United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40290 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Keen A. FERNANDEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

The above styled case was re-docketed with this court by the Appellate Records Branch on 19 December 2022.

Accordingly, it is by the court on this 20th day of December, 2022,

ORDERED:

That the Record of Trial in the above styled matter is referred to Panel 2 for appellate review.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40290 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Keen A. FERNANDEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 February 2023, Appellant's counsel submitted a Motion to Examine Sealed Material, requesting to examine Appellate Exhibits IX and XIX; and Prosecution Exhibits 5, 10, and 11.

Appellant's motion states the materials were reviewed by trial and defense counsel and sealed by the military judge. Appellant's counsel avers that viewing the exhibits is "reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his duty of representation . . . without first reviewing the complete record of trial."

The Government responded to the motion on 8 February 2023. It does not object to Appellant's counsel reviewing materials that were released to both parties at trial—as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to 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 finds Appellant's counsel has made a colorable showing that review of the attachments is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 16th day of February, 2023,

ORDERED:

Appellant's Motion to Examine Sealed Material is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Appellate Exhibits IX and XIX; and Prosecution Exhibits 5, 10, and 11**, 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

FLEMING E. KEEFE, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman First Class (E-3) **KEEN A. FERNANDEZ,** United States Air Force *Appellant*	)))))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL** Before Panel No. 2 Case No. ACM 40290 (f rev) 7 February 2023

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

Pursuant to Rules 3.1 and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel respectfully moves to examine the following sealed materials in Appellant's record of trial:

1. Appellate Exhibit IX, CD of Facebook Warrant with 10 Images from Facebook Warrant Return. Record (R.) at 15-16.

    a. These videos were sent by a third party to a Facebook message group that Appellant was a part of and that he forwarded to another user. R. at 151. This disc contains, *inter alia*, file numbers 8592 and 0210, which form part of Prosecution Exhibit 10. R. at 15.

2. Appellate Exhibit XIX, CD Containing Four Images/Videos. R. at 19.

    a. This CD forms part of the Government's response to the Defense Motion to Suppress. R. at 18. This disc contains, *inter alia*, file numbers 1626 and 9728, which form part of Prosecution Exhibit 11. R. at 19.

3. Prosecution Exhibit 5, Disc of Four Files (1 Image, 2 Videos, 1 .pdf). R. at 220.

    a. These files were contained in the CyberTip from the National Center for Missing and Exploited Children (NCMEC). R. at 209.

4. Prosecution Exhibit 10, Disc of Two Videos (1-8592/2-0210). R. at 265.

    a. This disc contains evidence obtained from Facebook from the government search warrant. R. at 262. They are the same videos as the CyberTip and Prosecution Exhibit 11. R. at 269.

5. Prosecution Exhibit 11, Disc of Two Videos (1-9728/2-1626). R. at 319.

    a. This disc contains evidence obtained from Facebook from the government search warrant. R. at 267-68. These are the same videos as the CyberTip and Prosecution Exhibit 10. R. at 269-70.

These exhibits contain videos and images of child pornography. The Military Judge did not issue an order to have the attachments sealed; rather he orally mandated that they would be sealed (at the record citations above). Trial Counsel presented the above exhibits as evidence at trial, the Military Judge accepted them into evidence (or as Appellate Exhibits), and the Military Judge subsequently sealed them. Defense Counsel and Appellant reviewed the exhibits prior to trial and during the trial.

Pursuant to R.C.M. 1113(b)(3)(B)(i), "materials presented or reviewed at trial and sealed…may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]" A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. §866, counsel must therefore examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation. *United States v. May*, 47 M.J. 478, 481, (C.A.A.F. 1998).

The sealed material must be reviewed in order for counsel to provide "competent appellate representation." *Id*. Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform his duty of representation under Article 70, UCMJ, 10 U.S.C. §870, without first reviewing the complete record of trial. Undersigned counsel needs to ensure the record of trial is complete and that the images and videos therein meet the definition of child pornography of which the court convicted Appellant.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 7 February 2023.

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

8 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

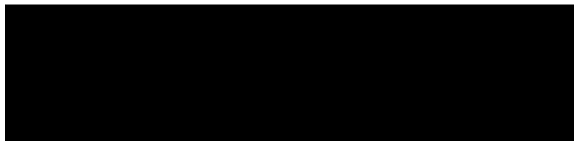
UNITED STATES, *Appellee,* v. Airman First Class (E-3) KEEN A. FERNANDEZ, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40290 (f rev) Panel No. 2

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 responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion – which Appellant avers were available to all parties at trial – so long as the United States can also review the sealed portions of the record 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.

The United States would not consent to Appellant's counsel viewing any exhibits that were reviewed in camera but not released to the parties unless this Court has determined there is good cause for Appellant's counsel to do so under R.C.M. 1113.

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



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

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 8 February 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**MOTION FOR ENLARGEMENT OF**
Appellee,	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3),	)	No. ACM 40290 (f rev)
KEEN A. FERNANDEZ,	)	
United States Air Force,	)	10 February 2023
Appellant.	)	

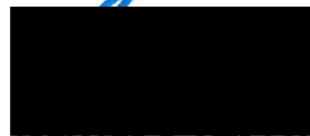
TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **18 April 2023**. The record of trial was originally docketed with this Court on 10 June 2022. Appellant requested three enlargements of time before this Court remanded this case to the Chief Trial Judge, Air Force Judiciary for correction to the record of trial. Order, 17 November 2022. The Government re-docketed this case with this Court on 19 December 2022. Notice of Docketing, 20 December 2022. From the new date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

Through no fault of Appellant, undersigned counsel has not yet finished Appellant's case. Counsel has reviewed the Record of Trial, submitted a motion to examine sealed materials, and started writing portions of the Assignment of Errors. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant is aware of his right to speedy appellate review, extensions of time, and consents to this extension of time request.

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

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 Division on 10 February 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

13 February 2023

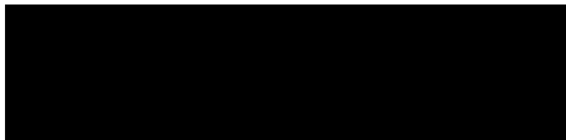
IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) KEEN A. FERNANDEZ, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40290 (f rev) Panel No. 2

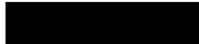
TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

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.

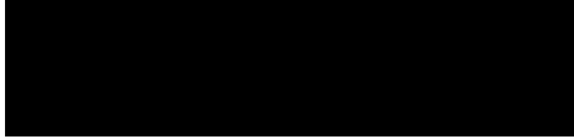


MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

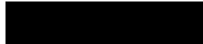


CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 February 2023.



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



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee,	)	**APPELLANT**
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3)	)	No. ACM 40290 (f rev)
KEEN A. FERNANDEZ,	)	
United States Air Force	)	3 April 2023
Appellant	)	

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

ASSIGNMENTS OF ERROR[1]

I.

WHETHER THE MILITARY JUDGED ERRED IN DENYING A1C FERNANDEZ'S MOTION FOR A MISTRIAL WHEN: 1) IN OPEN COURT AND AFTER SEEING THE EVIDENCE, THE COURT REPORTER SAID "I'M SORRY, I CAN'T" AND LEFT THE COURTROOM; 2) THE MILITARY JUDGE SPOKE WITH THE COURT REPORTER ALONE IN HIS CHAMBERS ABOUT WHY SHE LEFT THE COURTROOM; AND 3) A SPECTATOR WHO SAW THE INCIDENT SAID IT LOOKED LIKE THE COURT REPORTER "SAW SOMETHING DISGUSTING, AND IT MIGHT INFLUENCE THE DECISION OF THE CASE"?

II.

UNDER R.C.M. 902, WHETHER THE MILITARY JUDGE SHOULD HAVE *SUA SPONTE* RECUSED HIMSELF WHEN: 1) HE SPOKE WITH THE COURT REPORTER IN HIS CHAMBERS WITHOUT COUNSEL PRESENT AFTER SHE LEFT THE COURTROOM DURING LIVE TESTIMONY; 2) HE HAD TO BE *VOIR DIRED* REGARDING THE CONTENT OF THAT CONVERSATION; AND 3) A SPECTATOR WHO SAW THE INCIDENT SAID IT LOOKED LIKE THE COURT REPORTER "SAW SOMETHING DISGUSTING, AND IT MIGHT INFLUENCE THE DECISION OF THE CASE"?

[1] A1C Fernandez raises two issues, contained in Appendix A, under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

III.

WHETHER THE REPORTS FROM FACEBOOK AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (NCMEC) WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF A1C FERNANDEZ'S CONFRONTATION CLAUSE RIGHT?

IV.

WHETHER THE GOVERNMENT'S DOCKETING OF A DEFECTIVE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THIS COURT HAD A DEFECTIVE EXHIBIT WHICH WAS REQUIRED UNDER R.C.M. 1112(b); 2) THIS COURT, *SUA SPONTE*, REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE TOTAL DELAY UNTIL THE GOVERNMENT RE-DOCKETED A CORRECT RECORD OF TRIAL WAS 326 DAYS?

V.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[2] WHEN A1C FERNANDEZ WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

VI.

WHETHER THE MILITARY JUDGE ERRED IN DENYING A1C FERNANDEZ'S MOTION FOR A UNANIMOUS VERDICT?

STATEMENT OF THE CASE

On 28 January 2022, contrary to his plea, a Military Judge sitting as a general court-martial, at Cannon Air Force Base, NM, convicted Airman First Class (A1C) Keen A. Fernandez of one

[2] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

charge, one specification, of wrongfully distributing child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Record (R.) at 441. The Military Judge sentenced A1C Fernandez to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for six months, and to be discharged from the service with a bad conduct discharge. R. at 469. The Convening Authority took no action on the findings, took no action on the sentence, and did not approve A1C Fernandez's request to defer forfeitures. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 7 March 2022.

On 17 November 2022, pursuant to A1C Fernandez's Motion to Examine Sealed Materials, this Court remanded the ROT to the Chief Trial Judge, Air Force Judiciary, to fix Prosecution Exhibit (Pros. Ex.) Five. The Government re-docketed the case with this Court on 19 December 2022.

STATEMENT OF FACTS

A pertinent statement of facts is included with each issue.

ARGUMENT

I.

THE MILITARY JUDGED ERRED IN DENYING A1C FERNANDEZ'S MOTION FOR A MISTRIAL WHEN: 1) IN OPEN COURT AND AFTER SEEING THE EVIDENCE, THE COURT REPORTER SAID "I'M SORRY, I CAN'T" AND LEFT THE COURTROOM; 2) THE MILITARY JUDGE SPOKE WITH THE COURT REPORTER ALONE IN HIS CHAMBERS ABOUT WHY SHE LEFT THE COURTROOM; AND 3) A SPECTATOR WHO SAW THE INCIDENT SAID IT LOOKED LIKE THE COURT REPORTER "SAW SOMETHING DISGUSTING, AND IT MIGHT INFLUENCE THE DECISION OF THE CASE."

Additional Facts

In open court, during an expert's testimony, the Court Reporter moved her hand to her mouth, reached out to the Military Judge, and said "I'm sorry, I can't." Record (R.) at 353, 365. She then stepped out of the Court Reporter's box and quickly withdrew to the Military Judge's

chambers. R. at 365. Prior to standing up, she shifted her gaze to the left and then to the right. R. 365. She covered her face with a white piece of paper. R. at 365. This Court Reporter of 20 years then abruptly exited the courtroom during the Defense Counsel's cross examination after she saw evidence of alleged child pornography that was being shown to a testifying pediatrician. R. at 365, 366. The Military Judge thought the Court Reporter was having a medical emergency. R. at 353, 366. The testifying pediatrician offered his medical expertise to the Military Judge if the Court Reporter needed it. R. at 353, 366. The Military Judge opined that he thought the Court Reporter may be nauseous. R. at 366.

The Military Judge approached his chambers with Trial Counsel and Defense Counsel when he saw the Court Reporter exiting the bathroom in his chambers. R. 366. The Military Judge directed counsel to standby so he could talk to the Court Reporter alone. R. at 354, 366. The Court Reporter told the Military Judge, "I'm sorry, I'm sorry" and that she had a "unexpected reaction" when saw the evidence against Amn Fernandez which made her feel "ill." R. at 351, 366. The Military Judge asked the Court Reporter if she could continue and suggested that she get some fresh air. R. at 354. The Court Reporter believed that if she had a break—like the Military Judge suggested—she could continue her duties. R. at 354. From this private colloquy, the Military Judge intuited that the Court Reporter's issue was not a medical one, but rather an "emotional reaction that she experienced to the evidence." R. at 354. This reaction was "puzzling" to the Military Judge and he was "surprised." R. at 355. The Court Reporter never returned to the trial and the Government had to detail a new Court Reporter. R. at 351. The Court Reporter was never *voir dired* about what occurred.

In the gallery, a Chief Master Sergeant-spectator said he initially felt like the Court Reporter "saw something disgusting, and it might influence the decision of the case." R. at 359.

He said, "my perception is it might influence the decision maker." *Id.* He later downplayed his initial remarks. *Id.* In a motion for a mistrial, the Defense Counsel argued that the outside perspective of the Chief Master Sergeant-spectator seeing the Court Reporter make "these sort of gestures and actions and suddenly leave the courtroom" was critical. R. at 362. Seeing the incident gave the Chief Master Sergeant-spectator a "clear connotation to what that meant…and that has an impact on the fairness of the proceeding here and [the Court Reporter] role and [the Court Reporter] position and the perceived significance of that role and position." *Id.* The Defense Counsel also argued that the Military Judge was "intimately involved" with what happened. R. at 363. Defense Counsel argued, "Whereas it might be different in a case where we have impaneled members and the judge could potentially caution the members, and quite frankly, the members would be far less privy to what you, as the military judge, would have been privy to." *Id*. However, "given the perception of the public" the Defense Counsel argued "the perception of fairness has been impeded upon to the extent that the mistrial should be declared." *Id.*

The Military Judge denied the motion for a mistrial. R. at 367. He determined the Court Reporter leaving the Courtroom and his private conversation with her, "does not cast substantial doubt upon the fairness of the proceedings, such that declaring a mistrial is manifestly necessary in the interests of justice." *Id*. The Military Judge found that the Chief Master Sergeant who witnessed the event, "did not personally have any concerns about the fairness of this particular proceeding continuing with the military judge." *Id.* The Military Judge said that the Court Reporter's behavior would have "no bearing whatsoever on the court's evaluation on the evidence in this case" and that since it was a judge alone case, he was "confident [he could] and will disregard her behavior entirely." *Id*.

Standard of Review

This Court will not reverse a military judge's determination on a mistrial absent clear evidence of an abuse of discretion. *United States v. Rudometkin*, 82 M.J. 396, 400 (C.A.A.F. 2022) (citation omitted). A military judge abuses his or her discretion when: 1) the military judge predicates a ruling on findings of fact that are not supported by the evidence of record; 2) the military judge uses incorrect legal principles; 3) the military judge applies correct legal principles to the facts in a way that is clearly unreasonable; or 4) the military judge fails to consider important facts. *Id.* at 401 (citations omitted).

Law and Analysis

A1C Fernandez is "entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or *other circumstances not adduced as proof at trial*." *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978) (emphasis added). In other words, A1C Fernandez has the right to be convicted "on the basis of the evidence alone." *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005). Because of the Court Reporter's public, "puzzling," and "supris[ing]" behavior, this Court cannot be certain that A1C Fernandez was convicted on the basis of the evidence alone, or, in the words of the Chief Master Sergeant-spectator, that it did not "influence the decision of the case." R. at 355, 359. As such, A1C Fernandez was materially prejudiced. Article 59(a), UCMJ, 10 U.S.C. § 859.

Rule for Courts-Martial (R.C.M.) 915(a) provides that a military judge may declare a mistrial when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." When deciding on whether to grant a motion for a mistrial, "the military judge should examine the timing

of the incident, the identity of the factfinder, the reasons for a mistrial, and potential alternative remedies." *United States v. Thompkins*, 58 M.J. 43, 47 (C.A.A.F. 2003) (citations omitted). "Most importantly," a military judge should consider "the desires of and the impact on the defendant." *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1999).

The Military Judge abused his discretion in three ways. First, he failed to fully "consider [the] important fact[]" that he made himself a witness in this case. *Rudometkin*, 82 M.J. at 401. Although he acknowledged that he had "a conversation with" the Court Reporter, this was an understatement. R. at 367. The important facts that the Military Judge excluded from his *analysis* was that he made the decision to exclude counsel from his conversation with the Court Reporter, he interviewed the Court Reporter alone, the interview occurred in his chambers because the Court Reporter was already there, and the parties had to subsequently interview him—as a witness—in open court to determine what happened. R. at 352, 366. Thus, in a real sense, the Military Judge ceased being a judge, and became a witness to the proceedings. *See generally* Mil. R. Evid. 605(a) ("The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue."). Although the Military Judge acknowledged some of these facts, he did not consider them in the sense of analyzing what truly transpired, how it affected the proceedings, and why it happened.

Second, the Military Judge used "incorrect legal principles" in that he failed to analyze whether he should have recused himself because he made himself a witness. *Rudometkin*, 82 M.J. at 401. His conversation with the Court Reporter alone, in his chambers, should have led him to the realization that he had become a witness in the proceedings. The Defense Counsel's argument that he was "intimately involved" with what happened should have also prompted him to conduct a recusal analysis *sua sponte*. R. at 363. A motion for a mistrial and recusal can be closely related

at times. *See generally Rudometkin*, 82 M.J. at 396. As a result of the Military Judge's failure to conduct a recusal analysis, A1C Fernandez and the public were left to wonder why the Military Judge felt fit to preside.

Third, while the Military Judge applied some "correct legal principles to the facts," he did so "in a way that [was] clearly unreasonable." *Rudometkin*, 82 M.J. at 401. The Military Judge's analysis was cursory. He did not explain *why* no "substantial doubt" would be cast upon the fairness of the proceedings even though A1C Fernandez had chosen a Military Judge alone forum.

