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. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 28 October 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Michael J. Estep, the Appellant, hereby moves for a first enlargement of time to file an Assignment of Errors brief. A1C Estep requests an enlargement for a period of 60 days, which will end on **5 January 2023**. The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, A1C Estep respectfully requests this Honorable Court grant this requested first enlargement of time for the submission of an Assignment of Errors brief.

Respectfully submitted,

[redacted]
Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

[redacted]

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 28 October 2022.

Respectfully submitted,

[redacted]

aj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

31 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) MICHAEL J. ESTEP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40336 Panel No. 1

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]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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 31 October 2022.

[redacted]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 29 December 2022

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, the Appellant, Airman First Class Michael J. Estep, hereby moves for a second enlargement of time to file an Assignments of Error brief. A1C Estep requests an enlargement for a period of 30 days, which will end on **4 February 2023**. The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 14 June 2022, at a general court-martial convened at Whiteman Air Force Base, Missouri, A1C Estep was convicted, in accordance with his pleas, of one specification of possession of child pornography on divers occasions (Specification 1 of the Charge) and one specification of distribution of child pornography on divers occasions (Specification 2 of the Charge) in violation of Article 134, UCMJ, 10 U.S.C. § 934. Record of Trial (ROT) Vol. 1, Entry of Judgment, 11 July 2022. A military judge sentenced him to a dishonorable discharge, three years of confinement for Specification 1 of the Charge, eighteen months of confinement for Specification 2 of the Charge (with

all confinement to be served concurrently), a reduction to the lowest enlisted grade, total forfeitures of all pay and allowances, and a reprimand. *Id.* The convening authority took no action on the findings and sentence of the court-martial, and denied A1C Estep's requests to defer the reduction in grade and the adjudged and automatic forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 5 July 2022. A1C Estep is currently confined at Naval Consolidated Brig Miramar.

The trial transcript is 174 pages long and the record of trial is comprised of three volumes consisting of nine prosecution exhibits, one defense exhibit, and five appellate exhibits. This case is counsel's fifth priority case before this Court. Through no fault of A1C Estep, his counsel has been unable to review the record of trial and prepare and Assignments of Error brief, and will be unable to do so before this Court's current deadline.

WHEREFORE, A1C Estep respectfully requests this Honorable Court grant this requested second enlargement of time for the submission of an Assignments of Error brief for good cause shown.

[redacted]
[redacted]j, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 December 2022.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) MICHAEL J. ESTEP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40336 Panel No. 1

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
[redacted]

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 29 December 2022.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 27 January 2023

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, the Appellant, Airman First Class Michael J. Estep, hereby moves for a third enlargement of time to file an Assignments of Error brief. A1C Estep requests an enlargement for a period of 30 days, which will end on **6 March 2023**. The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 142 days have elapsed. On the date requested, 180 days will have elapsed.

On 14 June 2022, at a general court-martial convened at Whiteman Air Force Base, Missouri, A1C Estep was convicted, in accordance with his pleas, of one specification of possession of child pornography on divers occasions (Specification 1 of the Charge) and one specification of distribution of child pornography on divers occasions (Specification 2 of the Charge) in violation of Article 134, UCMJ, 10 U.S.C. § 934. Record of Trial (ROT) Vol. 1, Entry of Judgment, 11 July 2022. A military judge sentenced him to a dishonorable discharge, three years of confinement for Specification 1 of the Charge, eighteen months of confinement for Specification 2 of the Charge (with

all confinement to be served concurrently), a reduction to the lowest enlisted grade, total forfeitures of all pay and allowances, and a reprimand. *Id*. The convening authority took no action on the findings and sentence of the court-martial, and denied A1C Estep's requests to defer the reduction in grade and the adjudged and automatic forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 5 July 2022. A1C Estep is currently confined at Naval Consolidated Brig Miramar.

The trial transcript is 174 pages long and the record of trial is comprised of three volumes consisting of nine prosecution exhibits, one defense exhibit, and five appellate exhibits. This case is counsel's fourth priority case before this Court, behind 1. *United States v. Falls Down* (No. ACM 40268; 1,188 pages), 2. *United States v. Romero-Alegria* (No. ACM 40199 (f rev); 200 pages), and 3. *United States v. Bennett* (No. ACM S32733; 120 pages). Counsel has reviewed the record of trial in *Falls Down* and, along with civilian co-counsel, is drafting an Assignments of Error brief. Counsel has also completed review of the record of trial in *Romero-Alegria*. Counsel is also working on a supplemental brief to a petition for grant of review before the Court of Appeals for the Armed Forces (CAAF), due 2 February 2023. Through no fault of A1C Estep, his counsel has been unable to review the record of trial and prepare and Assignments of Error brief, and will be unable to do so before this Court's current deadline.

WHEREFORE, A1C Estep respectfully requests this Honorable Court grant this requested third enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

[redacted]
ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 January 2023.

Respectfully submitted,

[redacted]
ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) MICHAEL J. ESTEP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40336 Panel No. 1

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
[redacted]

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 January 2023.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 27 February 2023

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, the Appellant, Airman First Class Michael J. Estep, hereby moves for a fourth enlargement of time to file an Assignments of Error brief. A1C Estep requests an enlargement for a period of 30 days, which will end on **5 April 2023**. The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 14 June 2022, at a general court-martial convened at Whiteman Air Force Base, Missouri, A1C Estep was convicted, in accordance with his pleas, of one specification of possession of child pornography on divers occasions (Specification 1 of the Charge) and one specification of distribution of child pornography on divers occasions (Specification 2 of the Charge) in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 11 July 2022. A military judge

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

sentenced him to a dishonorable discharge, three years of confinement for Specification 1 of the Charge, eighteen months of confinement for Specification 2 of the Charge (with all confinement to be served concurrently), total forfeitures of all pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. *Id*. The convening authority took no action on the findings and sentence of the court-martial, and denied A1C Estep's requests to defer the reduction in grade and the adjudged and automatic forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 5 July 2022. A1C Estep is currently confined at Naval Consolidated Brig Miramar in San Diego, California.

The trial transcript is 174 pages long and the record of trial is comprised of three volumes consisting of nine prosecution exhibits, one defense exhibit, and five appellate exhibits. This case is counsel's third priority case before this Court, behind 1. *United States v. Falls Down* (No. ACM 40268; 1,188 pages) and 2. *United States v. Bennett* (No. ACM S32733; 120 pages). Counsel has reviewed the record of trial in *Falls Down* and, along with civilian co-counsel, is drafting an Assignments of Error brief. Counsel has begun reviewing the record of trial in *Bennett*. Counsel is also working on a supplemental brief to a petition for grant of review before the Court of Appeals for the Armed Forces (CAAF), due 1 March 2023. Through no fault of A1C Estep, his counsel has been unable to review the record of trial and prepare and Assignments of Error brief, and will be unable to do so before this Court's current deadline. Counsel has advised A1C Estep of his right to a speedy appellate review, and A1C Estep concurs with this request.

