself constitute a prima facie showing the convening authority in fact improperly relied on such criteria in selecting members under the plain error standard of review. Id.at *22. In doing so, this Court quoted both Jeter, 84 M.J. at 74 ("[R]acial identifiers are neutral, [although] capable of being used for proper as well as improper reasons"), and Loving, 41 M.J. at 285 ("We will not

presume improper motives from inclusion of racial and gender identifiers on lists of nominees for court-martial duty").

This Court was also not persuaded that the selection on one occasion of two females and two males from a pool of two female and seven male prospective members met the "clear" or "obvious" standard where (1) an innocent explanation is facially plausible, and (2) Appellant has not identified a similar pattern of possible discrimination in any of the other five member selections in this court-martial, nor in any other court-martial involving these convening authorities. Id. at *22. Notably, Appellant in this case has similarly not identified any similar pattern in any of the other three convening orders or member selections in this case or in any other court-martial involving this convening authority.

Finally, this Court explained the distinguishing factors between that case and Jeter, all of which also apply in this case. First, the appellant in Jeter did not forfeit the issue but instead challenged the selection process at trial, alleging "systematic exclusion of members based on race and gender." Id. at *22 (*citing* Jeter, 84 M.J. at 71). Further, the record in Jeter indicated the panel was composed entirely of "white men," and that the two African American members on the original convening order were subsequently removed from the panel by the convening authority. Id. at *23 (*citing* Jeter, 84 M.J. at 74). Finally, "three other courts-martial with African American accuseds were convened by [Jeter's] *convening* authority before all-white panel members." Jeter, 84 M.J. at 74. Our superior Court concluded those circumstances, coupled with the provision of racially identifying information to the convening authority, were sufficient for a prima facie showing under ordinary standards of review. However, this Court found in Patterson that no equivalent circumstances were present and that the appellant had not

met his burden to demonstrate "clear" or "obvious" error is higher. Patterson, at *23. The same is true in this case.

Where there is no appearance of racial or gender motivated member selection, there is no prima facie showing. Here, Appellant has not made a prima facie showing that either race of gender "played a role in the panel selection process." Jeter, 84 M.J. at 69. Thus, he is not entitled to the presumption that his panel was improperly constituted. Further, because he has failed to make the required showing, he cannot demonstrate error, much less clear error, and is entitled to no relief.

VIII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISSCRETION IN ADMITTING PROSECUTION EXHIBIT 18.

Standard of Review

This Court reviews a military judge's evidentiary ruling to exclude or require completion of a statement for an abuse of discretion. United States v. Rosales, 74 M.J. 702, 705 (A.F. Ct. Crim. App. 2015) (citations omitted). A military judge abuses his or her discretion when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." United States v. White, 80 M.J. 322, 327 (C.A.A.F. 2020) (*quoting* United States v. Miller, 66 M.J. 306, 307 (C.A.A.F. 2008)). "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) (*quoting* United States v. Lloyd, 69 M.J. 95, 99 (C.A.A.F. 2010)).

Military judges have "wide discretion" in applying the Mil. R. Evid. 403 balancing test; however, military judges are afforded less deference when they do not explain their analysis on the record, and we give them no deference when they do not conduct the analysis at all. United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000).

"When the Court finds error in the admission of sentencing evidence (or sentencing matters), the test for prejudice is 'whether the error substantially influenced the adjudged sentence.'" United States v. Edwards, 82 M.J. 239, 243 (C.A.A.F. 2022) (*quoting* United States v. Barker, 77 M.J. 377, 384 (C.A.A.F. 2018))

Additional Facts

As sentencing evidence, the Government sought to introduce a redacted version of the Entry of Judgment (EOJ) from Appellant's first court-martial. (R. at 1199.) Appellant's sentence, as well as the actions of the convening authority, were redacted. An unredacted version of the EOJ is at Appellant Exhibit LI. (R. at 1207.) The trial counsel, citing our superior Court's decision United States v. Barrier, 61 M.J. 482 (C.A.A.F. 2005), argued that "courts of appeals have stated it has long been the rule that sentences in other cases cannot be given to court martial members for comparative purposes" and that the probative value of Appellant's prior sentence was substantially outweighed by the danger of unfair prejudice. (Id.) The defense argued Appellant's first sentence was a "proper matter in aggravation and mitigation to assess [Appellant's] rehabilitative potential." (R. at 1211.)

The military judge, during argument on this issue, highlighted that he had already instructed the members that "any prior court-martial has no bearing whatsoever on this court-martial," and that he had previously instructed the members that they were "not to speculate whatsoever about what any redaction means or what's underneath it." (R. at 1213.)

After deliberating, the military judge provided the following ruling on Prosecution Exhibit 18:

> Regarding Prosecution Exhibit 18, the court has read and analyzed U.S. v. Barrier, at 61 M.J. 482, and finds that it is on point. In Barrier that military judge gave a Friedmann instruction when the appellate decided to put in a comparative sentence in his unsworn. C.A.A.F. found the military judge should not have used his discretion by giving that instruction. Barrier cites to United States vs. Mamaluy . . . 10 C.M.A. 102, pin cite 106, it's a 1959 cases, where it stated, "Moreover, it has long been the rule of law that the sentences in other cases cannot be given to courts -- to court-martial members for comparative purposes." Aside from keeping the court from becoming involved in collateral issues, that principle is founded on the hypothesis that accused persons are not robots to be sentenced by a fixed formula, but rather they are offenders who should be given individualized consideration and punishment.
>
> The court having considered M.R.E. 403 finds the probative value of telling the members the prior sentence on Prosecution Exhibit 18 is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the members specifically in light of U.S. v. Barrier and U.S. v. Mamaluy. Prosecution Exhibit 18 in the submitted redacted format is admitted into evidence.

(R. at 1226.)

Law

"If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statements—that in fairness ought to be considered at the same time." Mil. R. Evid. 106.

Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403. "Military judges receive wide discretion in conducting balancing under [Mil. R. Evid.] 403, but military judges' rulings receive less deference if they fail to articulate their

analysis on the record." United States v. St. Jean, 83 M.J. 109, 113 (C.A.A.F. 2023) (*citing* United States v. Collier, 67 M.J. 347, 353 (C.A.A.F. 2009)).

Analysis

To start, the Government is aware that our superior Court has held that an appellant's sentence in a prior court-martial is admissible under R.C.M. 1001. *See* United States v. Maracle, 26 MJ. 431, 432-33. Citing to Maracle, this Court has stated that a promulgating order from an appellant's prior court-martial was admissible under R.C.M. 1001(b)(3) and that, "[a]s a matter of law, the sentence adjudged, and the action of the convening authority are relevant parts of such a promulgating order." United States v. Douglas, 55 M.J. 563, 566 (A.F. Ct. Crim. App. 2001). However, while this Court in Douglas said the promulgating order was admissible under R.C.M. 1001(b)(3), this Court prefaced that statement by saying it was admissible "[s]ubject to Mil. R. Evid. 403." Id.

It is within this Mil. R. Evid. 403 balancing test that the military judge in this case did not abuse his discretion in admitting the redacted EOJ. Here, the military judge recognized the inherent Mil. R. Evid. 403 issues present in allowing members to see Appellant's sentence from his prior court-martial as it would have invited confusion among the members. Appellant's prior case included child pornography offenses which, even now, Appellant claims were the *same offense*. (*See* App. Br. at Issue I, II, IX.) Considering Appellant's implications, keeping Appellant's prior sentence from the panel ensured that Appellant was only sentenced for the child pornography offenses at issue in this trial. Further, as the trial counsel noted, Appellant's prior sentence was mitigated by the convening authority, which would have likely garnered further confusion by the members in this case as to what the convening authority in this case might do or not do, which again are matters specifically forbidden to be taken into consideration

by the members. Here the military judge put his Mil. R. Evid. 403 balancing on the record, and it is entitled to substantial deference. His exclusion of Appellant's sentence was well within the range of choices available to him and was not an abuse of discretion.

Finally, even if this Court finds the military judge abused his discretion in admitting the redacted EOJ, Appellant has failed to show prejudice. In fact, the circumstances in this case show Appellant would have been prejudiced if a fully unredacted EOJ had been provided to the members. Indeed, revealing Appellant's prior sentence to the members in this case could have prejudiced Appellant immensely – specifically in the realm of a potential punitive discharge. If the members had received Appellant's first sentence, they would have definitively known Appellant did not receive a punitive discharge in his first trial. Instead, since they did not receive the sentence, the panel did not know whether or not Appellant had already received a punitive discharge. The panel may very well have assumed, considering the amount of charges and specifications in his first trial, that he had already received a punitive discharge and decided not to adjudge one in the present case. Yet, had the panel definitely known Appellant *did not* receive a punitive discharge in his first case, Appellant's panel may very well have adjudged a punitive discharge in the instant case.

On the other hand, if Appellant's prior sentence *had* been provided to the panel and a punitive discharge *had then* been adjudged at his second court-martial, this Court can rest assured that Appellant would now be raising an issue before this Court complaining that he received a punitive discharge in this case because the panel received his first court-martial sentence and definitively knew he did not receive a punitive discharge in his prior court-martial.

Here, since the military judge conducted a Mil. R. Evid. 403 analysis and explained his analysis, he should be afforded "wide discretion" in his decision that any probative value in

telling the members about Appellant's prior sentence was substantially outweighed by the dangers of prejudice for various reasons. Finally, any claimed error did not substantially influence the adjudged sentence to Appellant's detriment. Instead, the opposite may very well have been true had the members known Appellant's prior sentence considering the fact that he did not receive a punitive discharge in his initial court-martial. Accordingly, this Court should deny Appellant's claim.

IX.

APPELLANT'S APPROVED SENTENCE IS ENTIRELY APPROPRIATE.

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

"Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves." United States v. Healy, 26 M.J. 394, 395 (C.M.A. 1988). This Court should affirm sentences it finds correct in law and fact and determines, based on the entire record, should be approved. Article 66(c), UCMJ. This Court also has the power to disapprove a mandatory minimum sentence. United States v. Kelly, 77 M.J. 404, 408 (C.A.A.F. 2018).

In order to determine the appropriateness of the sentence, this Court must consider: (1) the particular appellant, (2) the nature and seriousness of the offense, (3) the appellant's record of service, and (4) all matters contained in the record of trial. United States v. Amador, 61 M.J. 619, 626 (A.F. Ct. Crim. App. 2005) (*citing* United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982); United States v. Alis, 47 M.J. 817, 828 (A.F. Ct. Crim. App. 1998)).

This determination is separate from an act of clemency, i.e., treating an accused with less rigor than he deserves due to a consideration of mercy. The service appeals courts are not authorized to engage in exercises of clemency. Healy, 26 M.J. at 396; *see also* United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

With regard to sentence comparison, this Court is only required to examine sentences in closely related cases. United States v. Anderson, 67 M.J. 703, 705-06 (A.F. Ct. Crim. App. 2009) (citations omitted). "[A]ppellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.'" Id. "If the appellant meets that burden then the Government must show that there is a rational basis for the disparity." Id. Examples of "closely related" cases are those with "coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared." United States v. Lacy, 50 M.J. 286, 288 (C.A.A.F. 1999).

Our superior Court has explained the reason why it makes little sense to compare unrelated cases and why sentence comparison is appropriately rare. "From the mere face of court-martial promulgating orders or similar documents, it is simply not possible to assess the multitude of aggravating and mitigating sentencing factors considered in the cases they represent." United States v. Ballard, 20 M.J. 282, 285 (C.M.A. 1985).