Justice Frankfurter explained the problem that can beset judges: "[J]udges are also human, and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process." *Pennekamp v. Florida*, 328 U.S. 331, 357 (1946) (Frankfurter, J., concurring). Likewise, Justice Cardozo reasoned:

> I have spoken of the forces which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed [….] Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge…*The great tides and currents which engulf the rest of men, do not turn aside in their course and pass the judges by*.

Green v. Murphy, 259 F.2d 591, 604-05 (3d Cir. 1958) (quoting Cardozo's *Nature of Judicial Process*, pp. 168-69; Hall's *Selected Writings of Benjamin Nathan Car[d]ozo*, p. 178) (emphasis added). Justice Thomas said, "I tend to be morose sometimes….There are some cases that will drive you to your knees." Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 Calif. L. Rev. 1485, n. 7 (2011). Justice Kennedy said, "Bias is easy to attribute to others and difficult to discern in oneself." *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). In light of these humbling observations from learned judges at the pinnacle of their profession, the Military Judge's superficial analysis of his own fitness was deficient and should not afford him deference.

Additionally, the CAAF's jurisprudence has many examples of findings of error—and prejudice—in a variety of military judge alone cases or when the military judge makes an erroneous decision. *United States v. Hukill*, 76 M.J. 219, 220 (C.A.A.F. 2017); *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013); *United States v. McNutt*, 62 M.J. 16, 17 (C.A.A.F. 2005); *United States v. Leaver*, 36 M.J. 133, 133 (C.A.A.F. 1992); *United States v. Wingart*, 27 M.J. 128, 136-37 (C.M.A. 1988); *United States v. Cameron*, 21 M.J. 59, 66 (C.M.A. 1985). This case should be no different.

WHEREFORE, A1C Fernandez requests that this Honorable Court overturn his conviction.

II.

UNDER R.C.M. 902, THE MILITARY JUDGE SHOULD HAVE *SUA SPONTE* RECUSED HIMSELF WHEN 1) HE SPOKE WITH THE COURT REPORTER IN HIS CHAMBERS WITHOUT COUNSEL PRESENT AFTER SHE LEFT THE COURTROOM DURING LIVE TESTIMONY; 2) HE HAD TO BE *VOIR DIRED* REGARDING THE CONTENT OF THAT CONVERSATION; AND 3) A SPECTATOR WHO SAW THE INCIDENT SAID IT LOOKED LIKE THE COURT REPORTER "SAW SOMETHING DISGUSTING, AND IT MIGHT INFLUENCE THE DECISION OF THE CASE."

Standard of Review

When first raised on appeal, this Court reviews a military judge's recusal for plain error. *United States v. Rodriguez*, __ U.S.__, No. ACM 40218, slip op. at 8 (A.F. Ct. Crim. App. 9 Mar 2023) (unpub. op.) (citing *United States v. Martinez*, 70 M.J. 154, 157 (C.A.A.F. 2011)). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice." *Id.*

Law and Analysis

A1C Fernandez has a "constitutional right to an impartial judge" and a right to be convicted "on the basis of the evidence alone." *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005);

United States v. Wright, 52 M.J. 136, 140 (C.A.A.F. 1999). Because of the Court Reporter's and Military Judge's actions, this Court cannot be certain those rights were preserved.

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) (emphasis added). Specifically, a military judge "*shall* also" recuse "[w]here the military judge has been or will be a witness in the same case." R.C.M. 902(b)(3) (emphasis added). A "witness" is:

> One who has observed so as to be able to give an account of something. An individual who has knowledge of a fact or occurrence sufficient to testify in respect to it. In the usual application of the word in law, one who testifies in a cause or gives evidence before a judicial tribunal. A person summoned by subpoena or otherwise to testify in a case. Also, a person called to be present at some transaction so as to be able to attest to its having taken place.

BALLANTINE'S LAW DICTIONARY, *Witness*, 3rd Edition (2010).

Actual bias is not required; "an *appearance* of bias is sufficient to disqualify a military judge." *United States v. Uribe*, 80 M.J. 442, 446 (C.A.A.F. 2021) (emphasis in original) (citation omitted). Recusal based on an appearance of bias is intended to promote public confidence in the integrity of the judicial process. *Id*. (quotations and citations omitted); *see also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) ("We must continuously bear in mind that to perform its high function in the best way justice must satisfy the appearance of justice.") (quotations and citations omitted). Stated differently, "Judges, like Caesar's wife, should always be above suspicion. An impartial and disinterested trial judge is the foundation on which the military justice system rests, and avoiding the appearance of impropriety is as important as avoiding impropriety itself." *Uribe*, 80 M.J. at 454 (Stucky, C.J., dissenting) (citation omitted).

"Any suggestion" that this Court "should interpose additional language into a rule that is anything but ambiguous is the antithesis of textualism." *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020). To resolve this issue, this Court must "adhere to the plain meaning of any

text—statutory, regulatory, or otherwise." *Id.* Indeed, "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands*, *Inc.*, 580 U.S. 405, 414 (2017). "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

The text of R.C.M. 902(b)(3) plainly states that a Military Judge "shall" recuse himself when he "has been or will be a witness in the same case." The Military Judge's discussion with the Court Reporter and his later *voir dire*, placed him firmly within the definition of "witness." This Court should not deracinate the plain meaning of R.C.M. 902(b)(3) or the word "witness" to find his actions proper.

Because of the plain text of R.C.M. 902(b)(3), the Military Judge's actions were not only error, but they were also plain and obvious error. The Military Judge made himself a witness by speaking to the Court Reporter alone—in his chambers—after she abruptly and overtly left the courtroom upon seeing the Government's key evidence. He made this choice consciously because "rather than have all of the parties crowd into the room I thought I would ask her what was happening, what was going on. And so I think I told the counsel to standby." R. at 354. While the Military Judge's concern for the Court Reporter may be commendable, he nevertheless had a "*sua sponte* duty to insure that an accused receives a fair trial" and he was required to "scrupulously avoid[] even the slightest appearance of partiality." *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999) (citations omitted). Because that conversation was private, the parties then had to

voir dire the Military Judge about what happened to the Court Reporter, why it happened, and what she told the Military Judge. R. at 352.

The Military Judge's actions materially prejudiced A1C Fernandez's right to an impartial judge and his right to be convicted and sentenced based on the evidence alone. While it is settled law that a Military Judge may ask witnesses questions, such a practice is a "tightrope over which a trial judge must tread" to "scrupulously avoid[] even the slightest appearance of partiality." *United States v. Shackelford*, 2 M.J. 17, at *19 (C.M.A. Sep. 17, 1976). By questioning the Court Reporter—alone in his chambers, not on the record—the Military Judge lost his grip on the law, compromised his partiality, and prejudiced A1C Fernandez's right to be tried on the evidence alone.

Two facts reinforce the fact that the Military Judge compromised A1C Fernandez's rights. First, the Military Judge became a witness on an important evidentiary issue. The Court Reporter left the Courtroom and could not continue after she saw the alleged child pornography for which A1C Fernandez was convicted. There was no other more important piece of evidence in the trial. It was the *sine qua non* of A1C Fernandez's conviction. Thus, the Court Reporter's, and by extension, the Military Judge's professionality, decorum, and impartiality regarding this evidence and their reaction to it was crucial.

Second, the gut reaction of an observer in the courtroom was that the Court Reporter "saw something disgusting, and it might influence the decision of the case." R. at 359. He said, "my perception is it might influence the decision maker." R. at 359. While the witness later downplayed the incident during examination, his initial reaction is material and probative. By analogy, the Court of Appeals for the Armed Forces (CAAF) has said that "[t]he implicit premise" of the excited utterance exception is that "a person who reacts to a startling event or condition while under the

stress of excitement caused thereby will speak truthfully because of a lack of opportunity to fabricate." *United States v. Bowen*, 76 M.J. 83, 88 (C.A.A.F. 2017). That is what happened here. The witness—a Chief Master Sergeant—saw "a startling event" and his initial reaction was that it "might influence the decision of the case." R. at 359. As such, this Court should give his initial comments more weight than his later comments as they are indicative of what he truly thought.

Although this situation was indeed "puzzling," the Military Judge should have handled the situation like this: He should have had a paralegal or counsel speak to the Court Reporter about what happened. This is the standard practice for any witness interaction. Then, either side could have called her as a witness if needed. Alternatively, the Military Judge could have refrained from speaking to her and ordered her to be *voir dired* to determine what happened. Instead, the information about her actions had to be filtered through the Military Judge. This is problematic because "whether he be litigant or judge" there are "other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man." *Green v. Murphy*, 259 F.2d 591, 604-05 (3d Cir. 1958) (quoting Cardozo's *Nature of Judicial Process*, pp. 168-69; Hall's *Selected Writings of Benjamin Nathan Car[d]ozo*, p. 178). As such, the Court Reporter's testimony, body language, emotion, and feelings were all via the Military Judge who shaped—consciously or subconsciously—that information before it got to counsel. Then, despite being "intimately involved" with what happened and "privy to" extrajudicial information, he not only ruled on the Defense Counsel's motion for mistrial but also on A1C Fernandez's guilt. R. at 363.

The CAAF adopted the *Liljeberg* factors [*Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988)] as the test for determining whether reversal is necessary when a military judge has erred in failing to disqualify himself. *United States v. Butcher*, 56 M.J. 87, 92 (C.A.A.F.

2001). The National Institute for Military Justice (NIMJ) challenged this test, but the CAAF chose not to analyze the issue. *Rudometkin*, 82 M.J. at 401. A1C Fernandez also disagrees with this test and asks this Court not to apply it for the following reasons. First, "the three *Liljeberg* factors were formulated for civil cases" not criminal cases, and certainly not courts-martial. Brief for David J. Rudometkin as Amicus Curiae, p. 16, *United States v. Rudometkin*, 82 M.J. 396 (C.A.A.F. 2022). Second, "applying the *Liljeberg* factors unlawfully shifts the burden from the Government—to show the military judge's error in refusing to disqualify was harmless—to the accused to establish that the military judge's failure to disqualify himself caused him an injustice." *Id.* at 17. Third, "to require the accused to establish how he personally suffered a specific injustice, in addition to demonstrating that the military judge should have disqualified himself, severely undermines the purpose of R.C.M. 902(a), which is to promote public confidence in the integrity of the judicial process." *Id*. (quotations and citations omitted). The standard this Court should use is whether "the error materially prejudice[d] the substantial rights of the accused." *Id.* at 19; Article 59(a), UCMJ, 10 U.S.C. § 859(a). Here, A1C Fernandez's right to an impartial judge and his right to be convicted on the evidence alone were materially prejudiced. *United States v. Clifton*, 15 M.J. 26, 29 (C.M.A. 1983) ("It is axiomatic that a court-martial must render its verdict solely on the basis of the evidence presented at trial.").

WHEREFORE, A1C Fernandez requests that this Court set aside the findings and sentence of the court-martial.

III.

THE REPORTS FROM FACEBOOK AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (NCMEC) WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF A1C FERNANDEZ'S CONFRONTATION CLAUSE RIGHT.

Additional Facts

Facebook submitted a cyber tip to NCMEC identifying A1C Fernandez as a "suspect" that possessed, manufactured, and distributed child pornography. Pros. Ex. 4 at 3. NCMEC received Facebook's cyber tip, added information to it, and packaged it into its own standalone report. *Id.* The cyber tip and newly created NCMEC report contained the files that Facebook flagged as child pornography. *Id.* at 4. NCMEC then forward the report and the files to the New Mexico Attorney General's office where a criminal analyst reviewed the report. R. at 199. No one from NCMEC or Facebook testified. R. at 216. Rather, the criminal analyst laid the foundation for the report and—over Defense Counsel objection specifically to the Business Records Exception—the Military Judge allowed the report into evidence. *Id.* The Defense did not make a Confrontation Clause objection.

Standard of Review

When unobjected to at trial, this Court reviews a Confrontation Clause issue for plain error. *United States v. Bench*, 82 M.J. 388, 393 (C.A.A.F. 2022). Plain error occurs where (1) there is error, (2) the error was plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *Id.* (quotations and citation omitted).

Law and Analysis

The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him…" U.S. CONST. amend. VI. Under *Crawford v. Washington*, 541 U.S. 36 (2004), the Confrontation Clause bars the admission of testimonial statements of a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity for cross-examination. *United*

States v. Harcrow, 66 M.J. 154, 158 (C.A.A.F. 2008) ("We have no difficulty reaching the conclusion that these [drug] laboratory reports constitute testimonial statements.").

Although the Supreme Court did not articulate a bright-line test for what constitutes testimonial evidence, it explained:

> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; ***statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.***

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (quoting *Crawford*, 541 U.S. at 51-52) (emphasis added). This Court adopted *Melendez-Diaz*'s approach of determining whether the document is "attesting to the fact in question." *United States v. Yohe*, No. ACM 37950 (recon), 2013 CCA LEXIS 686, at *11 (A.F. Ct. Crim. App. 22 July 2013) (unpub. op.), *vacated*, 2015 CCA LEXIS 380 (2015) ("we find that, even if these NCMEC references constituted testimonial hearsay whose admission violated the Confrontation Clause, that error was harmless beyond a reasonable doubt."). This Court then quoted other guiding factors such as whether a document was "the precise testimony the analysts would be expected to provide if called at trial" and whether it is "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* (quotations and citations omitted). Notably, in *Yohe*, this Court found that the NCMEC report in question was, in fact, testimonial using the above approaches.

1. *The NCMEC Report, Including the Uploaded Files, Was Testimonial*

Regardless of the test or factor this Court chooses to use, the NCMEC report is testimonial. The facts reveal that the report was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford, 541 U.S. at 51-52. The Tenth Circuit—with Circuit Judge Neil Gorsuch authoring the opinion—found NCMEC is "a governmental entity…." *United States v. Ackerman*, 831 F.3d 1292, 1298 (10th Cir. 2016). It explained NCMEC's law enforcement involvement:

> NCMEC is statutorily obliged to operate the official national clearinghouse for information about missing and exploited children, to help law enforcement locate and recover missing and exploited children, to provide forensic technical assistance…to law enforcement to help identify victims of child exploitation, to track and identify patterns of attempted child abductions for law enforcement purposes, to provide training…to law enforcement agencies in identifying and locating non-compliant sex offenders, *and of course to operate the Cyber Tipline as a means of combating Internet child sexual exploitation*.

Ackerman, 831 F.3d at 1296 (emphasis added). With specific regard to cyber tips, like in the case *sub judice*, Judge Gorsuch explained that NCMEC has "special law enforcement duties and powers." *Id.* He found:

> First, NCMEC and NCMEC alone is statutorily obliged to maintain an electronic tipline for ISPs to use to report possible Internet child sexual exploitation violations to the government. Under the statutory scheme, *NCMEC is obliged to forward every single report it receives to federal law enforcement agencies and it may make its reports available to state and local law enforcement as well*.

Id. (emphasis added). This factual background alone demonstrates that an "objective witness" would reasonably "believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 51-52.

Using a different factor, the NCMEC report attests to "[t]he fact in question." *Melendez-Diaz*, 557 U.S. at 310. Specifically, it incorporates and presents as fact Facebook's determination that the images were child pornography. Although the NCMEC report states "unconfirmed" as to the child pornography, the fact that NCMEC packaged the evidence, made a report, included additional evidence, and forwarded it to law enforcement indicates it believed the images were child pornography. By incorporation, it gave its imprimatur to Facebook's determination that the "incident type" was "Child Pornography (possession, manufacture, and distribution)." Pros. Ex. 4

at 3. It even confirmed that Facebook had viewed "the entire contents" of the images. *Id.* at 4. The fact that the Government entered the NCMEC report into evidence shows that it believed the report was probative and material to "[t]he fact in question." *Melendez-Diaz*, 557 U.S. at 310. It also entered the uploaded files, which were part of the report, into evidence as Pros. Ex. 5.

A final test also reveals that the NCMEC report was testimonial. The report contained "the precise testimony the analysts would be expected to provide if called at trial" and was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* Meaning, the report confirmed A1C Fernandez's identity, email address, IP address, screen name, file names for the evidence in question, NCMEC's own classification of the evidence, and "suspect" information. Pros. Ex. 4. Most importantly, it provided all the information to explain the who, what, when, where, and why of Facebook's actions. *Id.* All of this information is the "precise testimony" or "functionally identical" to the information that the Facebook or NCMEC analyst would have provided if the Government would have called them as a witness. *Melendez-Diaz*, 557 U.S. at 310.

2. *The Military Judge Did Not Make an Unavailability Determination*

The Supreme Court also elucidated a "second proposition" to guide this Court's analysis: "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54. Stated mechanically, "no testimonial hearsay may be admitted against a criminal defendant unless (1) the witness is unavailable, and (2) the witness was subject to prior cross-examination." *United States v. Blazier*, 69 M.J. 218, 222 (C.A.A.F. 2010).

Here, there is no evidence that the Government attempted to have the Facebook analyst who viewed the images testify. Nor is there evidence that it tried to have the NCMEC analyst testify. As such, the Military Judge made no finding of unavailability. Likewise, Defense Counsel had no opportunity to cross examine either person since the Government never identified them. Therefore, the NCMEC report should not have been allowed into evidence.

3. The Criminal Analyst Could not be a "Surrogate" or "Substitute" Witness

The fact that the criminal analyst who received the NCMEC report testified and laid the foundation for its admissibility does not cure the constitutional defect. The CAAF confronted the same question in *Blazier*. 69 M.J. at 222. It held that "where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross-examination." *Id.* It also specifically held that "the Confrontation Clause may not be circumvented by an expert's repetition of otherwise inadmissible testimonial hearsay of another." *Id.* (citation omitted). As such, the NCMEC report—Pros. Ex. 4—and the uploaded files—Pros. Ex. 5—should not have been allowed into evidence via the criminal analyst. The Sixth Amendment prohibited her from being a "substitute witness or surrogate witness." *Id.* (quotations and citations omitted). Additionally, the criminal analyst never should have been allowed to indulge Trial Counsel's request to "flip[] through some of that document, we're going to go over what is on it. So what is the first page of this document?" R. at 204.