WHEREFORE, A1C Estep respectfully requests this Honorable Court grant

this requested fourth enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 February 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

27 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) MICHAEL J. ESTEP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40336 Panel No. 1

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]
OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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 February 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 27 February 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Michael J. Estep, Appellant, hereby moves this Court to permit his counsel's examination of certain sealed exhibits and sealed portions of the transcript in this case.

Facts

On 14 June 2022, at a general court-martial convened at Whiteman Air Force Base, Missouri, A1C Estep was convicted, in accordance with his pleas, of one specification of possession of child pornography on divers occasions (Specification 1 of the Charge) and one specification of distribution of child pornography on divers occasions (Specification 2 of the Charge) in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 11 July 2022. A military judge sentenced him to a dishonorable discharge, three years of confinement for Specification 1 of the Charge, eighteen months of confinement for Specification 2 of the Charge (with

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

all confinement to be served concurrently), total forfeitures of all pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. *Id*. The convening authority took no action on the findings and sentence of the court-martial, and denied A1C Estep's requests to defer the reduction in grade and the adjudged and automatic forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 5 July 2022.

The military judge ordered the following exhibits sealed:

> (a) Prosecution Exhibit (PE) 3: The digital images and videos identified on PE 2, created 13 June 2022 (1 disc).
>
> (b) PE 8: One file with a video, undated (1 disc)

R. at 37, 174. Both exhibits were admitted and considered by the military judge. R. at 36, 146.

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the *MCM*, governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record

unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] 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."[4] These requirements are consistent with those imposed by the state bars to which counsel belong.[5]

Analysis

Each of the sealed exhibits is an admitted prosecution exhibit "presented" and "reviewed" by the parties at trial. It is reasonably necessary for Appellant's counsel to review these sealed exhibits for counsel to competently conduct a professional

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[2] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).

[3] *Id*. at Rule 1.3.

[4] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).

[5] Counsel of record is licensed to practice law in Maryland.

evaluation of Appellant's case and to uncover all issues which might afford him relief. Because examination of the materials in question is reasonably necessary to the fulfillment of counsel's Article 70, UCMJ duties, and because the materials were made available to the parties at trial, Appellant has provided the "colorable showing" required by R.C.M. 1113(b)(3)(B)(i) to permit his counsel's examination of these sealed materials, and has shown good cause to grant this motion.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this motion and permit his counsel's examination of the aforementioned sealed exhibits contained within the original record of trial.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 February 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) MICHAEL J. ESTEP, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40336 Panel No. 1

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 responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing Prosecution Exhibits 3 and 8 so long as the United States can also review them as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

WHEREFORE, the United States respectfully responds to Appellant's motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
[redacted]

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 28 February 2023.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40336**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael J. ESTEP	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 27 February 2023, Appellant's counsel submitted a Motion to Examine Sealed Materials, specifically, Prosecution Exhibits 3 and 8.

The motion states "the materials were made available to the parties at trial" and that examination of these sealed materials is reasonably necessary to fulfill appellate counsel's responsibilities. The Government does not oppose the motion, as long as the materials were viewed by both counsel at trial and Government counsel can also examine the sealed materials.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities." Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial*, *United States* (2019 ed.).

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court has reviewed the requested material. The court also finds that appellate defense counsel has made a colorable showing that review of the material is reasonably necessary to a proper fulfillment of appellate defense counsel's responsibilities.

Accordingly, it is by the court on this 1st day of March, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED.** Appellate defense counsel and appellate government counsel are authorized to examine **Prosecution Exhibits 3 and 8**, subject to the following conditions:

To examine these materials, counsel will coordinate with the court.

No counsel will photocopy, photograph, or otherwise reproduce this material and will not disclose or make available its contents to any other individual

without this court's prior written authorization.

F[redacted]

ANTHONY F. ROCK, Maj, 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 (FIFTH)**
v.	)	Before Panel No. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 27 March 2023

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, the Appellant, Airman First Class Michael J. Estep, hereby moves for a fifth enlargement of time to file an Assignments of Error brief. A1C Estep requests an enlargement for a period of 30 days, which will end on **5 May 2023**. The record of trial was docketed with this Court on 7 September 2022. From the date of docketing to the present date, 201 days have elapsed. On the date requested, 240 days will have elapsed.

On 14 June 2022, at a general court-martial convened at Whiteman Air Force Base, Missouri, A1C Estep was convicted, in accordance with his pleas, of one specification of possession of child pornography on divers occasions (Specification 1 of the Charge) and one specification of distribution of child pornography on divers occasions (Specification 2 of the Charge) in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 11 July 2022. A military judge

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

sentenced him to a dishonorable discharge, three years of confinement for Specification 1 of the Charge, eighteen months of confinement for Specification 2 of the Charge (with all confinement to be served concurrently), total forfeitures of all pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. *Id*. The convening authority took no action on the findings and sentence of the court-martial, and denied A1C Estep's requests to defer the reduction in grade and the adjudged and automatic forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 5 July 2022. A1C Estep is currently confined at Naval Consolidated Brig Miramar in San Diego, California.

The trial transcript is 174 pages long and the record of trial is comprised of three volumes consisting of nine prosecution exhibits, one defense exhibit, and five appellate exhibits. This case is counsel's second priority case before this Court, behind 1. *United States v. Bennett* (No. ACM S32733; 120 pages). Counsel has nearly completed review of the record of trial in *Bennett*. Counsel is also working on a supplemental brief to a petition for grant of review before the Court of Appeals for the Armed Forces (CAAF) in *United States v. Cooper* (No. ACM 40092 (f rev), USCA Dkt. No. 23-0120) due 29 March 2023. Through no fault of A1C Estep, his counsel has been unable to review the record of trial and prepare and Assignments of Error brief, and will be unable to do so before this Court's current deadline. Counsel has advised A1C Estep of his right to a speedy appellate review, and A1C Estep concurs with this request.