Analysis

Convicted of viewing and possessing over a dozen PDF documents containing child pornography, Appellant now claims his rightfully-deserved sentence to four years and 11 months

of confinement is inappropriately severe.[11] (App. Br. 46.) Appellant rests his entire argument on the fact that he was sentenced to two years confinement in his first court-martial. (Id.)

Appellant is mistaken. To start, Appellant's sentence is entirely appropriate. Looking at the facts and circumstances of his crimes, as well as Appellant personally, a sentence that includes four years and 11 months of confinement is deserved. As described in Issue IV above, Appellant at various times over the course of two days from 6 to 7 January 2020, clicked, viewed, and possessed 13 different PDF documents containing child pornography. Appellant began his perusal of child pornography on 6 January 2020 at 1439 hours in Korea (0539 UTC), clicking on nine PDF documents in an approximate 45 minute time span. The following morning, on 7 January 2020 at 0832 hours in Korea (or 2332 UTC on 6 January 2020), Appellant clicked on another PDF document containing child pornography. Finally, later that afternoon, at 1410 hours in Korea (or 0510 UTC), Appellant clicked on two more PDF documents containing child pornography. (Pros. Exs. 8-9.)

Appellant's actions were not accidental or unsuspecting, but instead were repeated and deliberate actions over the course of nearly 24 hours where Appellant possessed and then viewed documents containing of child pornography. Furthermore, other facts and circumstances in this case show Appellant had a pre-existing penchant for child pornography and fantasized about having sex with young girls. Appellant's acts in possessing and viewing these 13 PDF documents containing child pornography was calculated and intentional, and deserved the adjudged confinement sentence.

[11] Appellant does not contest the appropriateness of the rest of his approved sentence, which is entirely appropriate considering the severity of Appellant's crimes.

The images of child pornography that Appellant possessed and viewed in this case were egregious. (Pros. Ex. 6.)[12] There is no dispute that the persons depicted in these images were very young girls at the time who were pre-pubescent.

Most vile, Appellant had images of young girls engaging in sexual acts. Appellant's iPhone contained two images of the same young girl in sexually explicit poses masturbating – penetrating her anus and vulva with a sex toy, a dildo. (Id.) There were also two other separate images of young girls digitally penetrating their vulva.

Many images mock the innocence of young girls. Appellant viewed and possessed images of young girls with hair and makeup done posing in what would normally be an innocent setting – except these images had young girls posing in a suggestive manner with genitals exposed. For example, one image portrayed a young girl sitting on a chair with her breasts and vulva exposed. Appellant also had access to the following images: a young girl posing with flowers on the beach with her hair done with breasts and vulva exposed; a young girl in pig tails sitting in the woods with her vulva exposed; and a young girl in what appears to be her childhood bedroom also with her vulva exposed. Appellant also possessed a vile image of a young girl who was draped over the toilet with her vulva exposed.

The images that Appellant viewed and possessed were contraband created to exploit children. Not only were these children exposed in a sexual nature, but whoever manufactured these child pornography images ensured that many of these victims had their hair and makeup done demonstrating a purposeful intent to create contraband to lure criminals like Appellant who fantasized about having sex with young girls. It is criminals like Appellant who view and

[12] Images can be found in Prosecution Exhibit 6 → iPhone XR Safari Temporary Directory → Files →.

possess child pornography that perpetuate the circulation of these images. The content of the contraband relevant on this appeal warranted a sentence of four years and 11 months.

Here, the maximum sentence faced by Appellant highlights the seriousness of this offense. Appellant faced a maximum confinement sentence that included 20 years of confinement and a dishonorable discharge. Yet, the members at Appellant's trial sentenced Appellant to less than 25% of that confinement maximum and adjudged *no punitive discharge*.

That last point – the lack of an adjudged punitive discharge – is particularly poignant in this case where Appellant now claims he received too much confinement. In making this argument, however, Appellant fails to acknowledge that both he and his counsel *repeatedly* focused their efforts during sentencing on Appellant not receiving a punitive discharge. During sentencing argument, Appellant's counsel repeatedly argued against adjudging a punitive discharge and finished the argument by stating, "Please do not sentence him to a dishonorable or a bad conduct." (R. at 1548, 1554, 1558-60.) Then, in the defense's surrebuttal sentencing argument, Appellant's counsel focused only on not adjudging a punitive discharge, by stating, "We're asking you to find that point somewhere on the charge sheet before you reach a punitive discharge that would be greater than necessary," by mentioning the "so many people you cut off if you adjudge a dishonorable discharge, a bad conduct discharge," and by concluding, "We simply ask you do not sentence him to a punitive discharge." (R. at 1563.) Confinement was not mentioned by Appellant's defense counsel in the surrebuttal argument.

Most striking, however, was Appellant himself specifically asking the members to sentencing him to *"more time"* in exchange for not adjudging a punitive discharge, when he stated the following during his unsworn statement:

> And consider the effects that, you know, forfeiture or a punitive discharge is going to have on [my family]. The long-term effects.

> What they are going to lose. ***If, you know, some -- some more time in confinement is something you feel that is right and just, I accept that.*** But I'm asking you to punish me, punish me for the things you guys found me guilty of and not to punish my family.

(R. at 1371.) (emphasis added.)

Here, Appellant specifically asked for added confinement time in exchange for not being adjudged a punitive discharge. The panel obliged that request.

Yet, now that he has received the benefit of that offer by not having an adjudged punitive discharge attached to his sentence, Appellant blatantly reneges on his plea to the members and now claims error on the very thing he requested – additional confinement –because his sentence in this case included more confinement time that what he received in his first court-martial. This Court should not be persuaded by Appellant's dubious change of heart.

In making his argument, Appellant claims his second court-martial is "closely related" to his second court-martial and that the two sentences were "highly disparate." (App. Br. at 48.) Appellant is wrong on both counts. First, Appellant claims the cases are "closely related" by making the same failed argument he makes in Issue I above – namely that the "conduct at issue" in both his first and second court-martial involves the possession and viewing of the same child pornography, or as Appellant puts it, the "same material." (App. Br. at 48.)

Yet, even Appellant in his brief is forced to admit the child pornography charges from his first court-martial did not include the "same material" as that involved in this current court-martial. (*See* App. Br. at 2-3, where Appellant states that child pornography found during an initial search was charged in his first-martial, but that 13 additional PDF documents containing child pornography found in a subsequent search were specifically excluded from Appellant's first court-martial and instead were the basis for the charges in Appellant's current court-martial.)

Indeed, in Appellant's first court-martial, the charged child pornography related to Appellant's iPhone XR amounted to a single image that Appellant viewed and possessed on or about 22 December 2019. In contrast, the child pornography at issue in this court-martial involved 13 separate PDF documents viewed and possessed by Appellant on or about 6-7 January 2020. Indeed, when the military judge at the instant court-martial inquired about double jeopardy concerns and specifically asked if the 13 charged documents in this current case were introduced in Appellant's first trial, Appellant's counsel agreed they were not. (R. at 82-84.)

Thus, the child pornography found on Appellant's iPhone that is at issue in this case is not the "same material" as the sole image of child pornography at issue in Appellant's first trial. Here, while Appellant may have been charged in both cases with possession and viewing of child pornography, the child pornography was not the "same" as Appellant alleges. Moreover, the crimes occurred weeks apart, the instant charges involve 13 times as many documents as there was just one image in the first trial, and the child pornography is in a different form (contained within PDF documents vice image files). Thus, the possession and viewing offenses in each case were not part of a "common crime" or part of a "common or parallel scheme," and thus not "closely related."

Furthermore, while Appellant was sentenced to two years confinement despite having additional convictions in his first court-martial, this Court has no idea what matters of mitigation and extenuation was presented in that case or the full details of Appellant's other convictions aside from various pieces of uncharged misconduct introduced during Appellant's instant trial. What this Court does know from his first trial, however, is that even Appellant's trial defense counsel recognized that Appellant's sentence at his first court-martial was "very light" and a "very favorable sentence for a child pornography case." (*See* Dec. of Maj JB.)

What this Court also knows is that Appellant's first court-martial included only one image of child pornography that was found on Appellant's iPhone. In this case, that number is much greater. As Appellant's own trial defense counsel acknowledged, Appellant's second trial had a "much larger selection of child pornography." (Id.) Moreover, this Court also knows that in this case, Appellant specifically asked the members for an increased confinement sentence in exchange for the members not adjudging a punitive discharge.

At trial, Appellant got his wish and was adjudged no punitive discharge. Now safe from the possibility of a punitive discharge, this Court should not allow Appellant to now turn face and argue his confinement sentence is too high. Appellant has received the benefit of his plea to the court members – he should likewise now live with the appropriate, lawful, and just confinement sentence adjudged by the members in response to that plea.

All things considered, Appellant's sentence amounts to a lawful and legally supportable sentence. Evaluating the facts and circumstances in the record of Appellant's case, the seriousness of his offenses, his service record, his particular character and rehabilitative potential, and in consideration of the entire record, including Appellant's specific request to the members to sentence him to additional confinement in exchange for not adjudging a punitive discharge, this Honorable Court should leave his confinement sentence undisturbed and affirm his entire sentence.

X.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ.

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and Entry of Judgment (EOJ) in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*Statement of Trial Results*, 26 June 2023, ROT, Vol. 1); (*Entry of Judgment*, 11 August 2023, ROT, Vol. 1.)

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Appellant asserts that his convictions did not trigger the firearm prohibition under 18 U.S.C. § 922. (App. Br. at 51). He also argues that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, citing the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). (Id.) Appellant's constitutional argument lacks merit and is a collateral matter beyond this Court's authority to review.

A. This court lacks jurisdiction to determine whether Appellant should be criminally indexed in accordance with 18 U.S.C. § 922.

This Court recently held in its published opinion in Vanzant that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are

beyond the scope of this Court's jurisdiction under Article 66, UCMJ. 84 M.J. 671, 675 (A.F. Ct. Crim. App. 28 May 2024). Thus, this Court lacks jurisdiction to grant Appellant relief.

B. The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant.

Appellant argues that 18 U.S.C. § 922 is unconstitutionally applied because he is not a violent offender. (App. Br. at 51, 53.) Even if this Court considers Appellant not to be a physically violent offender, he is a danger to our society. *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) ("[The] use of children as … subjects of pornographic materials is very harmful to both the children and the society as a whole."). Felons convicted of child pornography related offenses are required to register as sex offenders – even if they did not personally abuse the child. *See* 34 U.S.C. § 20911. Given this nation's historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.

C. This Court may not order correction of the First Indorsement **to the Entry of Judgment under Article 66(d)(2), UCMJ.**

Appellant suggests that Vanzant is not dispositive of his request because he has framed the issue merely as an error in post-trial processing under Article 66(d)(2), UCMJ, which he claims this Court did not analyze in Vanzant. (App. Br. at 54.) First, the Vanzant opinion was clear as to the scope of its jurisdiction under Article 66, UCMJ. Next, Appellant is not entitled to relief under Article 66(d)(2), UCMJ. A CCA "***may*** provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial ***after*** the judgment was entered into the record under section 860c of this title[.]" (emphasis added). The 18 U.S.C. § 922 annotation was entered into the record before the EOJ was entered into the record. The 18 U.S.C. § 922 annotation on the First Indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other information and the STR are

entered into the record. 10 U.S.C. § 8Article 60(1)(C). Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" cited in Article 66(d)(2). *Compare* Article 66 *with* Article 60c. Because the STR and the First Indorsement are entered into the record before the EOJ is entered into the record under Article 60c, the 18 U.S.C. § 922 annotation on the STR's First Indorsement is not an error occurring "*after* the judgment was entered into the record." Article 66(d)(2) (emphasis added).