WHEREFORE, A1C Fernandez requests that this Honorable Court find that the Government's introduction NCMEC report (Pros. Ex. 4) and accompanying images (Pros. Ex. 5) violated the Confrontation Clause and that this error was not harmless beyond a reasonable doubt, and set aside the findings and sentence of the court-martial.

IV.

THE GOVERNMENT'S DOCKETING OF A DEFECTIVE RECORD OF TRIAL WITH THIS COURT DOES NOT TOLL THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THIS COURT HAD A DEFECTIVE EXHIBIT WHICH WAS REQUIRED UNDER R.C.M. 1112(b); 2) THIS COURT, *SUA SPONTE*, REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE TOTAL DELAY UNTIL THE GOVERNMENT RE-DOCKETED A CORRECT RECORD OF TRIAL WAS 326 DAYS.

Additional Facts

The Military Judge sentenced A1C Fernandez on 28 January 2022. ROT, Vol 1, Entry of Judgment. The Government originally docketed A1C Fernandez's case with this Court on 10 June 2022. On 17 November 2022, after A1C Fernandez's original motion to view sealed materials, this Court remanded the ROT back to the Chief Trial Judge, Air Force Judiciary for correction. Order, Remand and Motion to Examine Sealed Material, 17 November 2022. This is because the disc containing sealed material—Pros. Ex. Five—was damaged and inoperable. *Id.* The Government re-docketed this case with this Court on 19 December 2022—a total delay of 326 days. Notice of Docketing, 20 December 2022.

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal *de novo*. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

Whether the Government complies with its post-trial processing deadlines by submitting a defective ROT for appellate review is a question of law this Court has not explicitly decided, but should. *But cf. United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) ("*Insubstantial omissions*

from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one….Accordingly, the omission of the remaining exhibits, Prosecution Exhibits 40, 41, 42, and 45 are insubstantial omissions from this record of trial and do not affect its completeness.") (emphasis added); *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. June 9, 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.").

A general court-martial "shall" keep a separate record of each case. R.C.M. 1112(a). The record "shall" include, *inter alia*, "exhibits" and the court reporter must certify the record of trial as complete. *Id*. at (b)(6), (c). This Court should view these directives alongside *Moreno*'s mandate, which compelled the Government to docket "the [ROT]" at a Court of Criminal Appeals (CCA) within 30 days of action to avoid a presumption of facially unreasonable delay. Because of changes to the *Manual for Courts-Martial*, this Court updated that standard in *United States v. Livak*, finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*." 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). This Court should find that the Government fails to meet its *Moreno* and *Livak* deadline if the ROT it submitted for docketing does not comport with statutory and regulatory requirements. As such, the presumption of unreasonable delay should be 326 days. This is true even though Appellant had to ask for some of the extensions of time that account for the 326 days: "[R]esponsibility for this portion of the delay [Appellate Defense delay] and the burden placed upon appellate defense counsel initially rests with the Government. The Government must provide adequate staffing within the Appellate

Defense Division to fulfill its responsibility under the UCMJ to provide competent *and timely* representation." *Moreno*, 63 M.J. at 137 (emphasis added).

The Government's failure to meet *Livak*'s deadline of 150 days triggers an analysis of the four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The *Barker* factors are: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *Id*. at 133 (citation omitted). When examining the reason for the delay this Court determines "how much of the delay was under the Government's control [and] assess[es] any legitimate reasons for the delay…." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors").

The second *Barker* factor addresses the reasons for the delay. If this Court rules that a defective ROT can toll *Livak*'s presumption of unreasonable delay, then this four-part test will not be triggered by a delay so long as the Government is able to docket *any* ROT within the required 150 days. This, in turn, means that the Government will never have to explain the reasons it submitted an incomplete record under the second *Barker* factor. Furthermore, if this Court rules that an incomplete ROT tolls *Livak*'s presumption of unreasonable delay, then the first *Barker* factor—the length of the delay—will never increase beyond the original, incomplete docketing date.

A ruling that allows the Government to docket a defective ROT to toll the presumption of unreasonable delay will incentivize it to submit incomplete or defective records for docketing merely to meet processing deadlines. Thus, the Government will essentially have two choices when compiling records in future cases. The Government can exercise due care in ensuring it compiles a complete and accurate record, to include searching for any missing or defective items from the outset. However, this approach may extend the time the Government needs to submit the

record for docketing, thereby risking a missed deadline and affording potential relief to an appellant.

In the alternative, the Government could hastily compile the record with little regard for accuracy, or even intentionally submit a record known to be either replete with errors or incomplete, with the full understanding that it will never have to justify its actions provided it meets its initial processing standard. Without impugning the motives and morals of Government representatives as a whole, one can easily foresee a scenario where bad or indifferent actors sacrifice accuracy for timeliness, resulting in additional post-trial delays that requires this Court—as it did here—to issue remands for correction or other actions such as show cause orders or granting motions to attach.

In sum, whether the Government complies with post-trial processing deadlines by submitting a defective ROT represents an important question of law that has significant ramifications for A1C Fernandez and others like him. Considering the purpose of *Moreno* was to ensure timely appellate review through the exercise of "institutional vigilance" in post-trial processing, a decision allowing defective records to be docketed—without consequences for the Government—would contravene this intent because it serves to discourage governmental vigilance, potentially resulting in longer post-trial delays and appellate processing. 63 M.J. at 143. This Court's intervention is necessary to both safeguard an appellant's right to timely appellate review and reaffirm the Government's statutory and regulatory obligations to compile complete and functional ROTs.

WHEREFORE, A1C Fernandez request that this Honorable Court not approve his bad conduct discharge.

V.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN A1C FERNANDEZ WAS CONVICTED OF A NON-VIOLENT OFFENSE AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

Additional Facts

After his conviction, the Government made the determination that A1C Fernandez's case met the firearm prohibition under 18 U.S.C. § 922. ROT, Vol. 1, Entry of Judgment, 16 March 2022. The Government did not specify why, or under which section his case met the requirements of 18 U.S.C. § 922. *Id.*

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation *de novo*. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The test for applying the Second Amendment is:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government 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."

Bruen, 142 S. Ct. 2111 at 2129-30 (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v.*

Rahimi, No. 21-11001, 2023 U.S. App. LEXIS 5114, at *31 (5th Cir. Mar. 2, 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pled guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at *3-4. Rahimi agreed to this domestic violence restraining order. *Id.* at *10.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at *6 (citation omitted). Therefore, the Government bears the burden of justifying its regulation.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at *7. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* Here the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted for a non-violent offense. *Id.*

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at *30. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include a violent offender who pled guilty to possessing a firearm while under an agreed upon domestic violence restraining order, then it likely cannot prove that its firearm prohibition on A1C Fernandez for non-violent offenses would be constitutional.

A further problem with the Statement of Trial Results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that

A1C Fernandez fell under the firearm prohibition. Notably, the Court did not convict him of an offense relating to him being "an unlawful user of or addicted to any controlled substance." 18 U.S.C. 922(g)(3). Thus, A1C Fernandez is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it would not be the domestic violence or drugs section given the facts of his case. Regardless, given the non-violent nature of the facts of his case, and *Rahimi*'s holding, it appears that the Government would not be able to meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms.

In *United States v. Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021). Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760. However, this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. In that decision, CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpub. op.). The CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is in contravention to this Court's holding in *Lepore*.

The CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, the CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the Court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized "the mere fact that a firearms prohibition annotation, *not required by the Rules for Courts-Martial*, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." *Id.* at 763 (emphasis added). The new 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information…required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6); 1111(b)(3)(F). DAFI 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required the Statement of Trial results to include "whether the following criteria are met…firearm prohibitions." As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this

issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, A1C Fernandez requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

VI.

THE MILITARY JUDGE ERRED IN DENYING A1C FERNANDEZ'S MOTION FOR A UNANIMOUS VERDICT.

Additional Facts

On 28 September 2021, A1C Fernandez moved for a unanimous verdict. Appellate Exhibit (App. Ex.) II. Specifically, Defense Counsel requested that "a unanimous finding be ordered by the Military Judge" and that the findings worksheet "be modified to include whether the members' verdict was unanimous or non-unanimous, to preserve this issue on appeal." *Id.* at 1. On 27 October 2021, the Military Judge denied A1C Fernandez's motion. App. Ex. XXIX at 5. On 26 January 2022, A1C Fernandez chose to be tried before a Military Judge alone. App. Ex. XXXII; R. at 170.

Standard of Review

This Court tests instructional errors with constitutional dimensions for prejudice under the standard of harmless beyond a reasonable doubt. *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2021) (citation omitted). This standard is met "where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." *Id*. (quotations and citations omitted).

Law and Analysis

In *Ramos*, the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards v.*

Vannoy, 141 S. Ct. 1547, 1551 (2021). Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal (civilian) convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As the Supreme Court reiterated, in so holding, *Ramos* unequivocally broke "momentous and consequential" new ground. *See Edwards*, 141 S. Ct. at 1559; *see also id*. at 1555–56 (noting that "[t]he jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" beforehand). Indeed, the *Edwards* majority recognized that *Ramos* was on par with other "landmark" cases of criminal procedure "like *Mapp*, *Miranda*, *Duncan*, *Batson*, [and] *Crawford* . . . ." *Id*. at 1559. This Court should and must decide this issue in accordance with the CAAF's forthcoming decision in *United States v. Anderson*, No. 22-1093/AF, 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul. 2022).

WHEREFORE, A1C Fernandez requests that this Court set aside the findings and sentence of the court-martial.

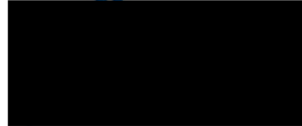
Respectfully submitted,

SPENCER R. NELSON, Maj, USAF Appellate Defense Counsel
Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 3 April 2023.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF Appellate Defense Counsel
Appellate Defense Division

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, Airman First Class (A1C) Keen Fernandez, through Appellate Defense Counsel, personally requests that this Court consider the following matters:

VII.

WHETHER OSI AGENTS VIOLATED A1C FERNANDEZ'S RIGHTS WHEN THEY ASKED FOR HIS PHONE PASSCODE AFTER HE HAD INVOKED HIS RIGHT TO REMAIN SILENT?

When OSI interviewed A1C Fernandez, he invoked his Article 31 rights. Appellate Exhibit X at 54. After invoking his rights, OSI agents then asked him for the passcodes to the devices that they had previously seized. *Id.* This violated A1C Fernandez's Fifth Amendment and Article 31, UCMJ, rights as well as Mil. R. Evid. 305 and applicable case law.

VIII.

WHETHER THE PROSECUTION CAN TAKE A1C FERNANDEZ TO AN ARTICLE 32 PRELIMINARY HEARING, DROP THE CHARGES AGAINST HIM ENTIRELY, AND THEN RE-PREFER NEW, DIFFERENT CHARGES AGAINST HIM?

Prior to the case *sub judice*, the Government preferred different charges against A1C Fernandez which went to an Article 32 Preliminary Hearing. Appellate Exhibit 5 at 2. The Preliminary Hearing Officer found no probable cause and the Convening Authority dismissed the charge and specifications without prejudice. *Id.* The Government then changed the charge and re-preferred its case against A1C Fernandez, which led to this case and his conviction. This should be error and the Government should not be allowed perfect its case in this way.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman First Class (E-3) **KEEN A. FERNANDEZ**, United States Air Force *Appellant*	)	No. ACM 40290 (f rev) 4 April 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests an enlargement of time to file its Answer to Appellant's Assignments of Error. Currently, the United States' answer is due on 3 May 2023. The United States requests an enlargement for a period of 30 days, which will end on **2 June 2023**.

This case was originally docketed with the Court on 10 June 2022. Appellant requested three enlargements of time before this Court remanded this case to the Chief Trial Judge, Air Force Judiciary for correction to the record of trial. (*Order*, dated 17 November 2022.) The Government re-docketed this case with this Court on 19 December 2022. (*Notice of Docketing*, dated 20 December 2022.) Since re-docketing, Appellant requested one enlargement of time. (*Motion for Enlargement of Time*, dated 10 February 2023.) Appellant filed his brief with this Court on 3 April 2023. (*Brief on Behalf of Appellant*, dated 3 April 2023.) From the new date of docketing to the present date, 106 days have elapsed. This is the United States' first request for an enlargement of time.

There is good cause for the enlargement of time in this case. An enlargement of time is necessary to ensure that assigned counsel will have sufficient time to review the record of trial

and draft and file the United States' answer. Appellant raised eight assignments of error[1]. The record in this case is 471 pages long. Moreover, additional time is needed for drafting and supervisory review before the United States files it answer. Undersigned counsel is striving to complete all necessary work as soon as possible but is on convalescent leave for 7 days for surgery and has another AFCCA brief that takes priority. With one appellate counsel on maternity leave and another deploying, the three-remaining counsel in the office will not be able to file an answer brief sooner than undersigned counsel, given their own respective workloads.

Additionally, between now and the current due date for this answer, undersigned counsel is tasked with the following:

- Convalescent Leave (5-11 April 2023)
- Appellate Counsel on United States v. Richard – (Answer Brief due to the Court on 21 April 2023)
- Teaching at the Advanced Sexual Assault Litigation Course (ASALC) – Maxwell AFB, AL (1-3 May 2023)
- Preparing for teaching at the Special Trial Counsel (STC) Qualification Course – Maxwell AFB, AL (15-19 May 2023).

For these reasons, the United States seeks an enlargement to ensure a proper and responsive brief is filed with this Court allowing for adequate time to review the record, research, and allow for supervisory review of its brief. Accordingly, the United States respectfully requests this Court grant this motion for an enlargement of time for a period of 30 days. The United States does not anticipate requesting any more enlargements of time.

[1] Appellant raises two issues personally pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Appellate Defense Division on 4 April 2023.

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**GENERAL OPPOSITION TO**
Appellee,	)	**GOVERNMENT'S MOTION FOR EOT**
	)	
v.	)	Before Panel No. 2
	)	
Airman First Class (E-3),	)	No. ACM 40290 (f rev)
KEEN A. FERNANDEZ,	)	
United States Air Force,	)	5 April 2023
Appellant.	)	

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, Appellant hereby enters his general opposition to the Government's Motion for Enlargement of Time to file an Answer in this case.

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

Respectfully submitted,

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

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 Division on 5 April 2023.

Respectfully submitted,

N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40290 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Keen A. FERNANDEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 4 April 2023, the Government submitted a Motion for Enlargement of Time (EOT) requesting an additional 30 days to submit its answer to Appellant's assignments of error brief. This is the Government's first request for an EOT. Appellant opposes the motion.

The court has considered Government's motion, the Appellant's opposition, case law, and this court's Rules of Practice and Procedure. The court specifically grants the Government's motion as a result of counsel's period of unavailability due to convalescent leave.

Accordingly, it is by the court on this 7th day of April, 2023,

ORDERED:

The Government's Motion for Enlargement of Time is **GRANTED**. Government shall file any answer to Appellant's brief not later than **2 June 2023**.

FOR THE COURT

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

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
Airman First Class (E-3)	)	
KEEN A. FERNANDEZ, USAF	)	No. ACM 40290 (f rev)
Appellant.	)	
	)	2 June 2023

<u>TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS</u>

MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Counsel Division
United States Air Force

INDEX OF BRIEF

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 4

ARGUMENT 4

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR MISTRIAL.

Additional Facts 4

Standard of Review 7

Law 8

Analysis 8

II.

THE MILITARY JUDGE DID NOT PLAINLY ERR BY FAILING TO SUA SPONTE RECUSE HIMSELF.

Standard of Review 11

Law 11

Analysis 13

III.

TRIAL DEFENSE COUNSEL INTENTIONALLY WAIVED ANY OBJECTION TO THE NCMEC CYBERTIP REPORT (PROSECUTION EXHIBIT 4) AND EVEN IF THIS COURT PIERCES WAIVER, THE REPORT CONSISTED OF ENTIRELY NON-HEARSAY MACHINE-GENERATED DATA.

Additional Facts 17

Standard of Review 18

Law 19

Analysis 21

IV.

APPELLANT IS NOT ENTITLED TO RELIEF BECAUSE THERE WAS NO POST-TRIAL DELAY IN THIS CASE.

Additional Facts 26

Standard of Review 27

Law 27

Analysis 28

V.

AS THIS COURT DETERMINED IN UNITED STATES V. LEPORE, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021), THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL MATTER NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF IT DID HAVE SUCH JURISDICTION, THE STAFF JUDGE ADVOCATE'S FIRST INDORSEMENT TO THE STATEMENT OF TRIAL RESULTS CORRECTLY ANNOTATES THAT APPELLANT'S CONVICTIONS REQUIRED SHE BE CRIMINALLY INDEXED FOR FIREARM PROHIBITION UNDER 18 U.S.C. § 922 BECAUSE HE WAS CONVICTED FOR A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, WHICH IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

Additional Facts 32

Standard of Review 32

Law and Analysis 33

VI.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURTS-MARTIAL.

Standard of Review 40

Law and Analysis 40

VII.

APPELLANT HAS NOT ARTICULATED HIS RIGHTS ADVISEMENT ASSIGNMENT OF ERROR WITH PARTICULARITY SUCH THAT THE GOVERNMENT CAN INTELLIGENTLY RESPOND.

Standard of Review 42

Law and Analysis 42

VIII.

THE CHARGE AND SPECIFICATION AGAINST APPELLANT WAS PROPERLY PREFERRED.