WHEREFORE, A1C Estep respectfully requests this Honorable Court grant this requested fifth enlargement of time for the submission of an Assignments of Error brief for good cause shown.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 March 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) MICHAEL J. ESTEP, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40336 Panel No. 1

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]

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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 28 March 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40336**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Michael J. ESTEP	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 27 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth), 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 28th day of March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **5 May 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

[redacted]

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MERITS BRIEF**
v.	)	Before Panel No. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 4 May 2023

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

Submission of Case Without Specific Assignment of Error

Undersigned appellate defense counsel attests that he has, on behalf of Airman First Class Michael J. Estep, Appellant, carefully examined the record of trial in this case. Appellant does not admit that the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no specific assignments of error apart from those raised in Appendix A pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).[1]

Respectfully submitted,

[redacted]
, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

[1] Appellant understands this Court will exercise its independent "awesome, plenary, and de novo power" to review the entire record of this proceeding for factual and legal sufficiency, and for sentence propriety, and to "substitute its judgment" for that of the court below, as is provided for and required by Article 66(c), UCMJ, 10 U.S.C. §866(c) (2012). *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

[redacted]

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 4 May 2023.

Respectfully submitted,

[redacted]
Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate defense counsel, personally requests that this Court consider the following matters.

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY CONSIDERING AS AGGRAVATION EVIDENCE A VIDEO DEPICTING CHILD PORNOGRAPHY WITHOUT DETERMINING WHETHER APPELLANT KNOWINGLY POSSESSED IT AND WITHOUT PROPERLY WEIGHING ITS PROBATIVE VALUE.

II.

WHETHER THE SENTENCE ADJUDGED BY THE COURT-MARTIAL IS INAPPROPRIATELY SEVERE.

STATEMENT OF THE CASE

On 14 June 2022, at a general court-martial convened at Whiteman Air Force Base, Missouri, Airman First Class Michael J. Estep, Appellant, was convicted, in accordance with his pleas, of one specification of possession of child pornography on divers occasions (Specification 1 of the Charge) and one specification of distribution of child pornography on divers occasions (Specification 2 of the Charge) in violation of Article 134, UCMJ, 10 U.S.C. § 934.[2] Record of Trial (ROT) Vol. 1, Entry of Judgment, 11 July 2022. A military judge sentenced him to a dishonorable discharge,

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

three years of confinement for Specification 1 of the Charge, eighteen months of confinement for Specification 2 of the Charge (with all confinement to be served concurrently), total forfeitures of all pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. *Id*. The convening authority took no action on the findings and sentence of the court-martial, and denied Appellant's requests to defer the reduction in grade and the adjudged and automatic forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 5 July 2022.

STATEMENT OF FACTS

Appellant's Background

Appellant grew up on a farm in "conservative" Wheeling, West Virginia. DE A at 1. He was the last of five children, and was born much later than his siblings. ROT Vol. 1, Clemency Request, 24 June 2022, at Attachment 2. Despite their difference in age, Appellant and his siblings got along well, and he was raised in a loving family. *Id*. He served as an altar boy in the Catholic church his family attended. *Id*. at Attachment 7. His family members describe Appellant as "honest, hard-working, caring," "intelligent," "kind and considerate," "dependable," and the first to help someone in need. *Id*. at Attachments 3-4, 6-7.

When Appellant was just a fifth grader, he was sexually assaulted. DE A at 1. While standing at a urinal in the bathroom at school with his pants unzipped, an older boy entered the bathroom, grabbed Appellant, pushed him away from the urinal, and up against a wall. *Id*. While Appellant tried to understand what was happening to him, the older boy began to fondle Appellant's genitals, and forced

Appellant to do the same to him. *Id*. Shaken by what had happened to him, Appellant did not tell anyone about the assault, not even his parents. *Id*. This assault was Appellant's first sexual experience. *Id*.

A few years later, while in middle school, Appellant came to understand that he was gay. *Id*. He broke this news to his parents on Thanksgiving day. *Id*. He could recall his mother's deep concern about him being openly gay in their conservative community, which Appellant explained "did not feel like an option." *Id*. Despite this heavy secret and his sexual trauma, Appellant worked hard in high school to earn a 3.8 grade point average and a scholarship to West Virginia University. *Id*. There, he was able to tell his friends he was gay for the first time in his life. *Id*. Though he did not earn a degree, Appellant chose instead to enlist. *Id*.

Facts Giving Rise to the Charges

In February 2021, while Appellant was stationed at Whiteman AFB, MO, the National Center for Missing and Exploited Children (NCMEC) notified the Missouri State Highway Patrol that Appellant's Dropbox[3] account was flagged for suspected child pornography activity. Prosecution Exhibit 1 at 2. Appellant was investigated and interviewed by the Air Force Office of Special Investigations (AFOSI). *Id*. He fully cooperated with investigators, consenting to a search of his two phones[4] and

[3] Dropbox is a file hosting service offering online cloud storage and file synchronization frequently used for file sharing. It is accessible from a personal computer or mobile device.

[4] Appellant purchased a new phone approximately one month prior to his interview with AFOSI. All videos and images but for two videos were discovered on Appellant's old phone. PE 1 at 2.

providing them with his passcodes. *Id*. Those searches yielded evidence that Appellant possessed images and videos depicting child pornography. The search also revealed that in January 2022, Appellant sent an image depicting child pornography to an unknown person via WhatsApp, a mobile messaging application. *Id*. at 3.

Appellant forthrightly admitted to investigators that he possessed and distributed child pornography. PE 6 at 3. He explained that when he was thirteen years old, shortly after coming out to his family, he began "looking for other people like me," i.e. other gay boys his age. PE 6 at 3; DE A at 1. This search led him to certain online applications on which he met "older guys" who shared child pornography with him, much of the same child pornography he pled guilty to possessing at his court-martial many years later. *Id*. Those same men enticed Appellant to produce and share intimate images of himself. DE A at 1. Over the years, Appellant intermittently deleted the child pornography from his phone only to re-download it from various cloud storage services. *Id*. He explained:

> At approximately 18 [years of age], I had went through and deleted everything off my phone and it was 100% clean for a while as I knew I shouldn't have that stuff any more…[I] was feeling better about not having any of that on my phone. Then I came to Whiteman [AFB] and I'm not sure if it was the loneliness or what but I found myself looking at it again. I really just want [to get] rid of it all for good but I don't know how to do that all by myself.

PE 6 at 3-4. Appellant admitted to possessing fifty-five images and forty-eight videos depicting child pornography. PE 1 at 2.

The Admission of Aggravation Evidence

During sentencing proceedings, the prosecution offered Prosecution Exhibit 8

as a matter in aggravation under R.C.M. 1001(b)(4). R. at 106. Prosecution Exhibit 8 is a disc containing a single video, which is roughly five minutes long and depicts minor boys engaging in sex acts. R. at 109-10. The video was recovered from Appellant's old phone. R. at 109. The defense objected to Prosecution Exhibit 8's admission on the basis that it was not proper aggravation evidence and failed Mil. R. Evid. 403 balancing.[5] R. at 107. The defense noted Appellant did not admit to possessing the video depicted in Prosecution Exhibit 8 during his guilty plea inquiry. It also noted Appellant's use of applications like Mega[6] and Dropbox, which "allow files and folders to be shared between users," could have resulted in the video being shared, or "auto-downloaded," to Appellant's account without his knowledge. R. at 117-18. The military judge asked trial counsel whether he had to find that Appellant knowingly possessed Prosecution Exhibit 8 to admit it for aggravation purposes; trial counsel responded, "No, you don't." R. at 120.