Next the STR and its First Indorsement are entered into the record again as attachments to the EOJ. Article 60c(a)(1)(A). Because they are entered again as attachments to the EOJ they are simultaneous with the judgment of the court. The STR and the STR's First Indorsement are not errors occurring after the judgment was entered into the record.

Appellant suggests that this Court could correct the First Indorsement to the EOJ because it was attached to the EOJ, which was completed after the EOJ during post-trial processing. (App. Br. at 54-55.) But a correction to the EOJ's First Indorsement would be a pyrrhic victory. Even if this Court had authority to remove the firearms prohibition annotation from the First Indorsement to EOJ (*Entry of Judgment*, ROT Vol. 1 at 3), it could not remove the firearms annotation from the STR that was incorporated into the EOJ (*Entry of Judgment*, ROT, Vol. 1, Attach. at 3) because that annotation on the STR occurred before the EOJ was entered into the record. Thus, Appellant would remain in the same situation he is in now – having a firearms prohibition annotated on the EOJ. Since this Court's intervention under Article 66(d)(2) would not provide meaningful relief, this Court should deny Appellant's claim.

Lastly, Appellant claims that this Court could remand for correct under R.C.M. 1112(d)(2). (App. Br. at 55.) But Appellant failed to articulate what authority this Court has to remand for correction for an issue that this Court does not have jurisdiction to review. In any

event, remand is not appropriate because even if this Court had jurisdiction to review a collateral matter, the 18 U.S.C. § 922 annotation was constitutionally applied to Appellant. For these reasons, this Court should deny this assignment of error.

XI.

THE RECORD OF TRIAL'S OMISSIONS DO NOT REQUIRE RELIEF OR REMAND FOR CORRECTION.

Additional Facts

An Article 30a proceeding was held on 28 April 2020. (R. at 2, 13.) As Appellant correctly stated, the record of the Article 30a proceeding was not included in the record of trial. The United States, in a motion to attach filed simultaneously with this answer, provided this Court with record of the Article 30a proceeding.

Standard of Review

Whether an omission from a record of trial is "substantial" is a question of law reviewed de novo. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the government must rebut. United States v. Henry, 53 M.J. 108, 1111 (C.A.A.F. 2000) (citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts can conduct an informed review. *See* United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App.

31 October 2016) (unpub. op.) (finding that despite the omission from the record of an Article 39(a) session containing the military judge's findings and conclusions related to an R.C.M. 917 motion, the record, as it was, was "adequate to permit informed review by this court and any other reviewing authorities"). R.C.M. 1112(b) states that a record of trial shall include "[a] substantially verbatim recording of the court-martial proceedings."

Appellant asserts that his Article 30a proceeding was not included in the record of trial. (App. Br. at 57.) Although the record of trial was missing the Article 30a proceeding, this Court can conduct appellate review because in a separate motion to attach the United States filed the missing documents from the record. Recently, in United States v. Mejia, this Court completed its Article 66, UCMJ, review of the appellant's court-martial when the United States filed a motion to attach the missing Article 30a proceeding. ACM 40497, 2025 CCA LEXIS 18 (A.F. Ct. Crim. App. 16 January 2025) (unpub. op.). Therefore, a remand is not necessary or appropriate.

Even if this Court did not have access to the Article 30a proceeding, this Court can conduct meaningful appellate review. The substance of the search warrant that resulted from the Article 30a proceeding is part of the record. (App. Ex. XV, App. Ex. XVI, App. EX XVIII, App. EX. XIX.)

Notably, Appellant's convictions in Casillas II do not derive from the search authorization that resulted from the Article 30a proceeding. The Article 30a proceeding is not referenced in an assignment of error. As a result, this Court's appellate review will not require any scrutiny of Appellant's Article 30a proceeding. If scrutiny is required, this Court has access to the search warrant already contained in the record of trial.

Nevertheless, the proceedings are contained in the motion to attach filed simultaneously with this answer brief. For these reasons, Appellant was not prejudice given that the initial record of trial did not contain his Article 30a proceeding. This Court should deny this assignment of error.

XII.[13]

THE SEARCH OF APPELLANT'S IPHONE DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHT.

Additional Facts

On 4 June 2023, the military judge granted the defense's motion to suppress evidence seized from Appellant's iPhone XR. (App. EX. XXII.) In short, "the military judge ruled that the government failed to produce evidence that [IA] was acting pursuant to any search authorization when he was searching the Accused's phone on 17 September 2022." (Id.) The military judge found that the government did not prove that the evidence would have been inevitably discovered nor that the good faith exception to the exclusionary ruled applied. (Id.) Lastly, the military judge found that the files obtained from Appellant's iPhone was the primary direct evidence of the charged offenses and therefore the government did not demonstrate that the deterrence of future unlawful searches or seizures is not appreciable or that such deterrence did not outweigh the costs to the justice system of excluding the evidence. (Id.)

Subsequently, the government moved for reconsideration of the military judge's ruling suppressing the evidence from Appellant's iPhone. (App. Ex. XXIII.) The government presented new evidence, the testimony of IA, demonstrating that he was relying on a valid search authorization dated 23 March 2020 – which trial defense counsel conceded was a valid search

[13] Appellant raised this assignment of error under Grostefon, 12 M.J. 431.

authorization. (App. Ex. XXXI.) The military judge found that IA testified credibly. (Id.) IA affirmed that he "relied solely on the 23 March 2020 search authorization when reviewing the materials in the temporary storage folder of the Safari web browser on the forensic copy of the Accused's iPhone XR, with trial counsel on 17 September 2022." (Id.)

Lastly, the military judge acknowledged that the government was delayed in providing the testimony of IA – that clarified what search authorization he relied on. (Id.) With that said, the military judge found that although this testimony was not provided at the prior motions hearing, there was in fact new evidence to present, and therefore the government met its burden under a motion for reconsideration to provide new facts (Id.) For these reasons, the military judge granted the government's motion for reconsideration and the evidence was not suppressed (Id.) (Maj AM Declaration, dated 20 February 2025.)

Standard of Review

This court reviews a military judge's ruling on a motion to suppress evidence for an abuse of discretion. United States v. Lattin 83 M.J. 192, 197-98 (C.A.A.F. 2023).

Law and Analysis

"[N]o Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV. Evidence obtained as a result of an unlawful search or seizure is inadmissible. Mil. R. Evid. 311. Here, the military judge did not abuse his discretion in granting the government's motion for reconsideration. The military judge was within his discretion to accept the new facts – IA's testimony – in finding that the agent did in fact rely upon a lawful search authorization when searching Appellant's iPhone. IA conducted a lawful search.

Appellant argues that the military judge abused his discretion in granting the motion for reconsideration because the government had ample opportunity to describe what search authorization the agent relied on. (App. Br. Appendix at 3.) Appellant further argues that the government did not provide reasonable justification for its failure to prove what search authorization IA relied on until the motion for reconsideration. (Id.) The military judge in his reconsideration ruling noted that while it was true that the previous military judge asked trial counsel multiple times under which search authorization IA relied on, trial counsel told the military judge that IA could have used either search authorization to perform the search. (App. Ex. XXXI.) Trial counsel did not believe that not providing what search authorization PO1 IA relied on to the military judge was case dispositive. (Id.) Trial counsel believed either search authorization was sufficient for the agent to rely on. (Id.)

The military judge considered United States v. Vangelisti, 30 M.J. 234, 241 (C.M.A. 1990) in which the court held that a military judge did not abuse his discretion when he denied a government's motion for reconsideration when the government failed to properly read the defense counsel's motion to suppress. (Id.) The military judge understood that it was within his discretion to determine whether the government provided new facts. Further, R.C.M. 905(f) states that "[o]n request of any party or *sua sponte*, the military judge may, prior to the entry of judgment, reconsider any ruling. . . ." Even the rules themselves give military judge's considerable discretion to adjudicate motions for reconsideration.

The military judge did find that the government presented new facts. Unlike Vangelisti where the trial counsel had complete ignorance of the issues at hand and therefore did not meet it its burden to move for reconsideration, here the trial counsel in the motion for reconsideration clarified what search authorization IA relied on when searching Appellant's iPhone. *See* 30 M.J.

at 241. This clarification was vital for the military judge to make an informed decision regarding the defense's motion to suppress evidence. Thus, the military judge did not abuse his discretion in allowing the government to present this evidence. Further, the search authorization that IA ultimately relied on was not in dispute, and trial defense counsel agreed that it was a valid search authorization. In sum, IA conducted a lawful search and evidence derived from the search was admissible. The military judge did not abuse his discretion in allowing evidence from the search to be presented at trial. For these reasons, this Court should deny this assignment of error.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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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 3 March 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION FOR**
Appellee,	)	**ENLARGEMENT OF TIME**
	)	**FOR REPLY BRIEF**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	3 March 2025

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

Master Sergeant (MSgt) Nathaniel A. Casillas, Appellant, hereby moves for an enlargement of time to file a reply to the United States' Answer to Assignments of Error. MSgt Casillas requests an enlargement for a period of five days, which will end on **15 March 2025**. The record of trial was docketed with this Court on 14 December 2023. From the date of docketing to the present date, 445 days have elapsed. On the date requested, 457 days will have elapsed.

Undersigned counsel makes this request, with MSgt Casillas' agreement, to ensure that she can (1) fully review and respond to the Government's brief and (2) obtain necessary review of MSgt Casillas' reply brief within the Air Force Appellate Defense Division before filing his reply. Undersigned counsel requires additional time to accomplish both above listed items due to the length of the Government's brief, which exceeds both this Court's page and word-limit for filings: 81 pages and 23, 779 words. Further, in addition to reviewing this lengthy filing, undersigned counsel must also review four documents, totaling 166 pages, that the Government now seeks to attach to the record. Undersigned counsel must review these pages in conjunction with reviewing the Government's answer brief to determine whether to oppose or not oppose the Government's motion to attach. Furthermore, undersigned counsel is also working to complete the appellant's brief in *United States v. Hagen*, No. ACM 40561, for filing by this Friday, 7 March 2025.

In accordance with this Honorable Court's Rules of Practice and Procedure and order, undersigned counsel notes the following information:

Undersigned counsel currently represents 18 clients and is presently assigned as sole counsel on four cases pending initial brief before this Court.

A general court-martial composed of officer members convicted MSgt Casillas, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). R. at 1278; Charge Sheet, 17 November 2022. The members sentenced him to four years and eleven months' confinement, reduction in pay grade to E-1, and a reprimand. R. at 1623. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 20 July 2023. The convening authority denied MSgt Casillas' request to defer confinement but granted both his request to defer all automatic forfeitures and defer the reduction in grade until the date the military judge signed the entry of judgment. *Id.* The convening authority also granted MSgt Casillas' request to waive all automatic forfeitures for a period of six months, or release from confinement, or expiration of term of service, whichever is sooner, with the waiver commencing on the date the military judge signed the entry of judgment, for the benefit of MSgt Casillas' dependents. *Id*. MSgt Casillas' 10-volume record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. MSgt Casillas is confined.

MSgt Casillas (1) was provided an update that the Government's brief would be due today and advised that depending on the length of that filing, undersigned counsel may need to request this enlargement of time, (2) he was advised of this possible request for an enlargement of time, and (3) he agreed with this request for an enlargement of time.