Additional Facts 43

Standard of Review 43

Law and Analysis 44

CONCLUSION 45

CERTIFICATE OF FILING AND SERVICE 46

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Barker v. Wingo,
407 U.S. 514 (1972)....27, 28

District of Columbia v. Heller,
554 U.S. 570 (2008)....37, 38

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847 (1988)....14, 15, 17

Melendez-Diaz v. Massachusetts,
557 U.S. 305 (2009)....7, 25

N.Y. State Rifle & Pistol Ass'n v. Bruen,
142 S. Ct. 2111, 2129-2130 (2022)....37, 38, 39

Ramos v. Lousiana,
140 S. Ct. 1390 (2020)....40, 41

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Arness,
74 M.J. 441 (C.A.A.F. 2015)....34

United States v. Ashby,
68 M.J. 108 (C.A.A.F. 2009)....8, 11

United States v. Bench,
82 M.J. 388 (C.A.A.F. 2022)....19

United States v. Blazier,
68 M.J. 439 (C.A.A.F. 2010)....20

United States v. Blazier,
69 M.J. 218 (C.A.A.F. 2010)....20, 22, 25

United States v. Britton,
26 M.J. 24 (C.M.A. 1988)....44

United States v. Burton,
52 M.J. 223 (C.A.A.F. 2000)....12

United States v. Butcher,
56 M.J. 87 (C.A.A.F. 2001)....14

United States v. Campos,
42 M.J. 253 (C.A.A.F. 1995) 12, 14

United States v. Campos,
67 M.J. 330 (C.A.A.F. 2009) 18

United States v. Chin,
75 M.J. 220 (C.A.A.F. 2016) 18

United States v. Clayton,
67 M.J. 283 (C.A.A.F. 2009) 19

United States v. Cooper,
51 M.J. 247 (C.A.A.F. 1999) 14

United States v. Davis,
79 M.J. 329 (C.A.A.F. 2020) 21

United States v. Diaz,
59 M.J. 79 (C.A.A.F. 2003) 7

United States v. Ellis,
68 M.J. 341 (C.A.A.F. 2010) 7

United States v. Foerster,
65 M.J. 120 (C.A.A.F. 2007) 19

United States v. Gay,
75 M.J. 264 (C.A.A.F. 2016) 32

United States v. Givens,
82 M.J. 211 (C.A.A.F. 2022) 44

United States v. Gore,
60 M.J. 178 (C.A.A.F. 2004) 8, 11

United States v. Grostefon,
12 M.J. 431 (C.M.A. 1982).................... *passim*

United States v. Hardy,
77 M.J. 438 (C.A.A.F. 2018) 18

United States v. Harris,
51 M.J. 191 (C.A.A.F. 1999) 8

United States v. Healy,
26 M.J. 394 (C.M.A. 1988)....................42, 44

United States v. Jones,
78 M.J. 37 (C.A.A.F. 2018) 18, 19

United States v. Kho,
54 M.J. 64 (C.A.A.F. 2000) 33

United States v. Kincheloe,
14 M.J. 40 (C.M.A. 1982)....................12, 14

United States v. Lemire,
82 M.J. 263 (C.A.A.F. 2022) (unpub. op.) 2, 33, 34

United States v. Martinez,
70 M.J. 154 (C.A.A.F. 2011) 11

United States v. Moreno,
63 M.J. 129 (C.A.A.F. 2006) 2, 27, 29

United States v. Norfleet,
53 M.J. 262 (C.A.A.F. 2000) 12

United States v. Quintanilla,
56 M.J. 37 (C.A.A.F. 2001) 12

United States v. Rudometkin,
82 M.J. 396 (C.A.A.F. 2022) 16

United States v. Sweeney,
70 M.J. 296 (C.A.A.F. 2011) 20

United States v. Sullivan,
74 M.J. 448 (C.A.A.F. 2015) 12

United States v. Tearman,
72 M.J. 54 (C.A.A.F. 2013) 20

United States v. Toohey,
63 M.J. 353 (C.A.A.F. 2006) 28

United States v. Travers,
25 M.J. 61 (C.M.A. 1987)....................7

United States v. Wright,
53 M.J. 476 (C.A.A.F. 2000) 40

SERVICE COURTS

United States v. Anderson,
No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), *review granted* 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul 2022) 41-42

United States v. Baratta,
77 M.J. 691 (N-M. Corp. Ct. Crim. App. 2018). 35

United States v. Bavender,
No. ACM 39390, 2019 CCA LEXIS 340, at *67, *68 n.28 (A.F. Ct. Crim. App. 23 August 2019) (unpub. op.). 29

United States v. Dawson,
65 M.J. 848 (A.F. Ct. Crim. App. 2007)...34

United States v. Lepore,
81 M.J. 759 (A.F. Ct. Crim. App. 2021)...2, 34, 35

United States v. Livak,
80 M.J. 631 (A.F. Ct. Crim. App. 2000)...27, 28, 29

United States v. Marsh,
No. ACM 38688, 2016 CCA LEXIS 244, at *10-11 (A.F. Ct. Crim. App. Apr. 19, 2016) (unpub. op.)...14

United States v. Monge,
No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. 5 July 2022) (unpub. op.) 41

United States v. Moss,
No. ACM 40249, 2023 CCA LEXIS 158, at *13 (A.F. Ct. Crim. App. Apr. 7, 2023) (unpub. op.)...25

United States v. Muller,
No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.). 27, 29, 30

United States v. Pennington,
2021 CCA LEXIS 101 (Army Ct. Crim. App. March 2, 2021) (unpub. op.). 35

United States v. Zegarrundo,
77 M.J. 612 (A.F. Ct. Crim. App. 2018)...29

FEDERAL CIRCUIT COURTS

Folajtar v. AG of the United States,
980 F.3d 897 (3rd Cir. 2020) 39

United States v. Ackermann,
831 F.3d 1292 (10th Cir. 2016) 25

United States v. Everist,
368 F.3d 517 (5th Cir. 2004) 39

United States v. Juhic,
954 F.3d 1084 (8th Cir. 2020). 24, 26

United States v. Morrissey,
895 F.3d 541 (8th Cir. 2018). 23

United States v. Rahimi,
61 F.4th 443 (5th Cir. 2023) 38, 39

OTHER AUTHORITIES

Article 28, UCMJ 9

Article 66(d), UCMJ 35, 36

Article 52, UCMJ 40

Article 54(c)(2), UCMJ 28

Mil. R. Evid. 605(a) 8

R.C.M. 902(a) 11, 12

R.C.M. 915(a) 8

R.C.M. 1111(c)(2) 35

R.C.M. 1112 ....26, 28, 30

Black's Law Dictionary (11th ed. 2019) 9

MCM, pt. IV, ¶ 93.d(3). 32

18 U.S.C. § 922. .... *passim*

Department of Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022 .... *passim*

Department of Air Force Manual (DAFMAN) 51-203, *Records of Trial*, dated 21 April 2022 ....
16, 28 30

Air Force Court of Criminal Appeals Rules of Practice and Procedure, Rule 18.2(b). 42, 44

Air Force Court of Criminal Appeals Rules of Practice and Procedure, Rule 30.4(a). 34

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) **KEEN A. FERNANDEZ,** United States Air Force *Appellant.*	)))))))))	ANSWER TO ASSIGNMENTS OF ERRORS Before Panel No. 2 No. ACM 40290 (f rev) 2 June 2023

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

ISSUES PRESENTED

I.

WHETHER THE MILITARY JUDGE ERRED IN DENYING [APPELLANT]'S MOTION FOR A MISTRIAL WHEN: 1) IN OPEN COURT AND AFTER SEEING THE EVIDENCE, THE COURT REPORTER SAID "I'M SORRY, I CAN'T" AND LEFT THE COURTROOM; 2) THE MILITARY JUDGE SPOKE WITH THE COURT REPORTER ALONE IN HIS CHAMBERS ABOUT WHY SHE LEFT THE COURTROOM; AND 3) A SPECTATOR WHO SAW THE INCIDENT SAID IT LOOKED LIKE THE COURT REPORTER "SAW SOMETHING DISGUSTING, AND IT MIGHT INFLUENCE THE DECISION OF THE CASE"?

II.

UNDER R.C.M. 902, WHETHER THE MILITARY JUDGE SHOULD HAVE *SUA SPONTE* RECUSED HIMSELF WHEN: 1) HE SPOKE WITH THE COURT REPORTER IN HIS CHAMBERS WITHOUT COUNSEL PRESENT AFTER SHE LEFT THE COURTROOM DURING LIVE TESTIMONY; 2) HE HAD TO BE *VOIR DIRED* REGARDING THE CONTENT OF THAT CONVERSATION; AND 3) A SPECTATOR WHO SAW THE INCIDENT SAID IT LOOKED LIKE THE COURT REPORTER "SAW SOMETHING DISGUSTING, AND IT MIGHT INFLUENCE THE DECISION OF THE CASE"?

III.

WHETHER THE REPORTS FROM FACEBOOK AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (NCMEC) WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF [APPELLANT]'S CONFRONTATION CLAUSE RIGHT?

IV.

WHETHER THE GOVERNMENT'S DOCKETING OF A DEFECTIVE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER UNITED STATES V. MORENO, 63 M.J. 129 (C.A.A.F. 2006), WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THIS COURT HAD A DEFECTIVE EXHIBIT WHICH WAS REQUIRED UNDER R.C.M. 1112(b); 2) THIS COURT *SUA SPONTE*, REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE TOTAL DELAY UNTIL THE GOVERNMENT RE-DOCKETED A CORRECT RECORD OF TRIAL WAS 326 DAYS?

V.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN [APPELLANT] WAS CONVICTED OF A NON-VIOLENT OFFENSE AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

VI.

WHETHER THE MILITARY JUDGE ERRED IN DENYING [APPELLANT]'S MOTION FOR A UNANIMOUS VERDICT?

VII[1].

WHETHER OSI AGENTS VIOLATED [APPELLANT]'S RIGHTS WHEN THEY ASKED FOR HIS PHONE PASSCODE AFTER HE HAD INVOKED HIS RIGHT TO REMAIN SILENT?

VIII[2].

WHETHER THE PROSECUTION CAN TAKE [APPELLANT[TO AN ARTICLE 32 PRELIMINARY HEARING, DROP THE CHARGES AGAINST HIM ENTIRELY, AND THEN RE-PREFER NEW, DIFFERENT CHARGES AGAINST HIM?

STATEMENT OF CASE

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

[1] The assignment of error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[2] The assignment of error is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF FACTS

Facts necessary to answer each assignment of error are included in the Argument section below.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE DEFENSE'S MOTION FOR MISTRIAL.

Additional Facts

On the third day of trial, during the Government's case-in-chief, trial counsel published Prosecution Exhibit 11 in conjunction with the testimony of an expert pediatrician, Dr. KG. (R. at 325, 353.) Prosecution Exhibit 11 consisted of two videos containing the charged child pornography. (R. at 325.) During the defense's cross-examination of Dr. KG, the military judge noticed "something was amiss" with the court reporter. (R. at 353.) The court reporter suddenly "scooted her chair back, moved her hand up to her mouth and said, 'I'm sorry, I can't'" and then withdrew from the courtroom. (R. at 350, 353.)

The military judge called a recess. (R. at 350.) The military judge went back to chambers to locate the court reporter, but she was in the adjoining bathroom that was connected to the military judge's chambers. (R. at 354.) The military judge believed the court reporter was experiencing nausea, but he was not sure why. (R. at 354.) In that moment, the military judge recalled a time he had the stomach flu during court and had to "quickly sprint out of the courtroom and go to the restroom," so thought the court reporter might be experiencing something similar. (R. at 354.)

The military judge then summoned counsel to have an R.C.M. 802 conference in chambers, but before he could do so, the court reporter exited the adjoining bathroom while apologizing to the military judge. (R. at 354.) The military judge decided "rather than have all the parties crowd into the room I thought I would ask her what was happening, what was going on." (R. at 354.) The military judge told counsel to "standby." (R. at 354.) The military judge then spoke to the court reporter alone. (R. at 354.) The court reporter said, "I'm sorry, I'm sorry. It's just the evidence that I saw had an unexpected impact on me. I just felt ill." (R. at 354.) The military judge asked the court reporter how long she had been a court reporter and asked if maybe taking a walk or getting some fresh air would allow her to continue. (R. at 354.) The court reporter informed the military judge "she had been a court reporter for 20 years," and she thought she would be able to proceed if given some time. (R. at 366.) The military judge then brought counsel back into chambers and conducted an R.C.M. 802 conference to explain his conversation with the court reporter. (R. at 354.)

After 30 minutes, the court reporter still felt ill. (R. at 351.) Consequently, the Government detailed a new court reporter. (R. at 351.) During another R.C.M. 802 conference, the defense informed the military judge they "would likely *voir dire* the military judge" once back on the record and "may have a potential motion for a mistrial." (R. at 351.) The military judge conducted a total of three R.C.M. 802 conferences with counsel over the recess to discuss the issue of the court reporter's illness. (R. at 352.)

Once back on the record in an Article 39(a) session, defense counsel requested to *voir dire* the military judge regarding "the perception of fairness as is viewed objectively versus subjectively." (R. at 352.) The military judge allowed defense counsel to *voir dire* him. (Id.)

Defense counsel directly asked the military judge about the impact the court reporter's nauseas reaction to the evidence would have on him:

> So as far as the sort of impact of knowing this information from [the court reporter], does the court have any sort of concerns subjectively in their evaluation of – the military judge's own evaluation of himself as to the impact that this evidence might have on any sort of ability to evaluate the evidence in a fair and impartial manner?

(R. at 354-55.)

The military judge reaffirmed his impartiality:

> So, no, I have zero concerns about any impact on my ability to impartially assess the evidence. To me it is surprising that [the court reporter] reported the experience that she had, particularly because she said that she's been doing this for 20 years. I don't view that as reflecting anything about the evidence itself, because the subject that's been charged in this case is commonly charged in Air Force courts-martial, and so to me the only surprise is, you know, is why she experienced that, because Air Force practitioners deal with this sort of material frequently in these sorts of prosecutions. And so, ordinarily, those persons who are involved in the investigation and prosecution of this case typically don't have that sort of reaction. So it was puzzling to me and I was surprised by her reaction. How that impacts me is not at all. It doesn't change my analysis of the evidence whatsoever. So subjectively, it has zero impact.

(R. at 355.)

When questioned by trial counsel, the military judge further affirmed that it was "commonplace for military judges to be exposed to evidence of all kinds when determining the admissibility of evidence, and this does not provide the basis for the military judge to be unable to subsequently serve as the finder-of-fact." (R. at 366.)

The defense then called a spectator from the gallery, who witnessed the court reporter's exit, as a witness in support of the mistrial motion. (R. at 357.) The witness testified, "As a spectator in the back, perception-wise, human instinct; I feel like she saw something disgusting, and it might influence the decision of the case." (R. at 359.) However, the witness also testified

he did not have any concerns about a perception of fairness. (R. at 359.) In fact, the witness testified, "I trust the judge itself that he's going to make the right decision for the case." (R. at 359.) The witness then clarified his concern that the court reporter's reaction "*could* influence the decision maker," but the witness had "confidence" in the specific judge detailed to Appellant's court-martial. (R. at 360) (emphasis added.)

The defense then raised a motion for a mistrial. (R. at 362.) The defense never requested the military judge recuse himself. (Id.)

In his oral ruling denying the defense's motion for mistrial, the military judge concluded:

> [The court reporter]'s behavior had and will have no bearing whatsoever on the court's evaluation on the evidence in this case. Additionally, the court has no concerns at all about its ability to disregard entirely what transpired with the court reporter. Since it is a judge alone case I am confident I can and will disregard her behavior entirely.

(R. at 367.)

Standard of Review

A military judge's determination on a mistrial will not be reversed absent clear evidence of an abuse of discretion. United States v. Diaz, 59 M.J. 79, 90 (C.A.A.F. 2003).

"A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts was clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010). "To reverse for 'an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal.'" United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987) (citations and ellipses omitted). "An abuse of discretion arises in cases in which the judge was controlled by some error of law or

where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support." Id. (citation and internal quotation marks omitted).

"The abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range." United States v. Gore, 60 M.J. 178, 187 (C.A.A.F. 2004).

Law

R.C.M. 915(a) provides that a military judge may declare a mistrial when "manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings."

Mistrial is a "drastic remedy" which should be used only when necessary "to prevent a miscarriage of justice." United States v. Harris, 51 M.J. 191, 196 (C.A.A.F. 1999). "Because of the extraordinary nature of a mistrial, military judges should explore the option of taking other remedial action, such as giving curative instructions." United States v. Ashby, 68 M.J. 108, 122 (C.A.A.F. 2009) (citations omitted).

Analysis

The military judge properly found Appellant did not meet his burden to demonstrate the drastic remedy of a mistrial was warranted, and Appellant now fails to demonstrate to this Court why the military judge's ruling was a clear abuse of discretion. Appellant contends the military judge abused his discretion in three ways: (1) by failing to consider the fact that he made himself a witness in the case; (2) by using incorrect legal principles; and (3) unreasonably applying correct legal principles. (App. Br. at 7-8.) None of these arguments are sound.

First, the military judge was never a "witness" within the meaning of Mil. R. Evid. 605(a). The rule prohibits a military judge from testifying "as a witness." Mil. R. Evid. 605(a).

But a “witness” is a person “called to court to testify and give evidence.” Black’s Law Dictionary (11th ed. 2019). The military judge never took the witness stand, was never administered an oath, and so never testified. On the contrary, the military judge allowed counsel to question him on the record during *voir dire*. By Appellant’s logic, if anytime a military judge was *voir dired* and stated a personal observation about something that happened off the record or summarized things that happened in chambers in an R.C.M. 802 conference, he or she would become a “witness.” But those instances happen routinely and the military judge is never considered a “witness.”

Appellants further argues the military judge excluded from his analysis the fact that he chose to “exclude counsel from his conversation with the Court Reporter.” (App. Br. at 7.) From that, Appellant attributes some sort of nefarious purpose to the military judge’s decision to speak to the court reporter alone. (Id.) But the military judge provided his rational for speaking to the court reporter alone: he did not want to “crowd” all the parties into a small room to question the court reporter about a possible medical condition in front of her. (R. at 354.) That is perfectly reasonable, given the situation. Importantly, defense counsel did not intervene, interject, or object to the military judge’s proposal to speak to the court reporter alone. (Id.) After all, at the time, no one knew the court reporter’s nausea was related to her viewing of Prosecution Exhibit 11. At the time, it seemed equally likely the court reporter was experiencing unrelated nausea, such as the stomach flu. (R. at 354.)