The military judge admitted Prosecution Exhibit 8. R. at 149. He found Appellant's possession of the video—knowing or not—was part of a continuous course of conduct with the charged offenses. R. 146-47. He found Appellant possessed the video—knowingly or not—within the charged time frame. R. at 147. He found the uncharged misconduct—Appellant's possession of Prosecution Exhibit 8—was the "same or similar" as the charged offenses. *Id.*

The military judge articulated his Mil. R. Evid. 403 balancing analysis as

[5] Appellant stipulated to the authenticity and foundation of Prosecution Exhibit 8. R. at 108; PE 1 at 3.

[6] Mega is a file sharing service like Dropbox.

follows: "I don't see that there's any unfair prejudice. I think that it's squarely admissible under [R.C.M.] 1001(b)(4), and so I don't that there's any unfair prejudice, and I find that it has probative value as far as giving some evidence with regard to timing, and the extent of the misconduct in question." R. at 147. He noted the possibility that Appellant "didn't know he possessed" the video depicted in Prosecution Exhibit 8, but also noted the defense "can argue the possibility that [the video] is on his phone, he didn't know about it…that there's a possibility that…it was potentially shared through some sort of peer-to-peer [software] or something like that." R. at 148. The military judge did not make a factual finding as to whether Appellant knowingly possessed the video depicted in Prosecution Exhibit 8.

ARGUMENT

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY CONSIDERING AS AGGRAVATION EVIDENCE A VIDEO DEPICTING CHILD PORNOGRAPHY WITHOUT DETERMINING WHETHER APPELLANT KNOWINGLY POSSESSED IT AND WITHOUT PROPERLY WEIGHING ITS PROBATIVE VALUE.

Standard of Review

A military judge's decision to admit or exclude evidence during sentencing is reviewed for an abuse of discretion. *United States v. Manns*, 54 M.J. 164, 167 (C.A.AF. 2000).

Law

During sentencing, the government may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which

the accused has been found guilty. R.C.M. 1001(b)(4). Evidence in aggravation includes evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of the offenses for which Appellant was found guilty, evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from those offenses, or evidence that the accused intentionally selected any victim or any property as the object of the offense because of the actual or perceived suspect class of that person. *Id.*

The Military Rules of Evidence are applicable during sentencing proceedings, thus "providing procedural safeguards to ensure the reliability of evidence admitted during sentencing." *United States v. McDonald*, 55 M.J. 173, 176 (C.A.A.F. 2001). The admission of aggravation evidence during sentencing proceedings is subject to Mil. R. Evid. 403 balancing, which weighs against admission when the probative value of evidence is substantially outweighed by the danger of unfair prejudice. *United States v. Carter*, 74 M.J. 204, 206-07 (C.A.A.F. 2015) (citing *Manns*, 54 M.J. at 166).

Analysis

The military judge first erred by failing to make a factual finding that Appellant knowingly possessed Prosecution Exhibit 8 before concluding it was proper aggravation evidence. Appellant's unknowing possession of a video depicting child pornography could not logically aggravate his knowing possession of other images and videos depicting the same. Only Appellant's knowing possession of Prosecution Exhibit 8 could directly relate or result from the offenses—*knowing* and wrongful possession and distribution of child pornography—of which he was found guilty.

Absent sufficient evidence to prove Appellant knowingly possessed Prosecution Exhibit 8, the exhibit did not fall within the ambit on R.C.M. 1001(b)(4).

The military judge's Mil. R. Evid. 403 analysis was also clearly erroneous. He reasoned there was no unfair prejudice to Appellant by the exhibit's admission because the evidence was "squarely admissible under [R.C.M.] 1001(b)(4)." R. at 147. But this is not the proper way to weigh the probative value of evidence against the danger of unfair prejudice. The fact that evidence falls within the purview of R.C.M. 1001(b)(4) does not dispel the danger of unfair prejudice. It is tautological to reason that because the evidence is aggravating, it is not unfairly prejudicial, and is thus admissible.

The military judge surmised Prosecution Exhibit 8 "has probative value as far as giving some evidence with regard to timing, and the extent of the misconduct in question." R. at 147. Given this assessment, the probative value of the exhibit was very weak at best. Whatever probative value the evidence had "with regard to timing, and the extent of the misconduct in question" was greatly diminished by the lack of evidence before the court-martial as to whether Appellant knowingly possessed the video. Without determining whether Appellant knowingly possessed the video, the military judge could not know the proper weight to give the evidence, and thus could not properly conduct a Mil. R. Evid. 403 balancing test.[7]

[7] The defense oriented the military judge to the same point: "[Knowledge] is absolutely a relevant factor that goes to whether [the evidence is] probative or not, and whether that probativeness is outweighed by the prejudicial effect, and whether in fact it is aggravating." R. at 122.

The video contained on Prosecution Exhibit 8 was longer than most if not all of the other videos Appellant admitted to possessing. As the military judge himself observed, "There are some aspects of this [video] that are more aggravating than some of the other images, as far as there's one point in this video where there's an indication of pain from the boy who is…receiving the sex" (he also noted, "But that was also true in some of the other evidence" before concluding the video was not "significantly more aggravating than the evidence to which A1C Estep has already admitted he possessed"). R. at 149. The military judge's consideration of Prosecution Exhibit 8 caused prejudice to Appellant. The pain experienced by one of the child victims in the video is more apparent than on any other video or image Appellant possessed. Prosecution Exhibit 8 was also one of if not the last video the military judge reviewed,[8] and thus loomed large in his mind as he deliberated on what became a three-year confinement sentence and a dishonorable discharge.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the sentence of the court-martial and authorize a rehearing.

[8] After deferring his ruling on the admission of Prosecution Exhibit 8, the military judge appears to review all fifty-five images and thirty of the forty-eight videos contained within Prosecution Exhibit 3 during the lunch recess. R. at 132, 137, 139, 144. He then recessed the court to view the eighteen remaining videos on Prosecution Exhibit 3, specifically so that he could then rule on the admission of Prosecution Exhibit 8. R. at 146.

II.

THE SENTENCE ADJUDGED BY THE COURT-MARTIAL IS INAPPROPRIATELY SEVERE.