WHEREFORE, MSgt Casillas respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 March 2025.

Respectfully submitted,

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5 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	FOR REPLY BRIEF
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS** United States Air Force, *Appellant.*	)	No. ACM 40551
	)	5 March 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file a Reply Brief in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

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Appellate Government Counsel
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1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 March 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES' MOTION TO EXCEED PAGE LIMIT**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS** United States Air Force *Appellant.*	)	No. ACM 40551
	)	3 March 2025

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

Pursuant to Rule 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States moves to exceed this Court's 50-page limit on filings.

Rule 17.3 provides that "filings shall not exceed either 50 pages or 20,000 words, excluding indices, tables, attachments, and appendices." There is good cause for exceeding the page limit. The United States' answer to Appellant's assignments of error—which raised 12 substantive issues, including one claim of error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)—is 81 pages, totaling 23,779 words. Exceeding the page limit was necessary to sufficiently address each issue.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to exceed the 50-page limit.

[redacted]

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MARY ELLEN PAYNE
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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 3 March 2025.

VANESSA BAIROS, Capt, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**UNITED STATES MOTION TO ATTACH**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS** United States Air Force *Appellant.*	)	No. ACM 40551
	)	3 March 2025

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves this Court to attach the following documents to this motion:

- Appendix A – Excepts from Casillas I verbatim transcript, 24 September 2022 (31 pages)
- Appendix B – Maj Edstrom declaration Article 30a proceeding, 25 February 2025 (2 pages)
- Appendix C – Article 30a Proceeding, multiple dates (131 pages)
- Appendix D – Maj Bairos declaration, 3 March 2025 (2 pages)

Many of Appellant's assignments of error asserts that the government erred in trying Appellant for a second time. Excerpts from the United States v. Casillas I verbatim transcript provides context explaining how the government became aware of additional crimes – the newly discovered contraband images found in Appellant's iPhone XR. Matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). Appendix A is necessary to explain why Appellant was tried twice for possessing and viewing child pornography, as the parties acknowledged on the record. (R. at 84.)

Appellant's eleventh assignment of error asserts that his Article 30a proceeding was not included in the record of trial. Assistant trial counsel mentioned during arraignment that an Article 30a proceeding was held in Appellant's case on 9 April 2022. (R. at 2.) Undersigned counsel reached out to the servicing base legal office to inquire about the missing documents listed in Appellant's assignment of error, and received the attached documents – Appendix B-C. Here, the transcript raised the issue that an Article 30a proceeding was conducted in Appellant's case, and the motion to attach can help resolve that issue and complete the record of trial. (R. at 2); Jessie, 79 M.J. at 444.

United States moves this Court to grant this motion to attach the appendices to the record of trial.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

[redacted]
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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 3 March 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S OPPOSITION**
Appellee,	)	**TO UNITED STATES' MOTION**
	)	**TO ATTACH**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	10 March 2025

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

Appellant opposes the Government's motion to attach Appendix C ("Article 30a Proceeding, multiple dates (131 pages)") of the United States' Motion to Attach, Mar. 3, 2025. JT. CT. CRIM. APP. R. 23(c); A.F. CT. CRIM. APP. R. 23.2.

Appellant asserted that his record of trial is incomplete because portions of the Article 30a proceedings that occurred in his case are missing from the record of trial. Br. on Behalf of Appellant at 56-58. The Government now seeks to attach Appendix C of the United States' Motion to Attach, asserting the documents contained in Appendix C were received from the servicing base legal office. United States' Motion to Attach, Mar. 3, 2025.

Appellant opposes the attachment of Appendix C because undersigned counsel was not Appellant's trial defense counsel and cannot herself confirm the completeness of the one-hundred and thirty-one pages contained within Appendix C of the United States' Motion to Attach. *See* United States' Motion to Attach, Mar. 3, 2025, Appendix C. Moreover, Appellant's concern for the completeness of the documents is further exacerbated by the explanation provided in Appendix B of the United States' Motion to Attach, which explains that the Government is aware that at least one email remains missing. United States' Motion to Attach, Appendix B. The

correct means to ensure how complete the Article 30a record of proceedings is, is to remand the case for correction under Rule for Court-Martial (R.C.M.) 1112(d)(2).

Given that the documents in Appendix C are not sealed, there is no reason to think that remand for correction would require any significant amount of time. And remand would allow the parties and military judge to examine and respond to the proposed correction, resolving with assurance the level of completeness of the Article 30a proceedings. R.C.M. 1112(d).

Remand for correction would also provide Appellant with the due process that is bestowed on him in R.C.M. 309(e). R.C.M. 309(e) provides that a record of any Article 30a proceeding "shall be *included* in the record of trial." R.C.M. 309(e) (emphasis added). When R.C.M. 309(e) is read in conjunction with R.C.M. 1112(b), it becomes clear that Article 30a proceedings should be treated the same as the examples listed in R.C.M. 1112(b)(1)-(9): R.C.M. 1112(b) uses the word "include," like R.C.M. 309(e), to explain example contents that must be included in the record of trial. *Compare* R.C.M. 309(e) ("shall be *included* in the record of trial") (emphasis added), *with* R.C.M. 1112(b) ("The record of trial in every general and special court-martial shall *include*") (emphasis added). Moreover, while R.C.M. 1112(f)(1) was recently amended to require attachment of "[a] copy of all materials required to be provided to the military judge pursuant to R.C.M. 309(a)(3),"[1] a conflict in the rules persists. R.C.M. 309(e)'s "shall be included" language was not changed when R.C.M. 1112(f)(1) was modified. Therefore, while R.C.M. 1112(f), and R.C.M. 1112(f)(1) as a sub-part, do not use the word "include," R.C.M. 309(e) still does. *Compare* R.C.M. 309(e) ("shall be *included* in the record of trial") (emphasis added), *with* R.C.M. 1112(f) ("a court reporter shall attach the following matters to the record before the certified record of trial is forwarded to the office of the Judge Advocate General for appellate review"). Given this tension

[1] Exec. Order No. 14,130, 89 Fed. Reg. 105343, 105360 (Dec. 20, 2024).

in the rules, the required inclusion of Article 30a proceedings should be reviewed in line with R.C.M. 1112(b) and remanded for correction under R.C.M. 1112(d) because attachments cannot complete an incomplete record of trial. *See United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. 9 Jun. 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete.").

Therefore, Appellant respectfully requests this Court deny the Government's motion to attach Appendix C of the United States' Motion to Attach.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 March 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**APPELLANT'S MOTION TO**
Appellee,	)	**ATTACH DOCUMENTS**
	)	
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force,	)	
Appellant.	)	22 January 2025

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

Pursuant to Rule 23(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the Declaration of Appellant found at Appendix A and the member data sheets and members' Single Unit Retrieval Format (SURF) found at Appendix B to the Record of Trial.

The attached sworn declaration (Appendix A) is relevant to this Court's consideration of Appellant's tenth assignment of error because it presents the factual bases that create a controversy in this case, the deprivation of Appellant's possession of firearms. This Court should attach this declaration to the record and consider its contents pursuant to *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), because it is necessary to resolve whether an injury in fact occurred when the Staff Judge Advocate's indorsement to the entry of judgment stated Appellant was firearm prohibited. *B.M. v. United States*, 84 M.J. 314, 317 (C.A.A.F. 2024); Entry of Judgment.

> As a prudential matter, this Court follows the principles of standing that apply to Article III courts. *United States v. Wuterich*, 67 M.J. 63, 69 (C.A.A.F. 2008). In accordance with these principles, this Court only addresses claims raised by parties who can show "an injury in fact, causation, and redressability." *Id*. (citing *Sprint Commc'ns Co. v. APCC Servs., Inc*., 554 U.S. 269, 273, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008)).

Id. Appellant's declaration outlines the specific, particularized injury to Appellant as a result of the 18 U.S.C. § 922 prohibition on the Staff Judge Advocate's indorsement to the entry of judgment.

The attached members data sheets and SURFs (Appendix B) are relevant to this Court's consideration of Appellant's seventh assignment of error. This issue is raised by matters in the record, the convening authority's orders, but not fully resolved by those matters. This Court should attach the matters contained in Appendix B to the record and consider its contents pursuant to *Jessie*, 79 M.J. 437, to determine whether the court-martial panel was properly constituted. *See United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023). The convening authority received these court member data sheets and SURFs to review before detailing members to the court-martial. *See* Pretrial Advice.

WHEREFORE, Appellant respectfully requests that this Court grant this motion to attach.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 22 January 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
Appellee,	)	TO APPELLANT'S
	)	MOTION TO ATTACH
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
NATHANIEL A. CASILLAS,	)	No. ACM 40551
United States Air Force	)	
Appellant.	)	29 January 2025

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

Under Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion to attach Appendix A – his declaration signed 10 January 2025, and Appendix B – member data sheets and members' Single Unit Retrieval Format (SURFs).

A. <u>Appendix A – Appellant's Declaration</u>

Consideration of Appellant's declaration is not necessary to review his tenth assignment of error regarding his firearm prohibition. Appellant's declaration states that the firearms prohibition under 18 U.S.C. § 922 will prevent him from "gaining and maintaining a concealed carry permit," legally carrying a firearm, and transporting his firearms. (App. Mot. Appendix A.) Appellant asserts that he owned handguns for personal and home protection, and owned rifles for hunting and sport. (Id.) Appellant argues that this Court should attach his declaration to the record of trial because "it is necessary to resolve whether an injury in fact occurred when the Staff Judge Advocate's indorsement to the entry of judgment states Appellant was firearm prohibited." (App. Mot. to Attach at 1.)

Our superior Court has held that appellants may supplement the record with affidavits

when claims and issues raised by the record are not fully resolvable by the materials in the record. United States v. Jessie, 79 M.J. 437, 442 (C.A.A.F. 2020) (internal citations omitted). But this case is fully resolvable by the materials in the record. This Court should deny Appellant's motion to attach his declaration for two reasons: 1) documentation of Appellant's firearm prohibition under 18 U.S.C. § 922 is already found in the record, and 2) his desire to possess firearms again are unnecessary to address Appellant's tenth assignment of error.

1. The record contains information regarding Appellant's firearm prohibition.

The fact that Appellant's convictions resulted in firearm prohibition is undisputed and evidenced throughout the record. (*Entry of Judgment*, 11 August 2023, ROT, Vol. 1.) Because this information is found within the record, Appellant's declaration notating that the firearm prohibition impacted his lawful firearm ownership is unnecessary.

2. Appellant's claim that he would lawfully carry firearms in the future is not necessary to address Appellant's assignment of error.

Appellant's assertion that he wishes to maintain ownership of his firearms in the future is not relevant to whether Appellant's conviction should have triggered firearm prohibition. And, assuming a post-trial processing error exists, this information is also unnecessary to evaluate whether Appellant has standing to raise this issue.

Appellant's tenth assignment of error asserts that his convictions for a nonviolent offense did not trigger firearm prohibition under 18 U.S.C. § 922 and the Staff Judge Advocate's decision to require the same was erroneous. (App. Br. at 53.) A firearms prohibition would be triggered automatically by the finding of guilt for a crime punishable by imprisonment for a term exceeding one year. 18 U.S.C. § 922(g). The maximum sentence for a violation of Article 134 – viewing and possessing child pornography – include a term of confinement for 10 years. Manual for Courts-Martial, United States, part IV, para. 95.d(1) (2019 ed.). Appellant's

convictions for possessing and viewing child pornography triggered the firearms prohibition. Appellant's declaration notating his past firearm ownership and his desire to maintain lawful possession of his firearms are not relevant for determining whether his convictions triggered a firearm ban. Similarly, the declaration is not relevant to establishing whether Appellant has standing to raise this issue. Regardless of whether there was a firearms annotation on Appellant's post-trial paperwork, Appellant would still be prohibited from lawfully obtaining a firearm by 18 U.S.C. § 922(g). Thus, Appellant's assignment of error is fully resolvable by the facts in the record. Appellant's claims that he used to possess firearms and wants to possess them once again is not necessary for resolving his assignments of error. This Court should deny the motion to attach Appellant's declaration.