There is no evidence of bad faith on the part of the military judge for speaking to the court reporter alone. On the contrary, the military judge is ultimately responsible for the court reporter. Article 28, UCMJ, provides: “Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial…shall detail or employ qualified court

reporters." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022, in turn vests the Chief Trial Judge with exclusive responsibility "for all policies pertaining to court reporters and the overall management of the court reporter program." DAFI 51-201, paragraph 1.7.1. The military judge did not make "himself a witness" by exercising his responsibilities to ensure the court reporter was physically fit for continued service. (App. Br. at 7.) If anything, the military judge's conversation with the court reporter confirmed that he, as the fact finder, would not be improperly swayed by what transpired. The military judge found the court reporter's reaction "surprising" because child pornography is "commonly charged in Air Force courts-martial," and "Air Force practitioners," like the military judge, "deal with this sort of material frequently." (R. at 355.) In other words, the military judge himself viewed the same evidence the court reporter reacted to as routine and unremarkable.

Second, Appellant once again argues because the military judge made himself a witness, he used "incorrect legal principles" in denying the motion for mistrial because "he failed to analyze whether he should have recused himself because he made himself a witness." (App. Br. at 7.) As discussed above, the military judge did not testify as a witness in Appellant's court-martial. Therefore, the military judge did not abuse his discretion in failing to analyze his role as a witness.

Third, and finally, Appellant argues the military judge's analysis in denying the mistrial motion was "cursory" because the military judge did not explain *why* "no substantial doubt would be case upon the fairness of the proceedings." (App. Br. at 8.) But the military judge explained he reached the conclusion that the court reporter's reaction to the evidence "does not cast substantial doubt upon the fairness of the proceedings" because of the military judge alone forum and his confidence in his own abilities to "disregard entirely what transpired with the

court reporter." (R. at 367.) That is not a conclusory statement. Furthermore, a new court reporter was detailed to the proceedings. (R. at 351.) Given the "extraordinary nature of a mistrial," it was not an abuse of discretion for the military judge to proceed forward with trial with a replacement court reporter who did not have any emotional reactions to the Government's evidence. Ashby, 68 M.J. at 122.

Denying the motion for a mistrial was within the "range of choices" the military judge had, and he correctly concluded Appellant failed to meet his burden to justify such a drastic remedy. Gore, 60 M.J. at 187. The military judge did not abuse his discretion when denying Appellant's motion for mistrial, and Appellant was not prejudiced in any way. Accordingly, this assignment of error should be denied.

II.

THE MILITARY JUDGE DID NOT PLAINLY ERR BY FAILING TO SUA SPONTE RECUSE HIMSELF.

Standard of Review

While a military judge's decision on recusal is reviewed for an abuse of discretion when it is raised by an appellant at trial, when an appellant does not raise the issue until appeal, it is reviewed under the plain error standard. United States v. Martinez, 70 M.J. 154, 157 (C.A.A.F. 2011). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice. Id.

Law

R.C.M. 902(a) requires a "military judge [to] disqualify himself or herself in any proceeding in which that military judge's impartiality might reasonably be questioned."

"[W]hen a military judge's impartiality is challenged on appeal, the test is whether, taken as a whole in the context of this trial, a court-martial's legality, fairness, and impartiality were

put into doubt by the military judge's [actions]." United States v. Burton, 52 M.J. 223, 226 (C.A.A.F. 2000) (citations and quotation marks omitted). The appearance of impartiality is reviewed objectively; that is, "[a]ny conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." United States v. Kincheloe, 14 M.J. 40, 50 (C.M.A. 1982) (citation and internal quotation marks omitted).

However, despite the objective standard, a military judge's "statements concerning his intentions and the matters upon which he will rely are" still relevant to the inquiry. United States v. Sullivan, 74 M.J. 448, 454 (C.A.A.F. 2015). CAAF observed:

> Where the military judge makes full disclosure on the record and affirmatively disclaims any impact on him, where the defense has full opportunity to voir dire the military judge and to present evidence on the question, and where such record demonstrates that appellant obviously was not prejudiced by the military judge's not recusing himself, the concerns of RCM 902(a) are fully met.

United States v. Campos, 42 M.J. 253, 262 (C.A.A.F. 1995).

"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). A military judge has an "equally weighty responsibility not to recuse himself or herself unnecessarily." Kincheloe, 14 M.J. at 50, n.14.

The concerns of R.C.M. 902(a) are fully met when the military judge makes full disclosure on the record, disclaims any impact, provides the defense with the opportunity for *voir dire*, and the record demonstrates a lack of prejudice. United States v. Norfleet, 53 M.J. 262 (C.A.A.F. 2000).

Analysis

Appellant has failed to overcome the presumption that the military judge was impartial in any way. Appellant argues for the first time on appeal that the military judge should have *sua sponte* recused himself from presiding over this court-martial. (App. Br. at 11.) Appellant asserts the military judge abandoned his impartiality when he tended to an ill court reporter in chambers without counsel for either side present. (Id.) According to Appellant, the military judge "made himself a witness" by virtue of talking to the court reporter in chambers alone to ascertain why she was ill. (Id.) Furthermore, Appellant argues that "by questioning the Court Reporter—alone his chambers, not on the record—the Military Judge lost his grip on the law, compromised his partiality, and prejudiced A1C Fernandez's right to be tried on the evidence alone." (R. at 12.) It is unclear how.

Appellant attempts to transpose the court reporter's emotional reaction to the evidence onto the military judge by arguing that "by extension" the military judge's "professionality, decorum, and impartiality regarding this evidence…was crucial." (App. Br. at 12.) But at no point during the proceedings did the military judge become ill, have a reaction to the evidence, or display any outward emotions at all. Appellant argues the military judge should have handled the situation by having "a paralegal or counsel speak to the Court Reporter about what happened" instead of speaking to the court reporter himself. (App. Br. at 13.) After all, according to Appellant, this is "standard practice for any witness interaction." (Id.) But the court reporter was not a witness. And, as discussed in AOE I, the military judge has a responsibility for the court reporter under departmental regulations.

The military judge was transparent about what happened with the court reporter on the record, submitted himself to extensive defense *voir dire* on the issue, and disclaimed any bias or impact. Therefore, "the concerns of R.C.M. 902(a) are fully met." Campos, 42 M.J. at 262. Furthermore, the fact that the defense counsel never requested the military judge recuse himself militates against a finding of plain error. *See* United States v. Cooper, 51 M.J. 247, 250 (C.A.A.F. 1999) (failing to move to disqualify the military judge strongly suggested that the defense did not believe that the military judge lost impartiality or the appearance of impartiality); *see also* United States v. Marsh, No. ACM 38688, 2016 CCA LEXIS 244, at *10-11 (A.F. Ct. Crim. App. Apr. 19, 2016) (unpub. op.) ("[i]t is also significant that the civilian defense counsel did not request that the military judge recuse herself.") At bottom, the military judge did not err by failing to sua sponte recuse himself. In fact, the military judge had an "obligation" to *not* recuse himself from the case. Kincheloe, 14 M.J. 40, n.14.

Even if this Court decides that the military judge should have *sua sponte* recused himself, Appellant is not entitled to relief. In Liljeberg v. Health Services Acquisition Corp., the United States Supreme Court adopted a three-factor test to determine if a remedy was warranted for a judge's failure to recuse himself: (1) the "risk of injustice to the parties in the particular case"; (2) the "risk that the denial of relief will produce injustice in other cases"; and (3) the "risk of undermining the public's confidence in the judicial process." 486 U.S. 847, 864 (1988). CAAF has endorsed, and used, the Supreme Court's Liljeberg test. United States v. Butcher, 56 M.J. 87 (C.A.A.F. 2001). Yet, Appellant argues he "disagrees with this test and asks this Court not to apply it." (App. Br. at 14.) Bypassing the Liljeberg test entirely, Appellant summarily concludes he suffered material prejudice without explaining how. But this Court must follow

both binding CAAF and Supreme Court precedent under the doctrine of vertical stare decisis. And after applying the Liljeberg test, any claim of prejudice is speculative.

The first Liljeberg factor requires consideration of "the risk of injustice to the parties." 486 U.S. at 854. In the present case, any risk of injustice was considerably diminished because a new court reporter was quickly detailed for the rest of trial and did not have any similar emotional reaction to the evidence. And importantly, the military judge said the incident would not effect him and there is nothing in the record to give reason to disbelieve him. While the military judge did find Appellant guilty of the lone charge and specification of which he was charged, the military judge only sentenced Appellant to six months confinement, a fraction of the total maximum sentence authorized (10 years confinement and a DD) *and* substantially less than trial counsel's recommendation[3]. (R. at 469.) This demonstrates the military judge was not unduly swayed by the prior court reporter's emotional reaction to the evidence earlier in the proceedings. Therefore, the first factor weighs in the Government's favor.

The second Liljeberg factor concerns "the risk that denial of relief will produce injustice in other cases." It is not necessary to reverse the results of this case to ensure that military judges exercise the appropriate degree of discretion in the future. This Court can use its combined experience as military justice practitioners and commonsense to conclude a court reporter having an emotional reaction to evidence mid-trial is an unusual circumstance. It is unlikely that this precise factual scenario will repeat itself and require guidance to military judges on how to interact with ill court reporters. Therefore, the second factor weighs in the Government's factor.

The third Liljeberg factor considers "the risk of undermining the public's confidence in the judicial process." This decision "turns upon an estimation of what an informed, reasonable

---

[3] TC argued for "no less than 12 months confinement" (R. at 461).

person would think." United States v. Rudometkin, 82 M.J. 396, 402 (C.A.A.F. 2022). The defense's spectator witness was an informed, reasonable person. And he maintained confidence in this military judge's ability to fairly preside over the trial. Moreover, the court reporter was not aligned with either side. The court reporter is charged "to remain neutral in any proceedings to which assigned." Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial,* 21 April 2021, 51-203, paragraph 14.3. Furthermore, the court reporter "should refrain from expressing personal opinions about the case before, during, or after trial." Id. An informed, reasonable person would not assume the court reporter sought to improperly influence the military judge's view of the evidence by her emotional reaction. And the court reporter certainly did not express her "personal opinions" on the evidence to the military—she merely apologized for her reaction. Id.

An informed, reasonable member of the public would know that the military judge does not consult with the court reporter regarding rulings or solicit her input regarding findings or a sentence. An informed, reasonable member of the public would also know that the military judge does not engage in *ex parte* communications with the court reporter because she is not counsel for either side nor does she have a vested interest in the outcome of the trial. It is hard to imagine the public would harbor serious doubts about the miliary judge's impartiality when the court reporter became ill, and the military judge inquired if she could continue her duties. This is especially so when the military judge did not camouflage his conduct in chambers, was transparent about his entire interaction on the record, and said it would not affect him. Therefore, the third factors weighs in the Government's favor.

Since all three Liljeberg factors weigh in favor of the Government, and this Court is bound to apply the Liljeberg test, Appellant is not entitled to relief. Appellant has not established plain error or prejudice, and this Court should reject this assignment of error.

III.

TRIAL DEFENSE COUNSEL INTENTIONALLY WAIVED ANY OBJECTION TO THE NCMEC CYBERTIP REPORT (PROSECUTION EXHIBIT 4) AND EVEN IF THIS COURT PIERCES WAIVER, THE REPORT CONSISTED OF ENTIRELY NON-HEARSAY MACHINE-GENERATED DATA.

Additional Facts

At trial, the Government offered Prosecution Exhibit 4 into evidence through the testimony of Ms. H.R., a criminal analyst in the Internet Crimes Against Children (ICAC) unit of the New Mexico Attorney General's Office. (R. at 199, 203.) The military judge asked, "Defense Counsel, any objection to what has been marked as Prosecution Exhibit 4 for Identification?" (R. at 203.) Trial defense counsel reviewed Prosecution Exhibit 4, "conferred" with trial counsel, and then had no objection. (Id.) The military judge noted there were a "number of redactions" to Prosecution Exhibit 4 before admitting it into evidence. (R. at 204.) Once the military judge admitted Prosecution Exhibit 4 into evidence, trial defense counsel relied on it during his cross-examination of Ms. H.R. (R. at 222, 223-224.)

Prosecution Exhibit 4 was a 12-page document titled National Center for Missing and Exploited Children (NCMEC) CyberTipline Report 65706465. (R. at 202.) Prosecution Exhibit 4 was offered in redacted form, featuring redactions on 8 of 12 pages. (Pros. Ex. 4.) A CyberTipline report is a report submitted by either members of the public or electronic service providers (ESP), such as Facebook, Google, or Instagram. (R. at 200.) When an ESP finds an image or video they believe to be child pornography on their platform, they provide identifiable information via a

CyberTip to NCMEC. (R. at 201.) In turn, NCMEC reviews the ESP's CyberTip and generates its own report using geolocation, such as IP addresses and phone numbers. (R. at 201.) NCMEC then sends its CyberTip report to whatever law enforcement agency is responsible for the geolocation where the alleged illegal activity occurred. (R. at 201.)

In Appellant's case, Ms. H.R. received a CyberTip from Facebook concerning Appellant through her office's ICAC data system. (R. at 199, 201.) The ICAC data system is a platform in which law enforcement agents, such as Ms. H.R., download various CyberTips sent to them from NCMEC. (R. at 201.) Accompanying the CyberTip that Ms. H.R. received in Appellant's case was a business records affidavit from NCMEC attesting to the authenticity of the CyberTip report. (App. Ex. XXXIX.) The NCMEC business records affidavit was signed by the Vice President of NCMEC, notarized, and explained each section of the CyberTipline Report in Appellant's case. (Id.) Ms. H.R. also reviewed two videos that were reported in NCMEC's CyberTip report as suspected child pornography. (R. at 209.)

Standard of Review

"If the appellant waived the objection, then [Courts] may not review it at all." United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018) (citing United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009)). However, CAAF has determined Courts of Criminal Appeals have discretion under Article 66, UCMJ, to pierce a waiver to correct a legal error. *See* United States v. Hardy, 77 M.J. 438, 442-43 (C.A.A.F. 2018); United States v. Chin, 75 M.J. 220, 222-23 (C.A.A.F. 2016).

Law

A. Waiver

"When an appellant does not raise an objection to the admission of evidence at trial, [Courts] first must determine whether the appellant waived or forfeited the objection." Jones, 78 M.J. at 44. Waiver usually occurs when there is an intentional relinquishment or abandonment of a known right. United States v. Bench, 82 M.J. 388, 392 (C.A.A.F. 2022) (internal quotations omitted) (internal citations omitted). When an appellant fails to raise a Confrontation Clause objection at trial, this Court considers the particular circumstances of the case to determine whether there was waiver but applies a presumption against finding a waiver of constitutional rights. Id. "A waiver of a constitutional right is effective if it 'clearly established that there was an intentional relinquishment of a known right.'" Jones, 78 M.J. at 44.

B. Confrontation Clause

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. AMEND. VI. CAAF has held that the right to confront witnesses "applies to testimonial statements made out of court, because the declarant is a witness within the meaning of the Sixth Amendment, and thus the accused must be afforded the right to cross-examine that witness." United States v. Clayton, 67 M.J. 283, 287 (C.A.A.F. 2009) (citing United States v. Foerster, 65 M.J. 120, 123 (C.A.A.F. 2007)). CAAF also held that an expert "may consistent with the Confrontation Clause and the rules of evidence, (1) rely on, repeat, or interpret admissible and non-hearsay machine-generated printouts of machine-generated data, and or (2) rely on, but not repeat, testimonial hearsay that is otherwise an appropriate basis for an expert opinion, so long as the expert opinion arrived at is the expert's own. United States v.

Blazier, 69 M.J. 218, 222 (C.A.A.F. 2010). Yet, an expert may not circumvent the Confrontation Clause through repetition of the otherwise inadmissible testimonial hearsay of another. Id.

"A statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" United States v. Sweeney, 70 M.J. 296, 301 (C.A.A.F. 2011). In determining whether any individual statement in a laboratory report is evidentiary, this Court treats "fine distinctions based on the impetus behind the testing and the knowledge of those conducting laboratory tests at different points in time" as relevant considerations, but not as dispositive factors. United States v. Blazier, 68 M.J. 439, 442 (C.A.A.F. 2010); *see also* Sweeney, 70 M.J. at 302 ("[T]he focus has to be on the purpose of the statements in the drug testing report itself, rather than the initial purpose for the urine being collected and sent to the laboratory for testing."). "The fact that a document is ultimately admitted at trial as part of a prosecution exhibit, does not prove a fortiori that it would be reasonably foreseeable to an objective person that it was created for an evidentiary purpose." United States v. Tearman, 72 M.J. 54, 60 (C.A.A.F. 2013).

CAAF has found internal chain-of-custody documents and internal review worksheets are created for the purpose of the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, and for that reason, they are not testimonial. Tearman, 72 M.J. at 61.

C. Non-Hearsay Machine-Generated Reports

It is "well-settled that under both the Confrontation Clause and the rules of evidence, machine-generated data and printouts are not statements and thus not hearsay – machines are not declarants – and such data is therefore not 'testimonial.'" Blazier, 69 M.J. at 227 (citing United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008); Moon, 512 F.3d at 362; United States v.

Washington, 498 F.3d 225, 230-31 (4th Cir. 2007); United States v. Hamilton, 413 F.3d 1138, 1142-43 (10th Cir. 2005); United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003); *see also* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 380 (2d ed. 1994) ("[N]othing 'said' by a machine ... is hearsay").

Machine-generated data and printouts are distinguishable from human statements, as they "involve so little intervention by humans in their generation as to leave no doubt they are wholly machine-generated for all practical purposes." Lamons, 532 F.3d at 1263, n.23.