Appellant does not downplay the wrongfulness of his conduct. His contrition is reflected by his willingness to plead guilty and agree to a period of confinement ("I know I can't change what I did, and I know there must be consequences for my actions, and I will be going to confinement." R. at 140). But the three-year confinement sentence, especially when combined with the dishonorable discharge, is inappropriately severe given the extenuation and mitigation of Appellant's crimes.

Appellant was not a grown man when he sought out child pornography. Rather, he first came into possession of child pornography—the same he plead guilty to possessing and distributing—when he was barely a teenager himself. He was given this child pornography by older men who, in addition to possessing and distributing these images, preyed upon Appellant, too. As a thirteen year old kid, Appellant's understanding of sexual morality was not close to being fully developed. Moreover, like the child victims depicted in the pornography Appellant possessed, Appellant's formative sexual experience—which was non-consensual and violent—occurred when he was much too young to understand it. What constitutes child sexual abuse was normalized for a young boy whose first sexual experience was a bewildering assault at the hands of an older boy; later, older men enticed him into sharing nude images of himself and gave him child pornography. Even though Appellant re-downloaded these images and videos as a young adult, he was still struggling greatly with his traumatic past and the addictive power of sexualized images he was exposed to just

as he was undergoing puberty. These facts significantly extenuate Appellant's misconduct.

Despite being preyed upon, Appellant never inflicted physical abuse onto someone else. True, Appellant's possession of images and videos of children being abused by others arguably aggravated that abuse. But Appellant was convicted of distributing only one image and one video of child pornography, and struggled with reconciling what he knew was wrongful conduct with the formative sexual conditioning, i.e. "grooming," he underwent as a young boy. Appellant was candid about this struggle when he told investigators about how he intermittently deleted the child pornography from his phone before re-downloading it, lamenting, "I really just want [to be] rid of it all for good but I don't know how to do that all by myself." PE 6 at 3-4. Appellant vividly demonstrated the need for rehabilitation, not punishment for its own sake. A sentence of three years of confinement is excessively punitive—particularly for an Airman with no other derogatory data—and is more than what is necessary to rehabilitate Appellant. *See* Article 56, UCMJ.

What Appellant needed was a significant intervention, and he got that with an investigation ("When I first read the OSI report—I went back to my room and I read through the whole thing, and I cried. It was the first time I cried about this case. Because it was clear how bad the things I was doing were, and I had no excuse for it." R. at 140); a court-martial ("I've had a large [amount] of time to think about my future…I realize what I did was wrong, and even if an early version [of me] did not see the extent that I was hurting people, the current me does." *Id.*); and a punitive

discharge and federal conviction ("I ask that as you consider what is an appropriate sentence, you consider allowing me the opportunity to rehabilitate sooner rather than later, so I can take the lessons I've learned[.]" *Id.*). Appellant should sooner "[R]eenter society, prepared to be the person I know I can become," and reunite with his large and loving family who "will serve as the support network that he will need when he is released from confinement." R. at 140; ROT Vol. 1, Clemency Request, 24 June 2022.

WHEREFORE, Appellant respectfully requests this Honorable Court not affirm the portion of his sentence which calls for confinement in excess of two years.

Respectfully submitted on behalf of Appellant,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

5 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40336
Airman First Class (E-3) MICHAEL J. ESTEP, USAF *Appellant.*	)	Panel No. 1

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

ISSUES PRESENTED

I.[1]

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY CONSIDERING AS AGGRAVATION EVIDENCE A VIDEO DEPICTING CHILD PORNOGRAPHY WITHOUT DETERMINING WHETHER APPELLANT KNOWINGLY POSSESSED IT AND WITHOUT PROPERLY WEIGHING ITS PROBATIVE VALUE.

II.[2]

WHETHER THE SENTENCE ADJUDGED BY THE COURT-MARTIAL IS INAPPROPRIATELY SEVERE.

STATEMENT OF THE CASE

The United States generally accepts Appellant's Statement of the Case.

STATEMENT OF FACTS

Facts necessary to the disposition of this case are discussed in the specific issues below.

[1] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[2] This issue is raised in the appendix pursuant to Grostefon.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING PROSECUTION EXHIBIT 8.

Standard of Review

This Court reviews a military judge's decision to admit sentencing evidence, including aggravation evidence under Rule for Courts-Martial (R.C.M.) 1001(b)(4), for an abuse of discretion. United States v. Ashby, 68 M.J. 108, 120 (C.A.A.F. 2009).

Law

R.C.M. 1001(b)(4) allows the prosecution to present "evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty." This includes evidence "which is directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding that offense or its repercussions may be understood by the sentencing authority." United States v. Irwin, 42 M.J. 479, 483 (C.A.A.F. 1995) (citing United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982

An abuse of discretion occurs when the military judge makes clearly erroneous findings of fact or when the military judge's legal conclusions are influenced by an erroneous view of the law. United States v. Hollis, 57 M.J. 74, 79 (C.A.A.F. 2002). 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).

When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion." United States v.

Manns, 54 M.J. 164, 166 (C.A.A.F. 2000). The military judge normally has "enormous leeway" in balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or undue waste of time. *See, e.g.*, United States v. Baldwin, 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (*citing* Stephen A. Saltzburg et al., Military Rules of Evidence Manual 490 (4th ed. 1999)).

Additional Facts

Appellant pled guilty to knowingly and wrongfully possessing and distributing child pornography. (R. at 19.) Appellant entered into a Stipulation of Fact in which he agreed that he possessed 55 images and 48 videos of children under the age of 18 that included "obscene visual depictions of a minor or minors engaging in sexually explicit conduct, or were visual depictions of an actual minor or minors engaging in sexually explicit conduct." (Pros. Ex. 1.) The images were contained on two phones solely possessed by Appellant. These images are contained in Prosecution Exhibit 3. (Id.) Appellant also admitted to distributing "a digital image and a digital video of minors, or what appear to be minors, engaging in sexually explicit conduct." (Id.)

After the military judge found Appellant guilty on both specifications, the Government sought to introduce the video contained at Prosecution Exhibit 8. (R. at 106.) This video, which was found on one of Appellant's phones, was not part of the videos contained in Prosecution Exhibit 3 and was not a video to which Appellant pled guilty to knowingly possessing. However, the Government argued it was "directly related to the charged offenses" because it was possessed by Appellant on his phone during the charged timeframe, was of a nature similar to the other child pornography to which Appellant had pled, and had a file path of a social media application (Mega) that Appellant had admitted to using to obtain child pornography. (R. at 112-14, *referencing* Pros. Ex. 6, which is Appellant's AF Form 1168.)