B. Appendix B – Member Data Sheets and SURFs

This Court should also not consider the member data sheets and SURFs as it relates to Appellant's seventh assignment of error, arguing that the panel of members were not properly constituted, because the issue is resolvable by materials already in the record. This Court may consider extra-record documents where: (1) such documents are "necessary for resolving issues raised by materials in the record"; and (2) the issues are not "fully resolvable by those materials" already in the record. Jessie, 79 M.J. at 444-45.

Appellant argues that the convening authority considered race and gender in selecting potential panel members. (App. Br. at 34.) The crux of Appellant's argument is that in Special Order A-8, the convening authority removed five female officers and four male officers and then added the exact same number of female and male officers." (App. Br. at 38.) Appellant argues that the convening authority replaced the excused members with the exact same ratio of male to female members, which demonstrated "a deliberate effort to balance the gender composition of

the detailed members." (Id.) Although the member data sheets and SURF's revealed the member's gender and race on the forms, Appendix B does not reveal whether the convening authority took gender and race into consideration. What appears to prompt this assignment of error were the convening orders in which the convening authority replaced members with the same ratio of male to female members. This alone, which is already included in the record of trial, is sufficient for this Court to decide Appellant's seventh assignment of error. Nothing in Appendix B would assist this Court in determining the convening authority's thought process in choosing potential panel members. To the contrary, the pretrial advice shows that the Staff Judge Advocate advised the convening authority to pick qualified members based on their age, education, training, experience, length of service, and judicial temperament – not their gender and race. (Pretrial Advice, 7 February 2023, ROT, Vol. 5.) The member data sheets and SURFs are not necessary to resolve the issue whether the court-martial panel was properly constituted.

Beyond this claim, Appellant does not offer any analysis to explain how the materials in the motion to attach support the argument that the court was improperly impaneled, an issue raised for the first time on appeal. Thus, Appellant failed to articulate the relevance and necessity to supplement the record with Appendix B. (A.F. Ct. Crim. App. R. 23.3(b)). Thus, this Court should deny the motion to attach the member data sheets and SURFs.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion to attach Appendix A-B.

[redacted]

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MARY ELLEN PAYNE
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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 29 January 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant*.	)	No. ACM 40551 17 March 2025

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

In furtherance of the issues raised in his opening brief, filed on 21 January 2025 (App. Br.), and replying to the Government's answer brief (Ans.), filed on 3 March 2025, Appellant, Master Sergeant Nathaniel A. Casillas, provides the following arguments. JT. CT. CRIM. APP. R. 18(d).

Argument

I.

The Double Jeopardy Clause of the Fifth Amendment requires dismissal of Appellant's convictions because Appellant was twice tried for the same "material," an iPhone XR.

1. This issue should be reviewed for plain error.

Appellant did not affirmatively waive this issue because a waiver of his right against double jeopardy was never clearly established. "Whether an appellant has waived an issue is a legal question that this Court reviews de novo." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (citing *United States v. Haynes*, 79 M.J. 17, 19 (C.A.A.F. 2019). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Davis*, 79 M.J. at 331 (quoting *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)).

"Relevant to [this] analysis is the particular right at stake." *United States v. Malone*, No. ARMY 20230151, 2025 CCA LEXIS 75, at *7 (A. Ct. Crim. App. Feb. 25, 2025) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008). Here, the issue is Appellant's constitutional right to not be twice put in jeopardy for the same offense. U.S. CONST. amend. V; *United States v. Broce*, 488 U.S. 563, 588 (1989) ("The Constitution's prohibition against placing a defendant in jeopardy twice for the same conduct is fundamental.") When faced with the question of whether an appellant has waived a constitutional right, appellate courts apply a presumption against finding waiver. *United States v. Blackburn*, 80 M.J. 205, 209 (C.A.A.F. 2020)). To find waiver of a constitutional issue, the waiver must be "clearly established." *United States v. Sweeney*, 70 M.J. 296, 303-304 (C.A.A.F. 2011) (citing *Harcrow*, 66 M.J. at 156).

Here, it was never clearly established that Appellant was waiving his constitutional right against double jeopardy. The military judge signaled that he had double jeopardy concerns[1] but the military judge never asked, and Appellant never indicated that he was knowingly relinquishing his right against double jeopardy. The Government points to defense counsel's statement that they had no further motions as evidence that Appellant waived this right,[2] but defense counsel's pro forma statement after the entry of pleas does not adequately reflect that Appellant knew "he was intelligently and voluntarily giving up the right to make motions." *See Malone*, 2025 CCA LEXIS 75, at *11-12 (finding defense counsel's pro forma statement—"that defense has no motions"—following the military judge's request for appellant's plea failed to demonstrate waiver of appellant's multiplicity claim). Like the Army Court of Criminal Appeals (ACCA) explained in

[1] R. at 84 ("I'm also – the obvious reason I'm asking these questions has [sic] raised double jeopardy concerns. My understanding is if the parties have any concerns with any double jeopardy aspects of this court-martial they'll bring it to my attention via appropriate motion.").
[2] R. at 471 ("MJ: And just so it is clear as well, Defense Counsel, you have no further motions, correct? DC: That is correct, Your Honor.").

Malone, Appellant needed to have "sufficient knowledge to make his waiver knowing and intelligent." *Id*. at *10, *13. Here, like in *Malone*, the military judge only advised Appellant that "any motions to dismiss should be made, not what would happen if such motions were not made."[3] R. at 471. Moreover, stating that the defense has no further motions is distinct from, for example, when defense counsel states "no objection" to instructions or an argument that has been made because, as the ACCA explained, the appellant could know in those circumstances "the content and scope of what he was not objecting [to]." *Id*. at *11-12. Conversely, the record does not reflect that Appellant made a knowing, intelligent, and deliberate decision to waive his right against double jeopardy.[4]

Because waiver of this issue was not clearly established and this issue is presumed to have not been waived, the failure to assert Appellant's right only forfeits the issue. *See* Rules for Courts-Martial (R.C.M.) 905(e)(1)[5] ("Failure by a party to raise defenses or objections or to make motions or requests which must be made before pleas are entered . . . forfeits the defenses or objections absent an affirmative waiver"). This Court reviews forfeited issues for plain error. *See* App. Br. at 4-5 (articulating the standard of review).

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[3] *Malone* did not include a "waive all waivable motions" provision. *Malone*, 2025 CCA LEXIS 75, at *11.

[4] Similarly, the record does not reflect that Appellant understood the implication of defense counsel's sentencing argument, discussed in App. Br. at 7, because the military judge never addressed the implication of the argument with Appellant nor defense counsel. *See* R. at 1552; *Malone*, 2025 CCA LEXIS 75, at *10-11 (finding no waiver despite the implication from appellant's remarks because the "military judge never clarified with appellant nor the parties whether . . . appellant . . . was knowingly relinquishing any protections against multiplicious convictions."). This is distinct from *United States v. Spears*, 39 M.J. 823, 823 (A.F.C.M.R. 1994), where defense counsel waived a multiplicity issue when the military judge fully discussed multiplicity and asked defense counsel if the specifications were multiplicitous, and defense counsel confirmed they were not raising that issue.

[5] Unless otherwise noted, all references to the Uniform Code of Military Justice (UCMJ), Military Rules of Evidence (Mil. R. Evid.), and the R.C.M. are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

2. The Government plainly erred because the specifications in *Casillas* 1 and *Casillas* 2 were not distinct acts made punishable by law. [6]

To demonstrate plain error, case law suggests that Appellant must show that the specifications at issue are "facially duplicative." *United States v. Forrester*, 76 M.J. 479, 484 n.5 (C.A.A.F. 2017) (citing *United States v. Heryford*, 52 M.J. 265, 266 (C.A.A.F. 2000)). However, closer review of applicable precedent reveals that specifications need only be facially duplicative when the appellant has pled guilty. *See, e.g.*, *United States v. Lloyd*, 46 M.J. 19, 24 (1997) (establishing waiver of multiplicity issues in *guilty plea cases* if the specifications are not facially duplicative; "if the factual component of each offense said to be multiplicious is not shown to be the same . . . appellate review of the legal aspect of such a claim is not required under our guilty plea doctrine"); *Harwood*, 46 M.J. at 28 (explaining "a guilty plea generally waives any appellate consideration of legal claims [including multiplicity] requiring a hearing to establish the factual basis of those claims"); *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004) (explaining "[a]n unconditional guilty plea waives a multiplicity issue unless the offenses are facially duplicative" and that "[t]his analysis turns on both the factual conduct alleged in each specification and the providence inquiry conducted by the military judge at trial.") (cleaned up)); *United States v. Campbell*, 68 M.J. 217, 219 (C.A.A.F. 2009) (explaining that because the appellant pled guilty, he relinquished his multiplicity claim, unless the offenses were facially duplicative) (citing *Broce*, 488 U.S. at 571).

Lloyd, *Harwood*, and the like draw support from *Broce*, which explained that by choosing to plead guilty, an appellant possesses "an understanding of the law in relation to the facts" and if they nevertheless choose to concede guilt for two separate crimes, the appellant's double jeopardy

[6] To avoid confusion, Appellant refers to the present case as "*Casillas* 2" and his previous court-martial, *United States v. Casillas*, No. ACM 40449, as "*Casillas* 1."

claim is waived, except when "a plea of guilty to a charge . . . *judged on its face*. . . is one which the State may not constitutionally prosecute." *Broce*, 488 U.S. at 570, 575 (quoting *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975) (per curiam) (emphasis in original)). Explicit in this precedent is the reasoning that the appellant chose to plead guilty. Therefore, this precedent should be limited to claims of double jeopardy in guilty plea cases. Because Appellant did not plead guilty, it should not apply here. Nonetheless, the specifications in *Casillas* 2 are facially duplicative of the specifications in *Casillas* 1.

"Whether two offenses are facially duplicative is a *question of law* that [this Court] reviews de novo." *Pauling*, 60 M.J. at 94 (emphasis added). It is a question of law, because it requires discerning Congress's intent from the applicable statute for the allowable unit of prosecution.[7] *See United States v. Bell*, 349 U.S. 81, 82-84 (1955) (focusing on Congress's expression of the offense to determine the unit of prosecution in resolving whether the transportation of two women amounted to one or two offenses); *Pauling*, 60 M.J. at 93 (explaining that separate legal liabilities attached to forging an actual person's name as the indorser of a check and forging another actual person's name as the drawer on a check, thereby permitting multiple convictions); *Lloyd*, 46 M.J. at 24 (analyzing the specifications at issue in reference to Article 125's unit of prosecution (penetration, however slight), finding "[s]ince sodomy by definition is complete upon penetration of any type, all of the above acts clearly constitute discrete offenses of sodomy"); *United States v. Planck*, 493 F.3d 501, 503 (5th Cir. 2007)[8] (explaining the test for multiplicity under the same statute is "whether separate and distinct prohibited acts, *made punishable by law*, have been

[7] That is, "whether conduct constitutes one or several violations of a single statutory provision." *Callanan v. United States*, 364 U.S. 587, 597 (1961).
[8] In *Forrester*, the CAAF adopted *Planck* among other circuit cases that are discussed below. *Forrester*, 76 M.J. at 485.

committed.") (emphasis added)). Therefore, to determine whether the specifications in *Casillas* 2 are facially duplicative of the specifications from *Casillas* 1, this Court "must first determine the 'allowable unit of prosecution.'"[9] *Forrester*, 76 M.J. at 485 (quoting *Planck*, 493 F.3d at 503).