Analysis

A. Appellant Waived any Objection to Prosecution Exhibit 4.

Appellant unequivocally waived all objections, including a constitutional testimonial hearsay objection, to the CyberTipline report when trial defense counsel was called on to make an objection, took a moment to review the document, confer with trial counsel, and then had no objection. Appellant had ample opportunity to raise a testimonial hearsay objection—he did not. While trial defense counsel objected on foundation grounds to Prosecution Exhibit 5, the images that accompanied the CyberTipline report, the defense did not raise any objection to the preceding exhibit (Prosecution Exhibit 4.) Not only did Appellant affirmatively represent he had no objection, he also relied on the evidence himself. Therefore, the issue is waived. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citing United States v. Smith, 531 F.3d 1261, 1268 (10th Cir. 2008) (deciding that the defendant had waived the issue when he had "affirmatively represented that he had no objection to the admission of the evidence at issue" and "also relied on the evidence himself").

B. Even if this Court pierces waiver, Prosecution Exhibit 4, in redacted form, did not contain testimonial hearsay.

This Court should not pierce waiver, because trial defense counsel's failure to object prevented the parties from fully developing the issue on record for this Court to review. But even if the defense had objected, Prosecution Exhibit 4, in the form it was offered at trial, only contained machine-generated data. Since the defense did not object, the Government was deprived the ability to specifically put on evidence of the computer-generated nature of the report, but a plain reading of Prosecution Exhibit 4, coupled with its accompanying business records affidavit (App. Ex. XXXIX), reveals the redacted document does not contain testimonial hearsay.

As explained in the NCMEC business records affidavit, a CyberTipline report contains 4 sections: Section A, Section B, Section C, and Section D. (App. Ex. XXXIX, ¶ 6.) Section A contains information submitted by the reporting ESP. (Id. at ¶ 7.) In this case, Facebook. (Id. at ¶ 12.) "NCMEC staff cannot revise or edit any information contained in Section A." (Id. at ¶ 7.) Section A contains various dates, times, IP addresses, file names, user ID information, and other assorted computer-generated fields of entry. (Pros. Ex. 4, Section A.) All the information Facebook provided to NCMEC in Section A of the CyberTipline report appears to be machine-generated. Since machines are not declarants, Section A does not contain a "statement," is not hearsay, and the data is therefore not "testimonial." Blazier, 69 M.J. at 224.

Section B contained "automated information that NCMEC Systems automatically generate based on information provided by a reporting ESP." (Id. at ¶ 8.) Section B is aptly titled: "Automated Information Added by NCMEC Systems." (Pros. Ex. 4, page 7.) Like Section A, automated information provided by a system, or machine, is not a "statement," so is not hearsay, and the data in Section B is therefore not "testimonial." Blazier, 69 M.J. at 224.

Section C contains "additional information compiled and documented by NCMEC based on the information submitted in Section A." (Id. at ¶ 9.) At first blush, this section could certainly contain testimonial hearsay if a human from NCMEC provided analysis or input. But, importantly, no one from NCMEC ever viewed the suspected images flagged by Facebook. In Section C, under "Additional Information Provided by NCMEC," the report reads: "Please be advised that NCMEC staff have not accessed or viewed any of the reported uploaded files submitted within this report at this time and have no information concerning the content of the files other than information provided in this report." (Pros. Ex. 4, page 9.) The CyberTipline report again repeats on page 10 that no one from NCMEC has viewed the uploaded files. (Id. at page 10.) Since no one from NCMEC ever viewed the suspected images, Prosecution Exhibit 4 did not contain any analysis, observations, input, or conclusions by an analyst that could qualify as testimonial hearsay. In this regard, the CyberTipline report in Appellant's case is distinguishable from those that other courts have found to contain testimonial hearsay.

In United States v. Morrissey, also a child pornography case, the Government introduced a spreadsheet, created by a digital forensic examiner, listing the files he believed to be child pornography recovered from the appellant's computer. 895 F.3d 541, 546-47 (8th Cir. 2018). The spreadsheet the examiner created also contained files which had been previously identified as child pornography by NCMEC. Id. at 547. The Eighth Circuit determined that the spreadsheet was hearsay. Id. at 547, 554. The Eighth Circuit determined that the spreadsheet was offered into evidence to prove that the images were, in fact, child pornography, and assumed without deciding that the NCMEC confirmations were testimonial. Id. Here, unlike Morrissey, since no NCMEC examiner ever reviewed the suspected images, the CyberTipline report did not

contain any opinion or belief by an examiner. Therefore, Prosecution Exhibit 4 did not contain any statements by a human declarant that could qualify as testimonial hearsay.

In United States v. Juhic, also a child pornography case, the Government likewise offered computer-generated reports against the appellant. 954 F.3d 1084, 1089 (8th Cir. 2020). The reports included notations identifying whether suspected files were “child-notable” or parties of “series” of child pornography that had been submitted to NCMEC. Id. at 1087. The Eighth Circuit held the computer-generated reports contained inadmissible hearsay because the “child-notable” and “series” notations were out-of-court statements offered for the truth of the matter asserted: that the videos and images were child pornography. Id. at 1089. The Court distinguished between reports that were exclusively machine-generated and those that contained human involvement:

> While the reports may have been computer-generated, human statements and determinations were used to classify the files as child pornography. It was only after a human determined that a file contained child pornography that the hash value or series information was inserted into the computer program and automatically noted in future reports. The human involvement in this otherwise automated process makes the notations hearsay.

Id.

Unlike the report in Juhic, the CyberTipline report in this case did not contain any out of court statement offered for the truth – that a particular image or video was, in fact, child pornography. On the contrary, the NCMEC system classified the images Facebook reported as “Apparent Child Pornography (Unconfirmed”) (Pros. Ex. 4, page 9.) Trial defense counsel capitalized on the unconfirmed nature of this statement by cross-examining Ms. H.R. that the report could not be used to establish that the images Facebook flagged were child pornography. (R. at 223.) At bottom, the machine-generated CyberTipline report did not qualify as a “statement” for hearsay purposes as it was not developed with any human input and no human

analyst determined that the files at issue were child pornography. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11, (2009).

Finally, Section D contains information related to the law enforcement agency to which NCMEC made the CyberTipline report available. (Id. at ¶ 10.) In Appellant's case, Section D only contained contact information for the New Mexico Attorney General's Office. (Pros. Ex. 4, page 12.) Section D also appears to only contain automated information populated by NCMEC's system. Therefore, Section D does not contain a "statement," is not hearsay, and the data is therefore not "testimonial." Blazier, 69 M.J. at 224.

The Government acknowledges this Court's recent holding in United States v. Moss where this Court held, "It is uncontroverted that the CyberTipline report contained testimonial hearsay statements offered to prove the truth of the matter asserted therein." No. ACM 40249, 2023 CCA LEXIS 158, at *13 (A.F. Ct. Crim. App. Apr. 7, 2023) (unpub. op.) But it is unclear what information was contained in the CyberTipline report offered in Moss. For instance, it is unknown whether any information was redacted from the report, like it was in this case. It is entirely possible the CyberTipline report in Moss contained testimonial hearsay that was not presented in the present case due to heavy redactions. Regardless, Moss is an unpublished case of limited persuasive authority since its actual holding is unclear.

In support of his claim that Prosecution Exhibit 4 contained testimonial hearsay, Appellant relies exclusively on a lone federal circuit case that held that NCMEC qualified as a government entity. (App. Br. at 7.) But the case Appellant exclusively relies on, United States v. Ackermann, 831 F.3d 1292 (10th Cir. 2016) dealt with the Fourth Amendment. Id. at 1304. There was no Confrontation Clause or testimonial issue presented in Ackermann. Id. Even so, Ackermann is not binding on this Court and is the only federal circuit to hold that NCMEC is a

government entity for purposes of the Fourth Amendment. In any event, even if NCMEC is a government or law enforcement entity, that has no bearing on whether the NCMEC reports were machine-generated data. Machine-generated data made by law enforcement entities still is not testimonial hearsay.

In sum, the redacted version of Prosecution Exhibit 4 contained only machine-generated data that does not qualify as a "statement" for purposes of testimonial hearsay. Since no analyst ever reviewed the images at issue to determine whether or not they met the definition of child pornography, there was no "human involvement in this otherwise automated process." And since Appellant waived this assignment of error, there is nothing to correct on appeal. Juhic, 954 F.3d at 1089. And so this Court should deny Appellant's claim.

IV.

APPELLANT IS NOT ENTITLED TO RELIEF BECAUSE THERE WAS NO POST-TRIAL DELAY IN THIS CASE.

Additional Facts

Appellant was sentenced on 28 January 2022. (R. at 471.) His case was originally docketed with this Court on 10 June 2022. (App. Br. at 20.) A total of 133 days elapsed between the conclusion of Appellant's court-martial and his case being docketed with this Court. On 17 November 2022, this Court remanded Appellant's ROT to the Chief Trial Judge to correct the record pursuant to R.C.M. 1112(d) as a disc containing sealed material, Prosecution Exhibit 5, was cracked and inoperable. (*Remand Order*, dated 17 November 2022.) On 15 December 2022, the detailed military judge signed a Correction of Record pursuant to R.C.M. 1112(d) and attached a working copy of Prosecution Exhibit 5. (*Certificate of Correction*, dated 15 December 2022.) On 19 December 2022, Appellant's case was re-docketed with this Court.

(*Notice of Docketing*, dated 19 December 2022.) A total of 32 days elapsed from when this Court remanded Appellant's case for correction and when it was re-docketed with this Court.

Standard of Review

This Court reviews *de novo* an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

In Moreno, the CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision over 18 months after the case is docketed with the court. 63 M.J. at 142-143. Post-trial processing of courts-martial has changed significantly since Moreno, including the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. Now, this Court applies an aggregate standard threshold: 150 days from the day the appellant was sentenced to docketing with this Court. Id. When evaluating whether a case has been docketed within the appropriate timeframe, this Court has not required the ROT to be complete and without errors to stop the clock. United States v. Muller, No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.).

When a case does not meet one of the above standards, the delay is presumptively unreasonable and a test to review claims of unreasonable post-trial delay evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. 135 (citing Barker v. Wingo, 407 U.S. 514, 530) (1972)). All four factors are considered together and "[n]o single factor is required for

finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ.

R.C.M. 1112(f) instructs that "[i]n accordance with regulations prescribed by the Secretary concerned, a court reporter shall attach" certain matters to the record before forwarding for appellate review. DAFMAN 51-203, *Records of Trial,* 21 April 2021, ¶ 1.4 instructs on what must be included in a "completed ROT." DAFMAN 51-203, ¶ 1.4.4. further directs: "A completed ROT (Part 1 and Part 2) is required for post-sentencing and appellate review. The completed ROT triggers the metrics and milestones mandated in DAF 51-201 (identified as "ROT Completion.")

Analysis

Applying Livak, there is not a facially unreasonable delay. From the conclusion of trial to the docketing of Appellant's case with this Court, 133 days passed, which is less than the 150 days for a threshold showing of facially unreasonable delay. Since there is not a facially unreasonable delay, this Court does need not assess whether there was a due process violation by considering the four Barker factors.

Appellant asserts that this Court should find, categorically, that the Government fails to meet its Moreno and Livak deadlines if the ROT that is submitted for docketing does not comport with statutory and regulatory requirements. (App. Br. at 22.) Applying this *per se* rule to his case, Appellant argues the presumption of unreasonably delay in his case should be 326 days versus 133 days. (Id.) Appellant argues this 326-day excess should *all* be attributed to the Government even though Appellant asked for three enlargements of time before the remand. (Id.) It is unclear why, especially when only 32 days of total delay is attributable to the process of remanding Appellant's record for correction and then re-docketing with this Court.

Appellant claims, "Whether the Government complies with its post-trial processing deadlines by submitting an incomplete ROT for appellate review is a question of law this Court has not explicitly decided." (App. Br. at 20.) This is not correct. Albeit an unpublished case, in Muller, this Court explained, "CAAF has not articulated that a record must be complete to forestall a presumption of post-trial delay." 2021 CCA LEXIS, at *14. In that case, the appellant's only EPR, a sentencing prosecution exhibit, was missing from the ROT. Id. at *7. This Court found that the failure to include the exhibit "was not shown to be anything other than simple negligence." Id. at *14-15. Relying on the fact that the omission was not "intentional, much less deliberate," this Court found "no facially unreasonable delay." Id. at *15.

In that regard, the Court distinguished Muller from cases where the Government docketed "[a] plainly deficient record," deliberately omitting evidence on which it relied to convict. United States v. Bavender, No. ACM 39390, 2019 CCA LEXIS 340, at *67, *68 n.28 (A.F. Ct. Crim. App. 23 August 2019) (unpub. op.). Here, the Government did not docket a "plainly deficient record wanting considerably important evidence." Id. The Government

docketed a ROT that was contained a singular exhibit that was unviewable due to damage to the disc.

Moreover, if this Court accepts Appellant's argument that *any* damage to a docketed record fails to toll the post-trial speedy trial clock, such a holding could incentivize appellants to delay bringing incomplete or damaged records to the Court's attention. That, in turn, will just further delay appellate review. After all, if Appellant's counsel had viewed the sealed materials earlier and brought the inoperability of the prosecution exhibit to the Court's attention months ago, it could have already been remedied months earlier than it was. While it is the Government's responsibility to compile a complete record of trial, Appellant should not be able to profit from a delay in raising the issue to the Court.

Here, like Muller, there is no evidence of ill intent regarding the damaged exhibit. There is no evidence the Government intentionally "cracked" the disc containing Prosecution Exhibit 5 before mailing it. Nonetheless, Appellant speculates that if this Court allows the Government to docket an incomplete record, such a rule will incentivize the Government to intentionally avoid its regulatory and statutory responsibilities to docket a complete record. There is no evidence to suggest this will be the case. On the contrary, the Government is obligated by statute (Article 54, UCMJ), rule (R.C.M. 1112), and regulation (DAFMAN 51-203) to compile a "complete ROT" before docketing the case with the Air Force Court.

Appellant argues that if this Court tolls the presumption of unreasonable delay when the Government dockets an incomplete ROT, the Government will be encouraged to willfully docket incomplete ROTs "merely to meet processing deadlines." (App. Br. at 22.) But Article 6, UCMJ, mandates "frequent inspections in the field of supervision of the administration of military justice." The administration of military justice, in turn, is governed by DAFI 51-201,

Administration of Military Justice, dated 14 April 2022. DAFI 51-201 explicitly instructs, "Incomplete ROTs (e.g., records of trial that are missing documents) should not be forwarded to JAJM. Incomplete ROTs will be returned to the responsible legal office and will not be considered transferred to JAJM for purposes of metrics and milestones." Therefore, not only will the Government run the risk that forwarding an incomplete ROT is rejected and returned to them, but they will also be inspected by TJAG pursuant to Article 6 on military justice processing. And so *if* the Government defies its own instructions and *if* JAJM accepts an incomplete record, the Government still runs the risk that they will receiving a failing, or negative, inspection grade for failing to docket complete ROTs. More importantly, there is no evidence of bad faith in this case. Nor is there evidence that the Government intentionally docketed Appellant's case as incomplete to deny him speedy appellate review. This Court should dismiss Appellant's theoretical concerns as speculative.

In sum, this Court should decline to find that Appellant's case involved a deprivation of his due process right to speedy post-trial review, and this Honorable Court should deny his requested relief.

V.

AS THIS COURT DETERMINED IN UNITED STATES V. LEPORE, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021), THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL MATTER NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF IT DID HAVE SUCH JURISDICTION, THE STAFF JUDGE ADVOCATE'S FIRST INDORSEMENT TO THE STATEMENT OF TRIAL RESULTS CORRECTLY ANNOTATES THAT APPELLANT'S CONVICTIONS REQUIRED SHE BE CRIMINALLY INDEXED FOR FIREARM PROHIBITION UNDER 18 U.S.C. § 922 BECAUSE HE WAS CONVICTED FOR A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, WHICH IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

Additional Facts

For the charge and specification of which Appellant was found guilty at his general court-martial he faced a maximum of twenty (20) years in confinement. (Manual for Courts-Martial, United States part IV, para. 93.d.(3) (2019 ed.) (MCM). The first indorsement to Appellant's Entry of Judgment contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (ROT at Vol. 1.) The first indorsement is signed by the Staff Judge Advocate (SJA). (Id.)

Standard of Review

"The scope and meaning of Article 66[] is a matter of statutory interpretation, which, as a question of law, is reviewed de novo." United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016) (citation omitted).

The proper completion of post-trial processing is a question of law the court reviews *de novo*. United States v. Zegarrundo, 77 M.J. 612 (A.F. Ct. Crim. App. 2018) (*citing* United States v. Kho, 54 M.J. 64 (C.A.A.F. 2000)).

Law and Analysis

18 U.S.C. § 922(g)(1) makes it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. The military judge convicted Appellant at a general-court martial of one charge and one specification of wrongful distribution child pornography, in violation of Article 134, UCMJ. (R. at 441.) The crime Appellant was convicted of was punishable by imprisonment for a term far exceeding one year.

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because it is not part of the findings or sentence.

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the first indorsement to the Entry of Judgment on the grounds requested by Appellant. Appellant argues that because CAAF ordered the Army to correct a promulgating order that annotated the appellant as a sex offender in Lemire: (1) CAAF has the authority to correct administrative errors in promulgating orders even when concerning collateral consequences; (2) CAAF thinks CCAs have power to correct administrative errors under Article 66, UCMJ; and (3) if CAAF and CCAs have the power to correct administrative errors then they also have the authority to address constitutional errors in promulgating orders even if they are collateral consequences. (App. Br. at 17); *See* United States v. Lemire, 82 M.J. 263 (C.A.A.F. 2022) (unpub. op.)

Appellant bases this argument solely on a footnote to an order in an unpublished opinion issued by CAAF that contained no analysis nor reasoning why this was a viable remedy in that case. Id. But this Court has previously declined to rely on such an incomplete analysis. In

United States v. Lepore, 81 M.J. 759, 762 (A.F. Ct. Crim. App. 2021), this Court even declined to rely on its own past decision in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007), because that opinion contained no analysis of jurisdiction when this Court summarily ordered the correction of the promulgating order when it referenced 18 U.S.C. § 922(g) allegedly in error. Here, Appellant asks this Court to follow a footnote in an unpublished opinion from CAAF, which contains no analysis of jurisdiction for directing correction of a promulgating order.