Appellant's trial defense counsel objected, arguing that Appellant did not knowingly possess the video. (R. at 115-16.) Appellant's counsel argued that since only one file was found in the Mega directory and because some applications have "auto-sync features," there was a "very good chance that [Appellant] may not have known that the file downloaded and unless he affirmatively had gone into that application and observed this file present there, he cannot be deemed to have known that that file existed on the phone." (R. at 116.)

The military judge later asked the Government if he had to make a determination on whether this was a knowing possession. (R. at 120.) The Government trial counsel responded, "No. No, you don't." (Id.)

The government overruled Appellant's objection and admitted Prosecution Exhibit 8. (R. at 146.) The military judge cited to a litany of cases regarding involving continuing course of conduct, and highlighted the video was "modified, created, or accessed," as well as actually found on Appellant's phone, within the charged timeframe. (R. at 146-47.) Next, the military judge noted the video involved the same offense, possession of child pornography, and that the content was "very similar to content that is admitted in Prosecution Exhibit 3." (R. at 147.) Thus, the military judge found it to be proper aggravation evidence under R.C.M. 1001(b)(4).

The military judge next conducted a Mil. R. of Evid. 403 balancing test and found no unfair prejudice, adding that "it has probative value as far as giving some evidence with regard to timing, and the extent of the misconduct in question." (Id.) The military judge highlighted that the defense was free to argue Appellant had no knowledge of the video, stating, "the defense can argue the possibility that it is on his phone, he didn't know about it, didn't necessarily know how it got there, that there's a possibility that it came through other means without even his

knowledge." (R. at 148.) The military judge also highlighted that "[w]e're in a judge alone setting, so, like, the danger of unfair prejudice is significantly lower for that reason."

Finally, the military judge held that "the evidence is pretty similar to what's in--what's already in Prosecution Exhibit 3. This is one video there are already 48 videos in evidence, and 55 images, many of which are--well, show similar kinds of things." (R. at 149.) He continued:

> There are some aspects of this that are more aggravating than some of the other images, as far as there's one point in this video where there's an indication of pain from the boy who is--well, there are multiple boys on a bed, and the bed who is receiving the sex, at one point there is an indication of pain on his part. But that was also true in some of the other evidence. These boys are--appear to be either the same age or older than the boys in the other videos. And, so, I think there's--I don't find it to be significantly more aggravating than the evidence to which A1C Estep has already admitted he possessed.

(Id.) Ultimately, the military judge held, "I find the probative value is not substantially outweighed by the danger of unfair prejudice, cumulativeness, waste of time, or any of the other considerations under M.R.E. 403." (R. at 148.)

The Government did not specifically mention Prosecution Exhibit 8 in its sentencing argument.

Analysis

Here, Appellant claims that "[o]nly Appellant's knowing possession of Prosecution Exhibit 8 could directly relate or result from the offenses . . . of which he was found guilty," and that "[a]bsent sufficient evidence to prove Appellant knowingly possessed Prosecution Exhibit 8, the exhibit did not fall within the ambit on R.C.M. 1001(b)(4)." (App. Br. at 10.) Appellant also believes the "military judge's Mil. R. Evid. 403 analysis was also clearly erroneous." (Id.) Appellant is incorrect.

Whether Appellant knew he possessed the video in Prosecution Exhibit 8 or not, the evidence was properly admissible under R.C.M. 1001(b)(4) because it directly related to or resulted from the offenses of which Appellant willfully pled guilty – namely possession of child pornography. Here, Appellant admitted to using various web applications to knowingly possess over 50 images and nearly 50 videos of minors engaged in sexually explicit conduct. His possession of the video at Prosecution 8, whether knowing or not, is directly related and a derivative of his behavior in knowingly possessing the multiple other pieces of child pornography. Moreover, as the military judge found, the video at Prosecution Exhibit 8 was modified, created, or accessed within the charged timeframe and then was actually found on Appellant's phone within the charged timeframe. Finally, the military judge found the content was "very similar to content" that Appellant admitted he knowingly possessed.

This Court dealt with a similar circumstance in United States v. Yohe, No. ACM 37950 (recon), 2015 CCA LEXIS 380, at *21-23 (A.F. Ct. Crim. App. 3 September 2015). There, an appellant was charged with knowingly possessing and viewing child pornography. This Court ultimately upheld the conviction due to other evidence, but found a portion of the evidence, namely 15 images and one video of child pornography recovered from the appellant's computer's backup system or temporary files, was legally and factually insufficient to support the appellant's conviction for knowing possession because the appellant did not know they were being saved on his hard drive and did not possess specialized computer skills to be able to access them. Id., unpub. op. at *16-17.

This Court next turned to the question of whether the appellant was prejudiced by the admission of the 15 images and one video that was now not evidence used to support his conviction and that this Court had found to be not *knowingly* possessed by the appellant. This

Court found no prejudice. In addition to holding that the images would have been admissible in findings under Mil. R. of Evid. 404(b), this Court further found the "evidence would also have been admissible in sentencing under Rule for Courts-Martial (R.C.M.) 1001(b)(4) as an aggravating circumstance directly relating to or resulting from the offenses of which Appellant was convicted." Id., unpub. op. at *20-23 (*citing* United States v. Wingart, 27 M.J. 128, 135 (C.M.A. 1998). This Court continued:

> As such, the evidence could be used to inform the sentencing authority's judgment regarding the charged offense as well as placing that offense in context, including the facts and circumstances surrounding the offense. United States v. Nourse, 55 M.J. 229, 232 (C.A.A.F. 2001); United States v. Mullens, 29 M.J. 398, 400-01 (C.M.A. 1990); United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982); *see also* United States v. Buber, 62 M.J. 476, 479 (C.A.A.F. 2006). Therefore, we are convinced beyond a reasonable doubt that the admission of the 15 thumbnail images and 3-minute video did not prejudice Appellant.

Id., unpub. op. at *23.

This Court's analysis and reasoning in Yohe applies in this case. Here, Appellant argues he did not knowingly possess the video at Prosecution Exhibit 8. Yet, as this Court held in Yohe, knowingly possessing an image or video is unnecessary for admissibility pursuant to R.C.M. 1001(b)(4). The proper test is whether the evidence directly related or results from the offenses of which Appellant was convicted. In Yohe, this Court found that 13 of the 15 images and the one video were "clearly . . . sexually explicit depictions of minor children" and that all depictions were found on the appellant's computer. Id., unpub. op. at *20-21. Likewise, here, the video at Prosecution Exhibit 8 was found on Appellant's phone during the charged timeframe, was either modified, created, or accessed during the charged timeframe, and depicted sexual explicit conduct that was similar to the 55 images and 48 videos that Appellant willfully pled guilty to knowingly possessing.