The fundamental disagreement in Issue I (and Issue II) boils down to how the unit of prosecution or actus reus[10] is defined in this case. The Government avers that the actus rei were different in *Casillas* 1 and *Casillas* 2 because the illicit depictions introduced in evidence were different. Ans. at 11-12. But this argument fails because the President chose not to define the act of violating Article 134 (child pornography), UCMJ, on a per image basis but rather on a per "material" basis.[11] *Forrester*, 76 M.J. at 486 (citing *MCM*, pt. IV, ¶ 68b.c.(1) (2012 ed.)) (determining the President defined the "actus reus" or "allowable unit of prosecution" for child pornography "*not* as images but '*material[s]*' that contain them" based on the definition of child pornography applicable to pt. IV, ¶ 68b (2012 ed.)) (emphasis added). The CAAF explained that by defining child pornography in this manner, the offending "material" was the "physical media or storage location 'that contains' the offensive images." *Forrester*, 76 M.J. at 486 (citing *MCM*, pt. IV, ¶ 68b.c.(5) (2012 ed.)).

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[9] The unit of prosecution reveals whether an offense is, for example, a "continuous-course-of-conduct offense as a matter of law" or "a distinct or discrete-act offense." *United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996) (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952)).

[10] The "actus reus" or "guilty act" is "[t]he wrongful deed [that] comprises the physical components of a crime and that generally must be coupled with the mens rea to establish criminal liability; a forbidden act." BLACK'S LAW DICTIONARY 45 (11th ed. 2009).

[11] In doing so, the United States Court of Appeals for the Armed Forces (CAAF) adopted its previous reasoning that "the word 'contain' suggests that the visual depiction must have some sort of host, such as a . . . computer disk." *Forrester*, 76 M.J. at 486 (citing *United States v. Falk*, 50 M.J. 385, 391 (C.A.A.F. 1999); *see Falk*, 50 M.J. at 392 (determining that one-hundred and twenty-six images on one computer hard drive (or "host") constituted a single "matter" for purposes of 18 U.S.C. § 2252).

The same definition applied in Appellant's court-martial. *Compare Forrester*, 76 M.J. at 486 (citing *MCM*, pt. IV, ¶ 68b.c.(1) (2012 ed.)) ("[M]aterial 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."), *with MCM* (2019 ed.), pt. IV, ¶ 95.c.(4)[12] ("[M]aterial 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."); App. Ex. L at 2 (military judge providing the same definition). Therefore, the unit of prosecution that applied here was the material that allegedly contained the illicit visual depictions, Appellant's iPhone XR. [13]

And when the material—Appellant's iPhone XR—was the same in both of Appellant's courts-martial, there was no distinct actus reus. *See, e.g.*, Prosecution Exhibit 18 at 1, 5 (alleging the child pornography was in Appellant's iPhone XR); R at 904 (trial counsel in *Casillas* 2 stating the images were located on Appellant's iPhone XR), 920 (witness in *Casillas* 2 explaining Appellant's iPhone XR was seized), 985 (witness in *Casillas* 2 explaining the expert's report was created for the iPhone XR). Thus, Appellant's convictions in *Casillas* 2 are facially duplicative of his convictions in *Casillas* 1.[14]

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[12] *MCM*, pt. IV, ¶ 95, provides the applicable UCMJ article for this case. In Appellant's opening brief, undersigned counsel mistakenly cited to *MCM*, pt. IV, ¶ 93 when she intended to cite to ¶ 95 (a typo stating ""¶93.a." exists at the top of page IV-142 of the *MCM*).

[13] *United States v. Mobley*, 77 M.J. 749 (A.C.C.A. 2018), further supports this conclusion. In *Mobley*, the appellant was charged with possessing nine videos of child pornography in one specification and two pictures of child pornography in a second specification, with overlapping date ranges. *Id*. at 750. The nine videos and two pictures were contained on the same computer. *Id*. at 751. Applying *Forrester*, the Army Court of Criminal Appeals determined that the specifications were multiplicitous "[b]ecause the computer—and not the individual videos or still pictures—constitutes the allowable 'unit of prosecution.'" *Id*. at 752. The same is true here. Appellant's iPhone XR constituted the allowable "unit of prosecution" or "actus reus," and the actus reus was therefore the same in both courts-martial.

[14] The specifications in *Casillas* 1 and *Casillas* 2 allege the same criminal acts, dates, and same locations. *Compare* Prosecution Exhibit 18 at 1, 5; *with* Charge Sheet. The slight difference in the location charging for the Specification of the Additional Charge in *Casillas* 1 is not sufficient

Moreover, while the Government avers that the specifications were "legally distinct" because the dates associated with files were different, Ans. at 12, this argument should fail just as it did in *United States v. Woerner*, 709 F.3d 527, 539 (5th Cir. 2013), which the CAAF cited approvingly in *Forrester*. *Forrester,* 76 M.J. at 485 (quoting *Woerner*, 709 F.3d at 539). In *Woerner*, the Fifth Circuit Court of Appeals explained the allowable unit of prosecution was "each 'material,' or medium, containing child pornography." *Woerner*, 709 F.3d at 540 (citing *Planck*, 493 F.3d at 504)). And critically, the Fifth Circuit also concluded that that *Planck*'s test of "'whether separate and distinct prohibited acts, made punishable by law, have been committed' . . . has two steps." *Woerner*, 709 F.3d at 539 (citing *Planck*, 493 F.3d at 503). *Woerner* explained the two steps as:

> First, we look to the statute charged to ascertain the "allowable unit of prosecution," or the *actus reus* of the crime. *United States v. Reedy*, 304 F.3d 358, 365 (5th Cir. 2002). "Congress's intent is paramount on this point: the legislature may castigate a particular act by exposing the actor to several prosecutions and punishments, or it may specify that the act should only be subject to a single unit of prosecution." *United States v. Chiaradio*, 684 F.3d 265, 272 (1st Cir. 2012). Second, we review the evidence to see how many distinct *criminal acts* the defendant committed. *United States v. Buchanan*, 485 F.3d 274, 282 (5th Cir. 2007).

Woerner, 709 F.3d at 539-40 (first emphasis in original, second emphasis added). Therefore, "[t]o charge multiple possession counts, the government must have evidence that a defendant (1) 'has images stored in separate materials,' *and* (2) 'the prohibited images were obtained through the result of different transactions.'" *Woerner*, 709 F.3d at 540 (citing *Planck*, 493 F.3d at 504)

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to render it unique from Specification 2 of the Charge in *Casillas* 2 because trial counsel conceded in *Casillas* 1 that the visual depictions (that it initially intended to introduce in *Casillas* 1 and that became the subject of *Casillas* 2) were "the same offense." Excerpt from *Casillas* 1, verbatim transcript, Bates stamped as page 562; *see also* Excerpt from *Casillas* 1, verbatim transcript, Bates stamped as page 561 (explaining the Government wanted to change the specifications in *Casillas* 1 to undo the changes that it had already made post-arraignment in that court-martial meanwhile making no mention of the desire to modify the alleged location).

(emphasis added). Thus, when the Government similarly argued in *Woerner* that the specifications were not multiplicitous because the appellant "possessed child pornography on different days," the Fifth Circuit Court of Appeals rejected this argument. *Woerner*, 709 F.3d at 540. "The government's response—that [the counts at issue] are not multiplicitous because Woerner possessed child pornography on different days—overlooks that the pertinent unit of prosecution is each material, not each day." *Id*.; *see also Sanabria v. United States*, 437 U.S. 54 (1978) (explaining "the Double Jeopardy Clause is not such a fragile guarantee that . . . its limitations [can be avoided] by the simple expedient of dividing a single crime into a series of temporal or spatial units, . . . or . . . into 'discrete bases of liability' not defined as such by the legislature.") (quoting *Brown v. Ohio*, 432 U.S. 161, 169 (1977)); *United States v. Olsen*, 79 M.J. 682, 686 (C.G. Ct. Crim. App. 2019) (citing *Forrester*, 76 M.J. at 395) (explaining "[f]or this type of multiplicity, we assess the statute's 'allowable unit of prosecution' to determine whether it prohibits each individual act or a continuous course of conduct[15], even when comprised of multiple acts."). Here, the Government's argument similarly fails because the material at issue in *Casillas* 2 was the same material that was at issue in *Casillas* 1, therefore, there is no distinct criminal act between Appellant's courts-martial.

Additionally, the Government's reliance on *United States v. Rector*, 2013 U.S. Dist. LEXIS 156937, *30 (W.D. Ark. Nov. 1, 2023), and *United States v. Fall*, 955 F.3d 363, 373 (4th Cir. 2020), are unhelpful to this assignment of error because the counts in *Rector* and *Fall* specifically

[15] A continuous course of conduct is "a pattern of conduct composed of same or similar acts repeated over a period of time, however short, which establishes a continuity of purpose in the mind of the actor." *Commonwealth v. Schnabel*, 236 Pa. Super. 280, 284 (1975) (citing *People v. Hotchkiss*, 59 Misc. 2d 823, 824 300 N.Y.S. 2d 405, 407 (1969)); *see United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1993) (explaining evidence of other occasions when the accused altered test scores was evidence of continuous nature of the charged conduct).

charged different dates for each specification of *receiving* child pornography, and receiving child pornography, at least under the law applicable to *Rector* and *Fall*, has a different unit of prosecution. *See Reedy*, 304 F.3d at 365-68 (holding that a person cannot be charged more than once for images received or distributed in the *same transaction*) (emphasis added); *Mobley*, 77 M.J. at 751 n.5 (explaining the court's "analysis would be different if the offense was *receipt* or *production* of child pornography") (emphasis in original).

Further, while *Rector* determined that it was not multiplicitous for the Government to allege both possessing and receiving child pornography on the same device when the images were different, *Rector*, 2013 U.S. Dist. LEXIS 156937, *30-31, that holding does not contradict *Forrester* because possessing and receiving were chargeable as distinct crimes under the law that applied to *Rector*. *See* 18 U.S.C. § 2252. The same is not true here where the crimes were not distinct: the alleged possession of child pornography in *Casillas* 2 was the same as it was in *Casillas* 1, and the alleged viewing of child pornography in *Casillas* 2 was the same as it was in *Casillas* 1.

What is more, while the Government purported in its answer brief that *Fall* decided that it was not multiplicitous for the appellant to be "convicted on possessing child pornography on different dates," Ans. at 12, the Government is incorrect. *Fall* decided the same issue[16] as *Rector*, which is a different issue than the issue raised here. In this assignment of error, Appellant's specific contentions are, first, that he was twice tried and convicted of *possessing* the same material—his iPhone XR—in *Casillas* 1 and *Casillas* 2. *Compare* Prosecution Exhibit 18 at 1 (Charge I, Specification 2), *with* Charge Sheet (Charge, Specification 1). These are not distinct

[16] *Fall*, 955 F.3d at 373, decided that possession of child pornography under 18 U.S.C. § 2252(a)(4)(B) was not multiplicious of receiving child pornography charges under § 2252(a)(2).

crimes. *See MCM*, pt. IV, ¶ 95.b.(1). And in the same vein, but independent of whether he was twice tried for possession, Appellant's second contention is that he was twice tried and convicted for *viewing* the same material—his iPhone XR—in *Casillas* 1 and *Casillas* 2. *Compare* Prosecution Exhibit 18 at 5 (Additional Charge, Specification), *with* Charge Sheet (Charge, Specification 2). Again, these are not distinct crimes. *See MCM*, pt. IV, ¶ 95.b.(1). Thus, it was plain error to try Appellant twice for (1) possessing the same material, and (2) viewing the same material.