Furthermore, Rule 30.4(a) of this Court's Rules of Practice and Procedure states:

> Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court's decision to the public, the parties, military practitioners, and judicial authorities.

Therefore, Lemire does not qualify as "precedent" and should not be followed, because the unpublished order from CAAF does not call attention to a rule of law or procedure and does not provide CAAF's rationale to this judicial authority. In any event, Lemire involves sex offender registration, not firearms prohibitions. CAAF ordering removal of the designation for sex offender registration from a promulgating order did not involve the Court adjudicating a constitutional question unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring it to evaluate the constitutionality of firearms prohibitions for convicted airmen.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act with "respect to the finding and sentence" of a court-martial "as approved by the convening authority." Lepore, 81 M.J. at 762 (*citing* 10 U.S.C. § 866(c)); *see* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015). Article 66, UCMJ, provides no statutory

authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the numerous times it has held that it lacks jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." 81 M.J. at 762 (citations omitted).

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors *in the performance of its duties and responsibilities*, so that authority does not extend to determining the constitutionality of a collateral consequence. The question Appellant asks this Court to determine is fundamentally different from the situations where our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, the Army Court of Criminal Appeals ordered modification of the statement of trial results to correct erroneous dates, wording in charges, reflection of pleas appellant entered, and other such clerical corrections. 2021 CCA LEXIS 101 (Army Ct. Crim. App. March 2, 2021) (unpub. op.). Pennington represents the type of error R.C.M. 1111(c)(2) is in place to correct.

Both the Navy-Marine Corps and the Air Force courts of criminal appeals have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corp. Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. The courts reasoned that they only had jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. Here, under updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The SJA's annotation on

the first indorsement to the Entry of Judgment still is not part of the finding or sentence entered into the record.

Following that logic, R.C.M. 918 makes no mention of the firearm prohibitions requirements in 18 U.S.C. § 922(g) as being part of a court-martial finding, and a firearms prohibition is not an authorized punishment in the MCM. Therefore, firearms prohibitions are not a findings or sentence, and indexing requirements under 18 U.S.C. §922 are outside the scope of this Court's authority.

In sum, this Court should decline to review this issue, because it is outside this Court's jurisdiction under Article 66(d), UCMJ.

B. The Entry of Judgment was correctly prepared in accordance with the applicable Air Force Instruction.

Even if this Court does have jurisdiction to review this issue, Appellant is not entitled to relief. The SJA followed the appropriate Air Force regulations in signing the first indorsement to the Entry of Judgment. Appellant received a conviction for a qualifying offense under 18 U.S.C. §922(g)(1). DAFI 51-201, paragraph 13.3.3 states, "Prior to distribution, the SJA must sign and attach to the Statement of Trial Results a first indorsement, indicating whether…firearm prohibitions are triggered[.]" Furthermore, paragraph 15.28.1. applies in this case, which shows the SJA correctly annotated firearms prohibition on the first indorsement:

> Persons convicted of a crime punishable by imprisonment for a term exceeding one year. If a service member is convicted of a crime for which the maximum punishment listed in the MCM exceeds a period of one year, this prohibition is triggered, regardless of the term of confinement adjudged or approved.

(*citing* 18 U.S.C. § 922(g)(1)).

Appellant's conviction qualifies him for criminal indexing in accordance with 18 U.S.C. § 922(g)(1), and the first indorsement annotates this in accordance with DAFI 51-201, so there was no error for this Court to correct.

C. It was constitutional for the SJA to annotate the firearms prohibition on the Entry of Judgment because Appellant is not a "law abiding, responsible citizen" and 18 U.S.C. § 922(g)(1) is part of the longstanding prohibition on the possession of firearms by felons.

In N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-2130 (2022), the Supreme Court held the standard for applying the Second Amendment is:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government 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."

(citations omitted).

In his concurrence in Bruen, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008), and McDonald v. City of Chicago, 561 U.S. 742 (2010), and further explained in the Bruen decision, that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). The proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (*citing* Heller, 554 U.S. at 636). The principal opinions in Heller and McDonald stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose….Nothing in our opinion

> should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]

Id. (citations omitted).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 25.) However, Appellant then cites United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for a "non-violent offense" is in keeping with the United States' historical tradition of firearm regulation. (App. Br. at 24-25.) But this is contrary to what Rahimi says. Rahimi concluded that the term "law abiding, responsible citizens," as used in Heller, is a shorthand in explaining that the holding in Heller should not be taken to cast doubt on longstanding prohibitions on possession of firearms by felons. Rahimi, 61 F.4th at 451 (*citing* Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different – it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. But the Court determined that Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), because Rahimi was only subject to an agreed upon domestic violence restraining order at the time he was convicted. Id. at 452. He did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. And the Fifth Circuit found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s

restriction of Second Amendment rights "fits within our Nation's historical traditional of firearm regulation. Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant finds himself in this case. Here, Appellant has been convicted of an offense punishable by well over a year in confinement, thus qualifying him as a felon prohibited from owning a firearm under 18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions, which limit the Second Amendment to "law abiding citizens." These cases make no distinction between violent and non-violent felonies. However, prior to Bruen, the Fifth Circuit noted "[i]rrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id. *See also* Folajtar v. AG of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons at large – including nonviolent felons – based on its consistency with history and tradition.) This understanding is in keeping with the Supreme Court's decision in Bruen, because the Fifth and Third Circuits made the determination that prohibiting felons from possessing firearms was consistent with this nation's historical tradition of firearm prohibition.

Appellant's conviction for distributing child pornography demonstrates he falls squarely into the category of individuals that should be prohibited from possession a firearm. Therefore,

(1) Appellant's Entry of Judgment correctly annotates firearm prohibition and (2) the United States' longstanding prohibition on felons possessing firearms appropriately applies to him. For these reasons, the criminal indexing annotation on Appellant's Entry of Judgment was correct.

If this Court should find it has the authority to review Appellant's firearm prohibition annotation on the first indorsement to the Entry of Judgment, it should find consistent with the Supreme Court and the Fifth Circuit that this Nation has a longstanding tradition consistent with the Second Amendment of prohibiting felons such as Appellant from possessing firearms. This Court should deny this assignment of error.

VI.

THE UNITED STATES DID NOT VIOLATE APPELLANT'S SIXTH OR FIFTH AMENDMENT RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURTS-MARTIAL.

Standard of Review

The constitutionality of a statute is a question of law that is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000) (*citing* United States v. Brown, 25 F.3d 307, 308 (6th Cir. 1994)).

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. Appellant elected to be tried by military judge alone.

Appellant now implicitly argues, given the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 102.) Appellant does not outright make this argument, but rather cites CAAF's grant of

review in United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), *review granted* 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul 2022). (App. Br. at 60.)[4]

In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

The Court recently addressed the applicability of Ramos to courts-martial in Anderson. It rejected the same claims Appellant implicitly raises now:

> Ramos does not purport, explicitly or implicitly, to extend the *scope* of the Sixth Amendment right to a jury trial to courts-martial; nor does the majority opinion in Ramos refer to courts-martial at all. Accordingly, after Ramos, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment right to a jury trial does not apply to trial by courts-martial—and, by extension, neither does the unanimity requirement announced in Ramos.
>
> …
>
> This court has repeatedly held that Fifth Amendment due process does not require unanimous verdicts in courts-martial.

Further, in Anderson this Court found that non-unanimous verdicts did not constitute an equal protection violation under the Fifth Amendment. Id. at *56. *See also* United States v. Monge, No. ACM 39781, 2022 CCA LEXIS 396, at *30-31 (A.F. Ct. Crim. App. 5 July 2022) (unpub. op.) (holding that Appellant's unanimous verdict claim did not warrant discussion or relief).

[4] Appellant argues this Court "should—and must decide this assignment of error in accordance with the CAAF's forthcoming decision in Anderson." (App. Br. at 29.) But it is speculative that CAAF will decide Anderson in favor of Appellant. In the interim, this Court should apply its previous reasoning and deny relief.

This Court should adopt its reasoning from Anderson and deny Appellant's requested relief, especially in light of the fact that Appellant elected to be tried by a military judge alone.

VII[5].

APPELLANT HAS NOT ARTICULATED HIS RIGHTS ADVISEMENT ASSIGNMENT OF ERROR WITH PARTICULARITY SUCH THAT THE GOVERNMENT CAN INTELLIGENTLY RESPOND.

In a three-sentence assignment of error, Appellant argues his rights were violated under the Fifth Amendment, Article 31, UCMJ, Mil. R. Evid. 305 "and applicable case law" when OSI asked Appellant for his passcode after he invoked his Article 31 rights. (App. Br. at Appendix A.) This argument is insufficient under this Court's rules. This Court's Rules of Practice and Procedure require Appellant to articulate issued raised pursuant to Grostefon "with particularity." A.F. CT. CRIM. APP. R. 18(B); *see also* United States v. Healy, 26 M.J. 394, 397 (C.M.A. 1988) ("Grostefon did not signal abolition of basic rules of appellate practice and procedure."). Furthermore, Rule 18.2(b) requires Appellant to "[l]ist issues and include relevant legal authority and argument for each issue." Appellant has not complied with this Court's rules.

Despite the plethora of case law on the topic of Article 31 rights violations and digital media, Appellant broadly invokes "applicable case law." (App. Br. at Appendix A.) Furthermore, Appellant does not provide a standard of review for his assignment of error. (Id.) At trial, the parties litigated a robust motion to suppress filed by the defense. (App. Ex. X.) The military judge issued a 29-page ruling on the defense's motion to suppress. (App. Ex. XXXI.) Despite having the burden to establish entitlement to relief, Appellant does not articulate what portion(s) of the military judge's ruling on the motion to suppress at issue was erroneous or an

[5] This issue is pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

abuse of discretion. Since Appellant has not complied with this Court's rules, the Government cannot intelligently articulate a response without knowing the specifics of Appellant's complaint.

VIII[6].

THE CHARGE AND SPECIFICATION AGAINST APPELLANT WAS PROPERLY PREFERRED.

Additional Facts

On 7 December 2020, the Government originally preferred one charge and two specifications against Appellant, in violation of Article 134, UCMJ, for possession and distribution of child pornography. (App. Ex. V, ¶ 2.) An Article 32 preliminary hearing was held on 4 January 2021. (Id.) On 7 December 2020, the Preliminary Hearing Officer drafted, but never finalized a report, finding no probable cause related to the preferred charge and two specifications. (Id.) The original charge and specifications were never referred to trial. (Id.) On 11 February 2021, the convening authority dismissed the charge and two specifications without prejudice. (Id. ¶ 4.)

On 23 April 2021, one charge and one specification of distribution of child pornography was preferred against Appellant. (R. at 5.) An Article 32 preliminary hearing was held on the new charge and specification. (R. at 5.) The new charge and specification were referred to trial by general court-martial and served on Appellant on 24 June 2021. Appellant was convicted of this charge and specification.

When called upon to enter pleas at trial, the military judge informed Appellant that "any motions to dismiss or grant other appropriate relief should be made at this time." (R. at 190.) Appellant did not raise a defective preferral or defective referral motion.

---

[6] This issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

Law and Analysis

For the first time on appeal Appellant argues it was "error" for the Government to prefer different charges against Appellant and then dismiss those charges after an Article 32 preliminary hearing and, instead, prefer a different charge against Appellant. (App. Br. at Appendix A, at 1.) Although he does not cite any rule of law, Appellant's claim seems to be styled as a defective preferral. But Appellant never raised a defective preferral claim at trial. And CAAF has "routinely found claims of defective preferral waived if not raised at trial." United States v. Givens, 82 M.J. 211, 215 (C.A.A.F. 2022) (additional citations omitted). CAAF has "stated previously that the failure to object to a defective preferral waives the error." Id. at 215-216 (additional citations omitted).

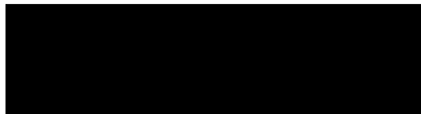
Despite having the burden to establish entitlement to relief, Appellant vaguely argues "the Government should not be allowed to perfect its case in this way." (App. Br., Appendix A at X.) This argument is insufficient. This Court's Rules of Practice and Procedure require Appellant to articulate issued raised pursuant to Grostefon "with particularity." A.F. CT. CRIM. APP. R. 18(B); *see also* Healy, 26 M.J. at 397 ("Grostefon did not signal abolition of basic rules of appellate practice and procedure."). Furthermore, Rule 18.2(b) requires Appellant to "[l]ist issues and include relevant legal authority and argument for each issue." Appellant has not complied with this Court's rules.

Even if this Court considers Appellant's Grostefon submission, and pierces waiver, Appellant is not entitled to relief. When charges are dismissed, a "[r]einstitution of charges requires the command to start over. The charges must be re-preferred, investigated, and referred in accordance with the Rules of Courts-Martial, as though there were no previous charges or proceedings." United States v. Britton, 26 M.J. 24, 26 (C.M.A. 1988). Therefore, the charge and

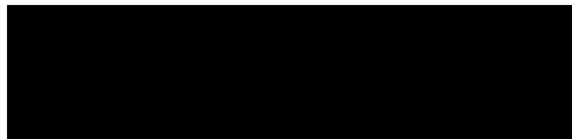
two specifications that were previously dismissed against Appellant are not properly before this Court as Appellant was never convicted of the original charge and specifications. Thus, this Court should reject Appellant's claim of unspecified "error" for this assignment of error.

CONCLUSION

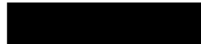
For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.



MORGAN R. CHRISTIE, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

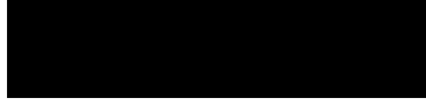


MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force



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 2 June 2023.



MORGAN R. CHRISTIE, Maj, 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	)	**APPELLANT'S REPLY BRIEF**
Appellee,	)	
	)	Before Panel No. 2
v.	)	
	)	No. ACM 40290 (f rev)
Airman First Class (E-3)	)	
KEEN A. FERNANDEZ,	)	8 June 2023
United States Air Force	)	
Appellant	)	

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

Appellant, Airman First Class (A1C) Keen A. Fernandez, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's answer of 2 June 23 [hereinafter Answer]. A1C Fernandez stands on the arguments in his initial brief, filed on 3 Apr 23 [hereinafter AOE], and submits arguments for the issues listed below.

ARGUMENT

III.

THE REPORTS FROM FACEBOOK AND THE NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN (NCMEC) WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF A1C FERNANDEZ'S CONFRONTATION CLAUSE RIGHT.

This Court Should not Find Waiver

The Government argued that A1C Fernandez "unequivocally waived all objections" to Prosecution Exhibit (Pros. Ex.) 4. Answer at 21. However, this Court is "not bound to apply waiver" when exercising its powers under Article 66(d), UCMJ. *United States v. Butcher*, 53 M.J. 711 (A.F. Ct. Crim. App. 2000) (citing *United States v. Evans*, 28 M.J. 74, 76 (C.M.A. 1989)). "[F]ailure to raise the issue does not preclude the Court of Military Review in the exercise of its

powers from granting relief." *United States v. Britton*, 26 M.J. 24, 27 (C.M.A. 1988). Recently this Court affirmed this principle, stating, "we retain the authority to address errors raised for the first time on appeal despite waiver of those errors at trial." *United States v. Andersen*, 82 M.J. 543, 547 (A.F. Ct. Crim. App. 2022) (citing *United States v. Hardy*, 77 M.J. 438, 442-43 (C.A.A.F. 2018)).

This Court should not find waiver for two reasons. First, Defense Counsel objected to the report on authentication grounds. R. at 216. Although this was not a Confrontation Clause objection, it is indicative of Defense Counsel's desire to keep the report and its contents out of evidence. Second, this Court "appl[ies] a presumption against finding a waiver of constitutional rights." *United States v. Bench*, 82 M.J. 388, 392 (C.A.A.F. 2022) (citation omitted). Even if this Court is inclined to find waiver, A1C Fernandez asks that this Court pierce waiver to review the issue.

The NCMEC Report was not "Machine-generated"

The Government argued that the NCMEC report did not contain testimonial hearsay because it was machine-generated. Answer at 22. The Government is mistaken for several reasons.

First, as to Section A, the Government said, "Section A of the CyberTipline report *appears* to be machine-generated." Answer at 22 (emphasis added). The document itself and the evidence in the record corrects the Government's mistaken impression and confirms this information was provided by a human. Page Four of Prosecution Exhibit 4 asks whether the Electronic Service Provider (ESP) viewed the files in question. The answer was marked as "yes," indicating a human viewed and confirmed the content. The Criminal Analyst who laid the foundation for the NCMEC report confirmed this: "And marking that, the ESP did, in fact, review those files." R. at 205. In fact, the report specifically notes that someone at Facebook viewed some images, but not others. R. at 228. Other indications that a human viewed the images and compiled this section of the report

are the notes such as, "This image was uploaded because it was sent immediately before Child Exploitation Imagery…." Pros. Ex. 4 at 5. Additional notes include, "This report contains a recent, believed-to-be non-mobile IP address under event type Other." *Id.* at 3.

Second, the Government correctly noted that Section B contains "automated information that NCMEC Systems automatically generate based on information provided by a reporting ESP." Answer at 22. However, this cuts against its argument that the report, as a whole, is machine generated. If NCMEC specifically said Section B contained automated information, that implies the other sections *do not* contain automated information. *Cf. Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 392 (2013) (Sotomayor, J., dissenting) ("That reading accords with the *expressio unius, exclusio alterius* canon, which instructs that when Congress includes one possibility in a statute, it excludes another by implication."); *see also United States v. Wilson*, 66 M.J. 39, 45-46 (C.A.A.F. 2008) ("[Where] Congress includes particular language in one section of a statute but omits it in another section…it is generally presumed that Congress acts intentionally and purposely in the disparate…exclusion…[;] the use of a phrase in one part of a statutory scheme only underscores our duty to refrain from reading a phrase into the statute when Congress has left it out of another section.") (quotations and citations omitted). If the entire NCMEC report were machine-generated, NCMEC would not need to specify that Section B contained automated information.