Here, there was no abuse of discretion, and there was no error in the military judge's ruling regarding R.C.M. 1001(b)(4). The military judge also did not err in his Mil. R. of Evid. 403 balancing test. First, the military judge specifically detailed the probative value of the evidence. Next, the military judge noted the dearth of unfair prejudice and specifically highlighted the video was "pretty similar" to what was already in evidence at Prosecution 3. The military judge even specifically stated the video was not "significantly more aggravating than the evidence" to the images and videos Appellant had already admitted to possessing. (R. at 149.) As the military judge stated, "This is one video[,] there are already 48 videos in evidence, and 55 images, many of which are--well, show similar kinds of things." (R. at 149.)

It is also for this very reason that Appellant suffered no prejudice. While Appellant blindly claims prejudice because this video was "one of if not the last video the military judge reviewed" before deliberating on a sentence, Appellant offers no real justification for prejudice. (*See* App. Br. at 11.) Here, the military judge repeatedly said the video at Prosecution Exhibit 8 was similar to the multitudes of images and videos already in evidence. Further, a military judge is "presumed to know the law and to follow it absent clear evidence to the contrary." United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). For these reasons, the military judge did not err in his Mil. R. of Evid. 403 balancing test nor did Appellant face any prejudice even if the military judge did err.

In sum, the military judge here did not abuse his discretion, and Appellant suffered no prejudice. Therefore, this Court should deny Appellant's claim.

II.[3]

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(d), 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).

[3] This issue is raised in the appendix pursuant to Grostefon, 12 M.J. at 436–37.

Analysis

At trial, Appellant admitted to possessing 55 images and 48 videos of child pornography. (R. at 33.; Pros. Ex. 1.) Appellant also admitted to distributing an image and video of child pornography. (R. at 67; Pros. Ex. 1.) Now convicted of possessing and distributing child pornography, Appellant claims his sentence is "inappropriately severe given the extenuation and mitigation of [his] crimes." (App. Br. at 12.) Appellant is wrong.

The maximum punishment authorized for Appellant's offenses included 30 years confinement and a dishonorable discharge. (R. at 79.) However, after hearing Appellant's guilty plea, his admission of wrongdoing, and his trial defense counsel's argument, the military judge sentenced Appellant to only three years confinement, a 90 percent reprieve from the maximum allowed. Moreover, the sentence was 57 percent less than the seven-year confinement cap and what the trial counsel argued for during sentencing. Yet, Appellant comes to this Court asking for even more relief in the form of reducing his confinement even further.

As evidenced by Appellant's own words in his providence inquiry describing the images and videos, Appellant's offenses are of a very serious and disgusting nature. (R. at 46-61.) While Appellant now attempts to use his childhood and difficult upbringing as mitigation, it was that very upbringing that should have deterred Appellant from irreparably damaging other children by possessing and distributing the haunting images and videos contained in Prosecution Exhibit 3. While Appellant wants to "reenter society" quicker, his actions and repugnant offenses show society needs to be protected from him for his full three-year confinement sentence.

Notably, Appellant asserts no legal objection to the sentence. Instead, he simply stands on his upbringing and his family's support. Here, Appellant has failed in his burden to show his

sentence is inappropriately severe. Appellant cannot overcome the facts of this case and his deplorable actions of possessing and distributing child pornography. Considering the circumstances, an approved sentence of a dishonorable discharge and three years confinement, after initially facing a dishonorable discharge and 30 years, is lenient but is legally supportable for Appellant's despicable acts. Evaluating the facts and circumstances in the record of Appellant's individual case, the seriousness of his offenses, his service record, his particular character and rehabilitative potential, and in consideration of the entire record, this Honorable Court should leave his three-year confinement sentence undisturbed[4] and affirm his entire approved sentence.

CONCLUSION

WHEREFORE, this Court should deny Appellant's claims and affirm the findings and sentence.

[redacted]

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
[redacted]

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
[redacted]

[4] Appellant does not contest the appropriateness of the rest of his approved sentence, which is entirely appropriate considering the severity of Appellant's crimes.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 5 June 2023 via electronic filing.

G. MATT OSBORN, Lt Col, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF**
v.	)	Before Panel No. 1
Airman First Class (E-3) **MICHAEL J. ESTEP** United States Air Force *Appellant*	)	No. ACM 40336 5 June 2023

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Airman First Class Michael J. Estep, Appellant, hereby moves for an enlargement of time to file a Reply brief to the United States' Answer, filed on 5 June 2023. Appellant's Reply brief is currently due on 12 June 2023. For good cause, Appellant respectfully requests an enlargement period of eleven days, which will end on 23 June 2023.

On 14 June 2022, at a general court-martial convened at Whiteman Air Force Base, Missouri, Appellant was convicted, in accordance with his pleas, of one specification of possession of child pornography on divers occasions (Specification 1 of the Charge) and one specification of distribution of child pornography on divers occasions (Specification 2 of the Charge) in violation of Article 134, UCMJ, 10 U.S.C. § 934.[1] Record of Trial (ROT) Vol. 1, Entry of Judgment, 11 July 2022. A military

[1] All references to the UCMJ, the R.C.M., and the Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

judge sentenced him to a dishonorable discharge, three years of confinement for Specification 1 of the Charge, eighteen months of confinement for Specification 2 of the Charge (with all confinement to be served concurrently), total forfeitures of all pay and allowances, a reduction to the lowest enlisted grade, and a reprimand. *Id*. The convening authority took no action on the findings and sentence of the court-martial, and denied Appellant's requests to defer the reduction in grade and the adjudged and automatic forfeitures. ROT Vol. 1, Convening Authority Decision on Action Memorandum, 5 July 2022. Appellant is currently confined at Naval Consolidated Brig Miramar in San Diego, California.

The trial transcript is 174 pages long and the record of trial is comprised of three volumes consisting of nine prosecution exhibits, one defense exhibit, and five appellate exhibits. Appellant requested and received five enlargements of time before filing an Assignments of Error brief.

Appellant requests an additional eleven days to submit a Reply to the United States' Answer. His counsel will be on a temporary duty assignment from 7-9 June 2023 at Maxwell AFB, Alabama, and will then attend a course at Headquarters Air Force, Pentagon, Washington, DC, from 0800-1400 hours on 12-14 June 2023. During these dates, counsel will be unable to attend to his primary duties, to include drafting the Reply brief. Additionally, counsel is simultaneously drafting a Reply brief in *United States v. McAlhaney* (No. ACM 39979 (rem)), currently due 9 June

2023.[2] Through no fault of Appellant, his counsel will be unable to draft and submit a Reply brief in this case on or before the current deadline. Granting this request will give Appellant's counsel sufficient time to draft the Reply brief.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time out of time for good cause shown.