Lastly, while the definition of child pornography analyzed in *Forrester* applied to the offense of possession of child pornography, 76 M.J. at 481, the definition of child pornography in the *MCM* does not apply only to possession of child pornography. It also applies to viewing child pornography under Article 134, UCMJ, because the presumption of consistent usage supports the conclusion that the definition of "child pornography" remains the same for both possession and viewing. *See IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990)) (explaining "that identical words used in different parts of the same statute are generally presumed to have the same meaning"); *MCM* (2019 ed.), pt. IV, ¶¶ 95.b.(1), 95.c.(4). Therefore, it follows that the definition of "child pornography" applies to both possessing child pornography and viewing child pornography. Moreover, should this Court find that Article 134, UCMJ, does not explicitly provide "the allowable unit of prosecution" for viewing child pornography, that ambiguity must "be resolved in favor of lenity." *Bell*, 349 U.S. at 83; *see United States v. Lindsay*, 985 F.2d 666, 673 (2d Cir. 1993) ("If we conclude that [legislative] intent is ambiguous, the rule of lenity would require us to conclude that the government may charge only one violation"). Thus, Appellant could not be tried twice for viewing the same material, the same way that he could not be tried twice for possessing the same material.

3. Prejudice is inherent in the fact that Appellant was tried twice.

Appellant was materially prejudiced because he was subjected to trial twice for the same offenses. *See* App. Br. at 7-8. The Government's only contention on this point is that it is Appellant's fault that a second court-martial occurred because he objected in *Casillas* 1 to admission of the images that were ultimately introduced in *Casillas* 2. Ans. at 14. Essentially, the Government asserts that by objecting to the images in *Casillas* 1, Appellant consented to a second court-martial. This argument is unsupported by fact or law. The Government cites to no law, and undersigned counsel can similarly find none, to support the Government's argument that double jeopardy would be essentially waived if an appellant successfully excluded a portion of evidence for an offense during a prior trial. The Government's argument is best understood as the Government furthering its incorrect understanding of the unit of prosecution that applied in this case, discussed *supra*. More importantly, the Government misses critical facts related to its own responsibility over the case in *Casillas* 1:

First, the Government did not have to change the specifications in *Casillas* 1 to introduce the additional images that it provided notice of in its amended bill of particulars because in military practice, the bill of particulars is not a part of the specification and does not restrict the Government's proof at trial. *United States v. Sudds*, No. ACM 39024, 2017 CCA LEXIS 574, at *21 (A.F. Ct. Crim. App. Aug. 23, 2017) (citing R.C.M. 906(b)(6), Discussion) (2012 ed.).[17]

Second, while Appellant objected to the Government's request to change the specifications in *Casillas* 1, he did not consent to a second court-martial, contrary to the Government's summation of the facts. *Compare* Ans. at 6 (alleging trial defense counsel stated that "the

[17] While *Sudds* cited to a previous *MCM* edition, R.C.M. 906(b)(6) and its Discussion remain unchanged. *See* R.C.M. 906(b)(6), Discussion.

government could seek to use these images in another court-martial"), *with* Excerpt from *Casillas* 1, verbatim transcript, Bates stamped as page 580 (explaining what the Government was doing in their Mil. R. Evid. 404(b) argument while making no concession that a second court-martial could occur: "what they're trying to do is effectively use as an end around what they would charge or have eluded [sic] that they will seek to use in another court-martial to then make it admissible in this case").

Third, even considering Appellant's objections to the Government's request to change the specifications in *Casillas* 1, Appellant's objections could only preclude the Government from changing the specifications, if the changes were major changes. *See* R.C.M. 603(d)(1) ("After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew."); R.C.M. 603(e) ("Minor changes may be made to the charges and specifications after referral."). But the military judge never decided whether the changes would be major or minor changes because *the Government* explicitly withdrew its requests to change the specifications without a ruling from the military judge. Excerpt from *Casillas* 1, verbatim transcript, Bates stamped as page 566 ("MJ: Are the parties requesting a ruling on this before we continue? CTC: No, Your Honor. . . . we are no longer even seeking this relief from the court. We withdraw the requests pursuant to the defense objection."). Therefore, it was not Appellant's objections that kept the images from being introduced as evidence of the charged offense in *Casillas* 1. It was the Government's own decisions that did that.

Appellant was inherently and materially prejudiced when he was twice tried for the same acts—possessing and viewing child pornography on his iPhone XR—and the only appropriate remedy for this error is for this Court to set aside the findings and sentence and dismiss the charge

and specifications. *See Rice*, 80 M.J. 45 ("Having been 'retried,' the charges from the 'retrial' must be dismissed.") (citing *Ex parte Nielsen*, 131 U.S. 176, 183-84 (1889)).

II.

Appellant was denied effective assistance of counsel when defense counsel failed to understand binding precedent regarding the "unit of prosecution" in child pornography cases, and therefore, did not move to dismiss the Charge and Specifications.

If this Court determines that the double jeopardy issue that Appellant raises in Issue I was waived by defense counsel, Appellant was denied the effective assistance of counsel. *See* App. Br. at 11-13. Had defense counsel conducted a thorough investigation of the law and the facts relevant to this issue, recognized the binding precedent regarding the unit of prosecution, and moved to dismiss the charge and specifications, there is a reasonable probability that the only result would have been that the military judge had to dismiss the charge and specifications. *See* Issue I, *supra*.

As a point of clarity, Appellant asserts in this issue that his attorneys were ineffective in *Casillas* 2, because that is the court-martial before this panel. Therefore, whether Appellant's attorneys were effective in *Casillas* 1 is not the question here. *Cf*. Major (Maj) JB Declaration (discussing strategy and results in *Casillas* 1). Further, it is clear from the face of the record that the images at issue in *Casillas* 2 were not admitted in *Casillas* 1—not due to their legal relevance but based on the Government's untimeliness. R. at 1307; *see* Excerpt from Casillas 1, verbatim transcript, Bates stamped as page 579 (highlighting the evidence at issue "is from the exact phone that they have had for the better part of two years.").

While Maj AM asserts that "it felt deceptive to the court" to file a motion regarding this issue, his declaration only highlights his lack of understanding of the facts at issue for Appellant and the application of the law. Maj AM Declaration at ¶ 4. Maj AM's lack of understanding of

the facts is demonstrated in his "understanding . . . that the judge had excluded the PDF files from evidence on the grounds that they were not encapsulated by the charging scheme in Casillas I." *Id*. The images were not excluded for any reason other than their untimeliness, which Maj AM should have known upon conducting a thorough investigation of the facts. *See United States v. Dewrell*, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984) ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable")). Moreover, Maj AM's assertion carries even less weight given that it was stated clearly by trial counsel during *Casillas* 2 that the images were excluded from *Casillas* 1 "only based on timeliness. It wasn't that there wasn't legal relevance to them." R. at 1307. More importantly, had Maj AM understood that the images were not legally distinct because they were contained within the same material, it would not have mattered what argument was made in *Casillas* 1 because Maj AM could show candor to the Court by explaining the facts of *Casillas* 1 and explaining that the applicable unit of prosecution precluded a second trial. *See* Issue I, *supra*.

Additionally, had Maj AM conducted thorough research, he would have also known that *viewing child pornography* is similarly defined within the *MCM*, and that the rule of lenity would nevertheless require resolution in favor of Appellant.[18] *See* Issue I, *supra*. Nonetheless, even if Maj AM believed that double jeopardy would only preclude a second trial for possessing child pornography, it was unreasonable to not move to dismiss that specification because it still put

[18] In the same vein, Maj JB's lack of understanding regarding the unit of prosecution for viewing child pornography is illustrated in his suggestion that "in order to view each alleged child pornography image, the user had to open up each PDF file." Maj JB Declaration at 2, ¶ 10. His proposition is neither supported in this case, nor is it provided for by the legislature. *See, e.g.*, R. at 1025-26 (testifying that files start to download when a user navigates to a website and the presence of the images in the iPhone's temporary directory does not mean that they were viewed on the iPhone's screen).

Appellant in jeopardy for an offense for which he was already tried. *See* Maj AM Declaration at ¶ 5. And further, Maj AM's declaration fails to recognize that each conviction carries with it a stigma for the Appellant—which is no less true when that conviction is for a child pornography offense. *See In re Winship*, 397 U.S. 358, 363 (1970) (explaining there is a certainty that appellant's will be stigmatized by a conviction).

Beyond Maj AM's problematic understanding as the lead defense counsel regarding the findings case, his reliance on a unitary sentencing misses the simple math of double the convictions, double the sentenced offenses. *See* Maj AM Declaration at ¶ 5. Maj AM posits that "given the requirement for unitary sentencing by members, [he] did not assess there to be a significant windfall even if the Defense prevailed on [a double jeopardy motion]." Maj AM Declaration at ¶ 5. This assertion is unreasonable because the fact that members must provide a unitary sentence does not change that they had twice the number of offenses to sentence Appellant for. And "any amount of actual jail time is significant, and ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 585 U.S. 129, 139 (2018) (alterations in original) (internal quotation marks omitted) (citations omitted). Therefore, even if Maj AM thought the viewing specification would not be dismissed—albeit due to his lack of understanding—it was still unreasonable to not move to dismiss the possession of child pornography specification (Specification 1 of the Charge).

Maj JB's declaration similarly demonstrates that he held many of the same incorrect interpretations of the law as Maj AM. In addition, however, Maj JB's declaration presumes that the only options available to Appellant were to forego his objection to the admission of additional evidence in *Casillas* 1 or risk facing a second court-martial. Maj JB Declaration at 1. This

disappointing assertion misses the complexity of the issues that were at stake. First, the defense could always object to the untimely notice of evidence and that objection alone does not mean that an Appellant has consented to a second court-martial. Moreover, had Maj JB understood the unit of prosecution, he would have understood that regardless of whether the thirteen PDFs were introduced in *Casillas* 1, Appellant could not be tried again in *Casillas* 2 because the material—the iPhone XR—was the same. That unit of prosecution did not change just because the Government failed to introduce a portion of evidence that could prove up possession or viewing of the same material in Appellant's first court-martial. *See* Issue I, *supra*.

Maj JB further posits that "we would lose all credibility with the Judge after we had proffered with the Government in a Joint Status Update that we would object to the joinder." Maj JB Declaration at 1; *see also* Maj JB Declaration at Attachment (trial counsel explaining the government only intended to join the new charges if Appellant consented to the joinder). Maj JB's proposition here is puzzling for a few reasons. First and most critically, Appellant's decision to not consent to the referral of new charges to *Casillas* 1 is a substantively different issue than whether Appellant had a valid double jeopardy claim. At base, when an appellant objects, or does not consent, to the referral of new charges to a referred court-martial, that objection does not inherently include any agreement regarding the substance of the new charges. Therefore, there would be no reason to be concerned that credibility would be lost by making a different substantive motion on double jeopardy during *Casillas* 2. Moreover, it is not clear how a motion to dismiss for double jeopardy in *Casillas* 2 could impact *Casillas* 1 on appeal, when Appellant's lack of consent to joinder says nothing of whether those charges violate double jeopardy, and further, the images were excluded in *Casillas* 1 for the completely unrelated issue of the Government's untimeliness, R. at 1307.