Third, the Government conceded that Section C "could certainly contain testimonial hearsay" if a human provided analysis. The Government argued that since NCMEC staff did not review the images, the report as a whole is non-testimonial. Answer at 23. This is a non sequitur. Whether a human viewed the images is largely irrelevant to the question of whether *the report* was machine generated. Section C indicates that the report was generated by a human. The Government recognized that "NCMEC staff have not accessed or viewed any of the reported uploaded files

submitted within this report at this time and have no information concerning the content of the files other than information provided in this report." Answer at 23 (quoting Pros. Ex. 4, page 9). This quote demonstrates that a machine did not write this report; rather, a human compiled it, annotated that he or she did not view the photos, and that they then sent the report to New Mexico law enforcement. This conclusion is bolstered by the note that "NCMEC classification" of "Apparent Child Pornography (unconfirmed)" is based on "NCMEC's review…." Pros. Ex. 4 at 9. It is apparent this annotation was made by a human, not a machine.

WHEREFORE, A1C Fernandez requests that this Honorable Court find that the Government's introduction of the NCMEC report (Pros. Ex. 4) and accompanying images (Pros. Ex. 5) violated the Confrontation Clause and that this error was not harmless beyond a reasonable doubt. Thus, A1C Fernandez requests this Court set aside the findings and sentence of the court-martial.

IV.

THE GOVERNMENT'S DOCKETING OF A DEFECTIVE RECORD OF TRIAL WITH THIS COURT DOES NOT TOLL THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THIS COURT HAD A DEFECTIVE EXHIBIT WHICH WAS REQUIRED UNDER R.C.M. 1112(b); 2) THIS COURT, *SUA SPONTE*, REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE TOTAL DELAY UNTIL THE GOVERNMENT RE-DOCKETED A CORRECT RECORD OF TRIAL WAS 326 DAYS.

Moreno *Recognized That Appellate Defense Delays "Rest[] With The Government."*

The Government correctly stated that A1C Fernandez' position is that all of the delay in this case should be attributed to the Government. Answer at 29. It then wondered, "It is unclear why, especially when only 32 days of total delay is attributable to the process of remanding Appellant's record for correction and then re-docketing with this Court." *Id.*

The answer to why the Government is still responsible for defense delays is simple: "The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation." *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006). In not holding Corporal Moreno responsible for "institutional vigilance," the Court of Appeals for the Armed Forces (CAAF) stated, "[R]esponsibility for [the Appellate Defense delay] and the burden placed upon appellate defense counsel initially *rests with the Government*….Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals." *Id.* (citation omitted) (emphasis added); *see also United States v. Merritt*, 72 M.J. 483, 489 (C.A.A.F. 2013) ("In considering this factor, we have declined to attribute to individual appellants the periods of appellate delay resulting from military appellate defense counsels' requests for enlargements of time where the basis for the request is excessive workload"); *United States v. Danylo*, 73 M.J. 183, 189 (C.A.A.F. 2014) ("[T]he responsibility for providing the necessary resources for the proper functioning of the appellate system…lies with the Judge Advocates General….").

If the Government does not believe the Appellate Defense Division is identifying *its* errors quickly enough, then it should "provide adequate staffing" so appellate defense attorneys can provide more "timely representation." *Moreno*, 63 M.J. at 137. Furthermore, the Government could petition for a change in this Court's Rules of Practice and Procedure since undersigned counsel was following this Court's implicit guidance of working on cases in order of the date the Government docketed them with this Court. *See generally* A.F. CT. CRIM. APP. R. 23.3(m)(5)-(6) ("the number of days that have elapsed since the case was first docketed with the Court…a detailed

explanation of the number and complexity of counsel's pending cases; a statement of other matters that have priority over the subject case.").

This Court Should Reject the Government's Attempts to Pass Responsibility for a Complete ROT to A1C Fernandez

The Government argued that this Court should allow an incomplete record of trial (ROT) to toll *Moreno*'s presumption of unreasonable delay. Answer at 29. It went on to state, "if Appellant's counsel had viewed the sealed materials earlier and brought the inoperability of the prosecution exhibit to the Court's attention months ago, it could have already been remedied months earlier than it was." Answer at 30.

It is ineluctable that the Government is responsible to not only docket a complete ROT with this Court, but to bring any omissions in said ROT to JAJM and this Court's attention on its own volition. The Government has approximately five levels of review to ensure the ROT is compiled correctly (the base legal office, the court reporter, the numbered Air Force, JAJM, and JAJG). As discussed above, if the Government would like the Appellate Defense Division to act as an additional layer of review to ensure its job is done correctly, it should provide adequate staffing to allow Appellate Defense Counsel to review appellants' cases sooner. It was not A1C Fernandez' choice to delay raising the issue of the incomplete ROT to this Court; he had no choice because his counsel was reviewing other cases. The solution is not for an appellant to find errors more quickly, but for the Government to docket a complete ROT on time.

The Government Needs Further Incentives to Ensure Timely Post-Trial Processing

In its Answer, the Government contended that if this Court rules in A1C Fernandez' favor, it "could incentivize appellants to delay bringing incomplete or damaged records to the Court's attention." *Id.* This Court should reject the Government's argument because the post-trial processing structure is not designed to hold appellants accountable for a process they are not in

charge of. Rather, as the Government acknowledged in its Answer, it is the one required by law and policy to compile complete, and timely, ROTs. Answer at 30-31.

The Government's incentive argument, however, reveals two things: First, it is not embracing its role to compile a timely, complete ROT; it is trying to push off its responsibility to appellants. Second, the current incentive structure is no longer having the fully intended effect on the Government's behavior. The Government listed numerous reasons why the current incentive structure is sufficient: "The Government is obligated by statute (Article 54, UCMJ), rule (R.C.M. 1112), and regulation (DAFMAN 51-203) to compile a 'complete ROT' before docketing the case with the Air Force Court." Answer at 30. It then concluded that "*if* the Government defies its own instructions and *if* JAJM accepts an incomplete record, the Government still runs the risk that they will receiving [*sic*] a failing, or negative, inspection grade." Answer at 31 (emphasis in original).

The irony is that in this case none of those things incentivized the Government to docket a complete ROT in a timely manner. A1C Fernandez' case is just the latest case to have an issue with an incomplete record; it is not the only case that shows the current incentive structure is not working.

In *United States v. Lampkins*, this Court found a substantial omission from the ROT. *Lampkins*, No. ACM 40135, Order, 25 October 2022. In that case, the Government failed to include the Military Judge's ruling on a case dispositive issue. *Id.* This Court remanded for correction. *Id.* In *United States v. Ort*, Appellate Defense Counsel not only *initially* caught an omission in the ROT, but found the very same omission a *second* time after the Government represented to this Court that it fixed the omission:

> On 21 September 2022, the record of trial was returned to this court purportedly complete post-remand. However, upon review of PHO Exhibit 23 *by defense counsel*, it was brought to this court's attention that it is a duplicate of PHO Exhibit 24 and that there is no such exhibit in the record that matches the PHO's description

> of PHO Exhibit 24. Therefore, this court once again returns this case to the military judge to correct the record in accordance with R.C.M. 1112(d).

2022 CCA LEXIS 571, at *2-3 (A.F. Ct. Crim. App. 11 Oct. 2022) (unpub. op.) (emphasis added). In a different post-trial delay case, this Court expressed its frustration over the Government's handling of post-trial processing:

> The systemic deficiencies exhibited by the post-trial processing of this case, along with more than a dozen other cases cause us to change our focus from admonition of the legal offices at Joint Base San Antonio-Lackland to granting relief to Appellant. Appellant's counsel refers to the processing of this case as 'a comedy of errors.' We are exasperated, not amused, by the failures of military justice administration at Joint Base San Antonio-Lackland requiring judicial action to ensure Appellant has not been prejudiced.

United States v. Turpiano, No. ACM 38873 (f rev), 2019 CCA LEXIS 367, at *20 (A.F. Ct. Crim. App. 10 Sep. 2019) (unpub. op.).

Because the existing incentive structure is not producing the intended effect in this case and others, this Court should change the incentive structure by holding that an incomplete ROT does not toll the presumption of post trial delay. Such an action makes sense because "altering incentives…by changing the law, alters people's behavior because it changes the costs and benefits of making specific decisions." Diane H. Crawley, *America Invents Act: Promoting Progress or Spurring Secrecy?*, 36 HAWAII L. REV. 1, 1 (2014). Stated differently, "incentives matter: when costs go up or down, people make different choices." Andrew P. Morriss, *The Preferential Option for the Poor: The Necessity of Economics: The Preferential Option for the Poor, Markets, and Environmental Law*, 5 U. ST. THOMAS L.J. 183 (2008). If the penalty for docketing an incomplete ROT goes up, the Government will docket fewer incomplete ROTs.

As this case demonstrates, the "benefits" of docketing a complete ROT, on time, are low for the Government—mere compliance with statutory and regulatory guidance. Likewise, the "costs" of not doing so are also low: being marked down a point or two on an Article 6, UCMJ,

inspection and just having this Court remand the case—multiple times if necessary. This Court can change the incentive structure by creating a bright-line rule that when the Government omits a required item from a ROT under R.C.M. 1112 and this Court deems that omission "substantial," then the incomplete ROT does not toll the presumption of unreasonable delay. If this Court is unwilling to create a bright-line rule, this Court has other avenues through which to provide relief to an appellant, including setting aside an appellant's punitive discharge. Such action would also incentivize the Government to act with more diligence and haste.

Creating a bright-line rule is not only within this Court's authority, but it is also necessary to ensure this Court is exercising "institutional vigilance." *Merritt*, 72 M.J. at 484. The CAAF has found "lengthy delays" to be "particularly problematic given that the CCA is directly responsible for exercising institutional vigilance over [all] cases pending Article 66 review." *Id*. (quotations and citations omitted). So, not only does this Court have the authority under Article 66 to re-align incentives, but it also has CAAF's backing as well.

A cost-benefit analysis reveals the marginal cost of implementing a bright-line rule is low, while the marginal benefit is high—indicating that this Court should make the change. Stated in more formal law and economic terms, "When there are greater marginal benefits relative to marginal costs, more regulations provide net benefits." Jeff Schwartz, *The Law and Economics of Scaled Equity Market Regulation*, 39 IOWA J. CORP. L. 347, 351 (2014). Here, the marginal cost of adopting a bright-line rule is low for this Court and the Government. For the Court, a simple rule change requires no additional work apart from stating the rule in its opinion. For the Government, no process changes are required, just more attention to detail to ensure ROTs are complete the first time they are compiled and submitted. The benefit, however, is high for all parties involved: less squandering of both appellate and trial judiciary time and resources; more

efficient use of both defense and government appellate counsel since there will be fewer mistakes to catch; more public confidence in the military justice system; and, for appellants, faster appellate review. *Moreno*, 63 M.J. at 135 ("This court has recognized that convicted servicemembers have a due process right to timely review and appeal of courts-martial convictions.").

WHEREFORE, A1C Fernandez requests that this Honorable Court not approve his bad conduct discharge.

V.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN A1C FERNANDEZ WAS CONVICTED OF A NON-VIOLENT OFFENSE AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

The Government argued that "[b]oth the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions, which limit the Second Amendment to 'law abiding citizens.'" Answer at 39. The Government then stated, "These cases make no distinction between violent and non-violent felonies." *Id.* The Government then used these statements to argue that 18 U.S.C. § 922's firearm prohibition is constitutional. Unfortunately, the Government has fallen into the same trap that has beset lower courts; namely, giving the Second Amendment short shrift or treating it as a "second class right":

> Members of the Supreme Court have repeatedly criticized lower courts for disfavoring the Second Amendment. The Supreme Court has now responded by setting forth a new legal framework in *Bruen*. It is incumbent on lower courts to implement *Bruen* in good faith and to the best of our ability.

United States v. Rahimi, 61 F.4th 443, 462-63, 464 (5th Cir. 2023) (Ho, J., concurring). Stated differently, the courts must now be "more forceful guardians" of the right to keep and bear arms by using the text, history, and tradition test. *Id.* at 461.

The Government's cursory review of the text, history, and tradition of firearms regulation has two main problems. First, it failed to recognize that a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because the categorization of crimes as felonies has not only increased, but it has been implemented in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 697 (2009). Notably, the "federal felon disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with the majority of this country's history and tradition.

The Government's second problem is its assertion that there is "no distinction between violent and non-violent felonies" in the historical record. Answer at 39. In fact, the Government is dead wrong, as this was the actual test that was used throughout this country's history *if* a law imposed a ban at all:

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests 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*.

Id. at 698 (emphasis added).

Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver…." *Id*. at 701 (quotations omitted). 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.* (quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* 698.

As mentioned previously, prior to World War I, firearm prohibitions on convicts were largely nonexistent. There were no federal firearms regulations and to the extent that states regulated firearms, it was against *carrying* weapons in a concealed manner, not banning *possession*. *Id.* at 707. Notably, "it is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

For an understanding of the founders' thinking, three proposals from the constitutional convention emerged that show the distinction was between violent and non-violent crimes. First, "that the Constitution protect the right to bear arms and also provide that 'no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of *public injury from individuals*.'" *Id*. at 712 (emphasis added, quotations omitted). Second, from Samuel Adams, that the Constitution "be never construed . . . to prevent the people of the United States who are *peaceable* citizens, from keeping their own arms." *Id.* at 713 (emphasis added, quotations omitted). Third, that "Congress shall never disarm any Citizen unless such as are or have been in *Actual Rebellion*." *Id.* (emphasis added, quotations omitted).

The text, history, and tradition from the founding indicates that 18 U.S.C. § 922's firearm ban, as applied to A1C Fernandez, is not constitutional. The Government not only failed to meet its burden of proof, but it failed to discuss important history relating to firearms regulations. "The right to keep and bear arms has long been recognized as a fundamental civil right. Blackstone saw it as an essential component of 'the natural right' to 'self-preservation and defence.'" *Rahimi*, 61 F.4th at 461 (Ho, J., concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008)). This Court should follow Judge Ho's lead in finding it "incumbent" to "implement *Bruen* in good faith." *Id.* at 463. In doing so, this Court will find "how respect for the Second Amendment is entirely compatible with respect for our profound societal interest in protecting citizens from *violent* criminals." *Id.* at 461-62 (emphasis added).

WHEREFORE, A1C Fernandez requests this Court find the Government's firearm prohibition unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit his firearm possession.

ISSUES VII. & VIII.[1]

OSI AGENTS VIOLATED A1C FERNANDEZ' RIGHTS WHEN THEY ASKED FOR HIS PHONE PASSCODE AFTER HE HAD INVOKED HIS RIGHT TO REMAIN SILENT.

AND

THE PROSECUTION CANNOT TAKE A1C FERNANDEZ TO AN ARTICLE 32 PRELIMINARY HEARING, DROP THE CHARGES AGAINST HIM ENTIRELY, AND THEN RE-PREFER NEW, DIFFERENT CHARGES AGAINST HIM.

For both of these *Grostefon* issues, the Government averred that A1C Fernandez "has not complied with this Court's rules" for the submission of *Grostefon* matters. Answer at 42, 44. The

[1] A1C Fernandez raised these issues under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Government is implicitly asking this Court not to consider these personally raised issues. *Id.* To support this, the Government argued that A1C Fernandez did not provide a standard of review, relevant legal authority, and argument. *Id.*

The Government's arguments are unavailing and this Court should consider these personally raised issues for three reasons. First, if the Government did not want this Court to consider these *Grostefon* issues, then it should have moved to strike them. AF. CT. CRIM. APP. R. 23.3(p). Because it did not, the issues are still before this Court for consideration.

Second, the only requirement for *Grostefon* issues is to raise them with "particularity" and in accordance with "Service Court rules." *Id.* at R. 18(b). A1C Fernandez did this. The issues were precise, contained argument, cited to *relevant* legal authority, and cited to relevant portions of the ROT. A standard of review, an exposition on the law, and lengthy argument are not required. On the issue of authority, Issue VII cited to the "Fifth Amendment and Article 31, UCMJ…as well as Mil. R. Evid. 305 and applicable case law." AOE at Appendix A. Issue VIII cited to Article 32, UCMJ. It could be the case that A1C Fernandez did not include other authority because it was not "relevant," no "relevant" authority existed, or because he thought his submission was raised with enough "particularity" as written.

Third, the Government claimed the Issues are "insufficient" and "vaguely" argued. Answer at 42, 44. However, the Government then submitted 3.5 pages of argument against the issues. This demonstrates that it understood the issues. Assuming, *arguendo*, the Government did not understand the issues, this Court certainly will, given its experience under Article 66, UCMJ. This Court is mandated to " affirm only such findings of guilty…as the Court finds correct in law and fact…" regardless of whether the issue was even raised or briefed in a filing. Article 66, UCMJ, 2019. This Court has the necessary experience to understand issues even when they are not raised.

As such, the *Grostefon* issues, as written, are raised with enough particularity for this Court to consider them.

WHEREFORE, A1C Fernandez requests this Court to consider the *Grostefon* issues as raised and rule in his favor.

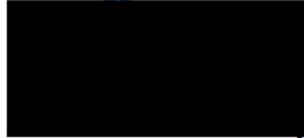
Respectfully submitted,

SPENCER R. NELSON, Maj, USAF Appellate Defense Counsel
Appellate Defense Division

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Division on 8 June 2023.

Respectfully submitted,



N, Maj, USAF Appellate Defense Counsel
Appellate Defense Division

United States Air Force
Court of Criminal Appeals

UNITED STATES	)	**No. ACM 40290 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Keen A. FERNANDEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

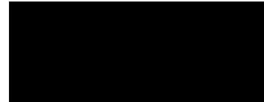
It is by the court on this 8th day of August, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to Panel 3 for appellate review.

This panel letter supersedes all previous panel assignments.

FOR THE COURT



TANICA S. BAGMON
Appellate Court Paralegal