Respectfully submitted,

[redacted]
Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 5 June 2023.

Respectfully submitted,

[redacted]
Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

[2] On the date of this pleading, counsel filed a motion for an enlargement of time in *McAlhaney*, too, requesting a deadline of 21 June 2023 (or twelve days of additional time). The motion is pending.

7 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) MICHAEL J. ESTEP, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF ACM 40336 Panel No. 1

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 does not oppose Appellant's Motion for Enlargement of Time to file a Reply to the United States' Answer to Assignments of Error.

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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 7 June 2023.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**REPLY BRIEF**
Appellee	)	
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM 40336
MICHAEL J. ESTEP	)	
United States Air Force	)	21 June 2023
Appellant	)	

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

Appellant, Airman First Class Michael J. Estep, by and through counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, submits this Reply to the United States' Answer, dated 5 June 2023 (Gov. Ans.). Appellant stands by the arguments he raised in his opening brief (Op. Br.) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982) and further argues the following.

I.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY CONSIDERING AS AGGRAVATION EVIDENCE A VIDEO DEPICTING CHILD PORNOGRAPHY WITHOUT DETERMINING WHETHER APPELLANT KNOWINGLY POSSESSED IT AND WITHOUT PROPERLY WEIGHING ITS PROBATIVE VALUE.

Appellee cites *United States v. Yohe*, No. ACM 37950 (recon), 2015 CCA LEXIS 380 (A.F. Ct. Crim. App. 3 Sep. 2015) (unpub. op.), to support its argument that the video contained on Prosecution Exhibit 8 was admissible at sentencing under R.C.M. 1001(b)(4). In *Yohe*, this Court affirmed a possession of child pornography conviction based on appellant's possession of two videos. Yet, 15 thumbnails and one additional video were also shown to the panel. Despite finding the government failed to prove

beyond a reasonable doubt that the appellant possessed the thumbnails and the additional video, this Court found the appellant suffered no prejudice by their admission. It found the thumbnails and the video were admissible under R.C.M. 1001(b)(4) because they "could be used to inform the sentencing authority's judgment regarding the charged offenses as well as placing that offense in context, including the facts and circumstances surrounding the offense." *Id.*, unpub. op. at *23. This reasoning is, respectfully, flawed. It is questionable how this unproven misconduct could have "inform[ed]" the sentencing authority's "judgment" any more so than the proven misconduct. Invoking "context" and "facts and circumstances" does little to shore up admissibility under R.C.M. 1001(b)(4), which requires evidence to be "directly relating to or resulting from the offenses" of which the accused is found guilty. That rule was not "intended to authorize admission of evidence of uncharged misconduct merely because under some circumstances that evidence might be admissible in a contested case to prove an offense for which the accused is being tried." *United States v. Wingart*, 27 M.J. 128, 135 (C.M.A. 1988).[1]

II.

THE SENTENCE ADJUDGED BY THE COURT-MARTIAL IS INAPPROPRIATELY SEVERE.

Appellee contends Appellant's sentence is appropriate because he received "a 90 percent reprieve from the maximum [confinement sentence] allowed," and because the

[1] The Supreme Court of the United States will soon conference over a petition for a writ of certiorari from the United States Court of Appeals for the Seventh Circuit presenting the issue of whether the Fifth and Sixth Amendments to the United States Constitution prohibit a federal court from basing a criminal defendant's sentence on conduct for which a jury has acquitted the defendant. *United States v. McClinton*, 23 F.4th 732 (7th Cir. 2022), *petition for cert. filed*, 10 Jun. 2022 (No. 21-8128).

confinement sentence "was 57 percent less than the seven-year confinement cap and what the trial counsel argued for during sentencing." Gov. Ans. at 10. This argument is too facile. True, a "90 percent reprieve" is considerable when appropriateness is anchored on the *maximum allowable* punishment. Arguing a sentence is appropriate because it did not meet the government's excessive recommendation operates the same way.

Appellee next dismisses the extenuation value of Appellant's victimization, arguing imperiously that "it was that very upbringing that should have deterred Appellant from irreparably damaging other children by possessing and distributing [child pornography]." Gov. Ans. at 10. This statement is startling in its ignorance of what has been empirically proven and is commonly understood, which is that harm begets harm, and the cycle of abuse is a real phenomenon.[2] Appellant was sexually assaulted as a fifth grader and was later exploited by older men for their pedophilic sexual fantasies. While Appellee may look at Appellant and see nothing more than "disgusting" and "deplorable" crimes (Gov. Ans. at 10-11), sentences are adjudged not

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[2] *See* Cathy S. Widom and Michael G. Maxfield, *An Update on the 'Cycle of Violence,'* Research in Brief (National Institute of Justice, U.S. Department of Justice, Washington, D.C.), February 2001, at 3, https://www.ojp.gov/pdffiles1/nij/184894.pdf. *See also* Mirko Bagaric and Gabrielle Wolf, *An argument for recognising childhood sexual abuse and physical abuse as a mitigating factor in sentencing*, 49 AUST BAR REV 227, 242 (2020) ("[T]here is now a large body of empirical research…confirming that individuals who have experienced sexual abuse and physical abuse (as well as neglect and emotional and psychological abuse) during childhood are at a high risk and have an increased probability of committing criminal offences in adolescence and adulthood. Particularly significant studies in this area have been prospective and longitudinal, and collated information about victims of childhood abuse as well as a control group that did not have this history, but their findings match the results of research that has relied on different methodologies. Many of the studies, and the early ones in particular, were conducted in the United States.").

upon crimes but upon the human beings—with all their complexities and varied experiences—who commit them. This principle of "individual consideration" is enshrined in the law and rules governing sentencing. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Accordingly, in response to Appellee's curious argument that Appellant "asserts no legal objection to the sentence" but instead "simply stands on his upbringing and his family's support," Appellant points out that these *are* legal considerations—they constitute evidence of extenuation (which explains "the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification or excuse," R.C.M. 1001(d)(1)(A)), and evidence of rehabilitation potential (or the accused's potential to be restored through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society," R.C.M. 1001(b)(A)(5)).

WHEREFORE, Appellant respectfully requests this Honorable Court not affirm the portion of his sentence which calls for confinement in excess of two years. Appellant hereby demands speedy appellate review.

Respectfully submitted on behalf of Appellant,

[redacted]aj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 June 2023.

Respectfully submitted,

[redacted]

ESHAWN R. RAWLLEY, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40336**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Michael J. ESTEP	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 20th day of July, 2023,

ORDERED:

The Record of Trial in the above-styled matter is withdrawn from Panel 1 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
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

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