Maj JB's declaration also suggests that his advice and actions were based on his personal and incorrect interpretations of isolated *MCM* provisions rather than the governing law. *See* Maj JB Declaration. For example, Maj JB states that the "*or*" in the definition of child pornography is meant to distinguish between child pornography that is "material that contains . . ." from "a visual depiction of a minor engaging in sexually explicit conduct." Maj JB Declaration at 2, ¶¶ 8-9 (emphasis in original). He asserts that if "or" is not read as he suggests, there would a distinction without a difference. *Id*. at ¶ 9. But getting the law wrong is no defense to ineffective assistance of counsel, and Maj JB is wrong. Both the plain language of the *MCM* and case law show this.

First, the plain language does not support his reading because his interpretation disregards the word "either" in the definition of child pornography that demonstrates that "material that contains" applies to both "an obscene visual depiction of a minor engaging in sexually explicit conduct" and "a visual depiction of an actual minor engaging in sexually explicit conduct" in the definition of child pornography. *See MCM*, pt. IV, ¶ 95.c.(4). The plain language also demonstrates that the distinction in this definition is the Government's ability to charge "obscene visual depictions of a minor" and/or those depictions that depict "an actual minor." *See id*.

Had Maj JB researched to verify his interpretation of Article 134 (child pornography), he would have found that his interpretation was incorrect. *See* 2019 MCM, App. 17, at A17-16; *see also 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).

Separately, Maj JB suggests that the phrase "material that contains" should be defined as the file and not the iPhone XR. Maj JB Declaration at 2, ¶ 10. But this again demonstrates his

ignorance of case law and, potentially, the rule of lenity. Specifically, the CAAF determined that the material must be some sort of host, such as a computer disk. *Forrester*, 76 M.J. at 486 (citing *Falk*, 50 M.J. at 391); *see Falk*, 50 M.J. at 392 (determining that one-hundred and twenty-six images on one computer hard drive (or "host") constituted a single "matter" for purposes of 18 U.S.C. § 2252). And when compared to the CAAF's reasoning, Maj JB's suggestion falls apart. Specifically, the CAAF reasoned that one book with twenty pictures of child pornography in it equates to only one material under the definition that applied to 18 U.S.C. § 2252. *Falk*, 50 M.J. at 391. Therefore, if each page in the book does not amount to a "host," which is akin to a "material," than neither could each file on Appellant's phone.[19] Lastly on this point, any uncertainty regarding the unit of prosecution for viewing must be resolved in favor of Appellant because of the rule of lenity. *Bell*, 349 U.S. at 83 (explaining ambiguity must "be resolved in favor of lenity"). Therefore, Maj JB's assessment cannot be viewed as a strategic and reasonable decision because it is based on an incorrect understanding of the law that is rooted in defense counsel's failure to research a fundamental issue that would have precluded Appellant's trial and convictions in *Casillas* 2. *See* App. Br. at 12.

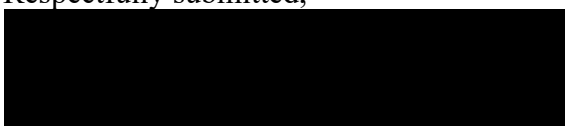
Maj AM's and Maj JB's lack of understanding of the applicable unit of prosecution demonstrates ignorance of a point of law that was fundamental in Appellant's court-martial, *see Hinton v. Alabama*, 571 U.S. 263, 274 (2014), and there is a reasonable probability that Appellant could have been saved from twice being tried and convicted for possessing and viewing the same material had they filed a motion to dismiss for double jeopardy. *See* App. Br. at 13. Therefore,

[19] The thirteen PDF files on the phone also arguably differ from, for example, an email account, which can be accessed separate from the container, whereas the thirteen PDF files could not be. *See* R. at 1026-27 (explaining a user would need a forensic tool such as Cellebrite to access the files on the iPhone XR).

Appellant was denied the effective assistance of counsel and the prejudice to Appellant is inherent because Appellant could not be twice tried.

Thus, this Court should set aside the findings and sentence and dismiss the charge and specifications.

Respectfully submitted,



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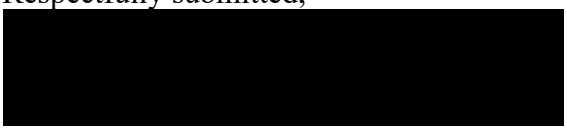
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 17 March 2025.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Nathaniel A. CASILLAS	)	**PANEL CHANGE**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 26th day of March, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

On 8 September 2025, in accordance with Rule 27 of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, a majority of the judges of the court in regular active service, none of whom were disqualified, voted to consider the above-captioned case *en banc*.

Accordingly, it is by the court on this 9th day of September, 2025,

ORDERED:

That the record of trial in the above-captioned case is withdrawn from the Special Panel and referred to the court *En Banc* for appellate review.

This order supersedes all previous panel assignments.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40551**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Nathaniel A. CASILLAS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

On 9 September 2025, this court issued an order withdrawing the above-styled case from the Special Panel and referring it to the court *en banc* for appellate review.

Subsequently, a judge who participated in the vote with regard to consideration *en banc* determined they were disqualified from participation due to a previously unidentified conflict that pre-dated the *en banc* vote.

On 12 September 2025, in accordance with Rule 27 of The Joint Rules of Appellate Procedure for Courts of Criminal Appeals, another vote by the judges of the court in regular active service, and who were not disqualified, did not result in a majority ordering consideration of the case *en banc*.

Accordingly, it is by the court on this 15th day of September, 2025,

ORDERED:

That the record of trial in the above-captioned case is withdrawn from consideration by the court *en banc* and referred to a Special Panel. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

This order supersedes all previous panel assignments.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant*.	**APPELLANT'S MOTION FOR ORAL ARGUMENT OUT OF TIME** Before the Court *En Banc* No. ACM 40551 12 September 2025

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

Pursuant to Rules 18.5 and 23.3(a) of this Court's Rules of Practice and Procedure and Rule 25 of the Joint Rules of Appellate Practice and Procedure for Courts of Criminal Appeals, Appellant, Master Sergeant (MSgt) Nathaniel A. Casillas, hereby moves for oral argument on the following issues:

I.

Whether the Double Jeopardy Clause of the Fifth Amendment requires dismissal of Appellant's convictions because Appellant was twice tried for the same "material," an iPhone XR.

II.

Whether Appellant was denied effective assistance of counsel when defense counsel failed to understand binding precedent regarding the "unit of prosecution" in child pornography cases, and therefore, did not move to dismiss the Charge and Specifications.

There is good cause to grant this motion out of time. On 9 September 2025, the Court issued an order withdrawing this case from a Special Panel and referring it to the Court *En Banc* for review. Order, Sep. 9, 2025. While the order does not specify why the case was referred to the Court *en banc*, *id.*, Rule 27 of the Joint Rules of Appellate Practice and Procedure identify

three possible reasons for *en banc* review in this case:[1] (1) it is "necessary to secure or maintain uniformity of the Court's decisions;" (2) "the opinion overrules a binding precedent of the Court;" or (3) "the proceeding involves a question of exceptional importance." All three of these possibilities denote difficult issues that will likely affect future cases before this Court. Oral argument will assist the Court in further analyzing these issues and making important determinations.

The Court's order for *en banc* review highlighted this case as one that presents particularly challenging and consequential questions. The opportunity to pose questions to counsel for both parties will undoubtedly aid the Court in its deliberations, whether it seeks to answer a question of exceptional importance, overrule a binding precedent, or maintain uniformity of its decisions. Oral argument is therefore warranted in this case.

WHEREFORE, MSgt Casillas respectfully requests this Honorable Court grant the motion for oral argument.

Respectfully submitted,

[redacted]

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[1] A fourth possibility found in Rule 27—reviewing a sentence that extends to death—is obviously inapplicable here.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 September 2025.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	OPPOSITION TO MOTION FOR ORAL ARGUMENT – OUT OF TIME
v.	)	
	)	Before Special Panel
Master Sergeant (E-7) **NATHANIEL A. CASILLAS,** United States Air Force, *Appellant.*	)	No. ACM 40551 17 September 2025

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

Pursuant to Rules 23(c), 23.3(a), and 25 of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument filed out of time.

From January to March 2025, the parties filed submissions in this case. And at that time, neither party requested oral argument. On 9 September 2025, this Court referred this case for *en banc* appellate review. (*En Banc Order*, 9 September 2025.) On 12 September 2025, Appellant filed a motion for oral argument out of time. (App. Mot. at 1.) On 15 September 2025 the record of trial was "withdrawn from consideration by the court *en banc* and referred to a Special Panel." (*Panel Reassignment Order*, 15 September 2025.)

Appellant's motion for oral argument out of time should be denied for two reasons: (1) Appellant offers no reasons why oral argument would be helpful to this Court; and as a result, fails to provide good cause why this Court should grant this request out of time; and (2) further delay is unwarranted in this case.

First, Appellant has failed to articulate why oral argument is necessary or would be helpful to this Court when the issues have been fully briefed by both sides. The good cause basis for Appellant's motion for oral argument out of time was the Court's order referring this case for

en banc appellate review. (App. Mot. at 1.) But since this Court has referred this case back to a special panel, *en banc* review no longer supports Appellant's basis to hold oral argument in this case. (*Panel Assignment Letter*, 15 September 2025.)

Nonetheless, Appellant does not articulate how an oral argument would be helpful to this Court regardless of the panel composition. In his motion for oral argument, Appellant noted that "the order for *en banc* review highlighted this case as one that presents particularly challenging and consequential questions." (App. Mot. at 2.) But Appellant does not elaborate on what legal or factual matters would pose challenging and consequential questions warranting oral argument other than generally requesting oral argument for Assignments of Error I and II.[1] In any event, the assignments of error raised in Appellant's case have not changed, and the law governing those issues remain well-established, negating the need for oral argument. Appellant's request for oral argument well out of time is not justified. For these reasons, Appellant fails to articulate good cause to grant this motion out of time.

Second and lastly, additional delays are unwarranted. This case was docketed on 14 December 2023. And as of the date of this filing, 664 days have elapsed since docketing – surpassing the 18-month metric for this Court to render a decision in accordance with United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006). Considering this Court's obligations under

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[1] Assignments of Error I and II are as follows:

I. WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT REQUIRES DISMISSAL OF APPELLANT'S CONVICTIONS BECAUSE APPELLANT WAS TWICE TRIED FOR THE SAME "MATERIAL," AN IPHONE XR.

II. WHETHER APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO UNDERSTAND BINDING PRECEDENT REGARDING THE "UNIT OF PROSECUTION" IN CHILD PORNOGRAPHY CASES, AND THEREFORE, DID NOT MOVE TO DISMISS THE CHARGE AND SPECIFICATIONS.

Moreno, partaking in any further delay to schedule and conduct an unwarranted oral argument in this case is unwarranted. This Court has the record of trial and extensive written submissions from both parties to make an informed decision in this case. Here, the positions of each party are clear, and this Court should proceed to issue a decision in due course of its deliberations without the further delay of an oral argument.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion.

[redacted]

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Associate Chief
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 17 September 2025.

[redacted]

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