UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40304 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Jordan P. GOODWATER	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 20 June 2023 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 20th day of June, 2023,

ORDERED:

The above-styled case is referred to Panel 2 for appellate review.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
JORDAN P. GOODWATER, Airman (E-2) United States Air Force *Appellant*	)	No. ACM 40304 (f rev) 10 August 2023

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 an enlargement of time (EOT) to file Appellant's Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **18 October 2023.** The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

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

GRANTED
15 Aug 2023

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 Appellate Government Division on 10 August 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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14 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 August 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **JORDAN P. GOODWATER,** Airman (E-2) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 No. ACM 40304 (f rev) 11 October 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **17 November 2023**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Appellant was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Appellant pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Appellant guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, UCMJ, 10 U.S.C. § 934. R. at 366. The same day, the mili[illegible]dge sentenced Appellant to two years and eight months' confinement, reduction to E-1, [illegible]ll pay and allowances, and a bad-conduct discharge. R. at 413. The convening au[illegible]k no action on the findings or sentence. Convening Authority Decision on Action, 28

GRANTED
12 Oct 2023

April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Appellant is confined.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 11 October 2023.

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

12 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 October 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	6 November 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Jordan P. Goodwater, Appellant, hereby moves for a third enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **17 December 2023**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 139 days have elapsed. On the date requested, 180 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Amn Goodwater was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. R. at 413. The convening authority took no action on the findings or sentence.

GRANTED
9 NOV 2023

Convening Authority Decision on Action, 28 April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Amn Goodwater is confined.

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 6 November 2023.

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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8 November 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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.

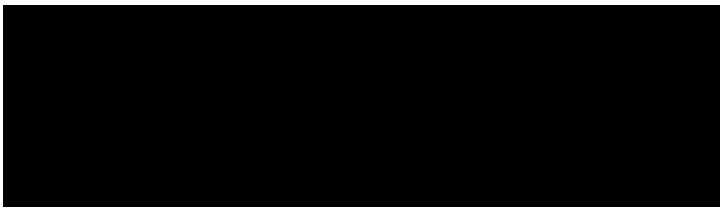
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 November 2023.



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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	6 December 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Jordan P. Goodwater, Appellant, hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **16 January 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 169 days have elapsed. On the date requested, 210 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Amn Goodwater was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years [illegible]nths' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-[illegible]harge. R. at 413. The convening authority took no action on the findings or sentence.

GRANTED
8 DEC 2023

Convening Authority Decision on Action, 28 April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Amn Goodwater is confined.

Through no fault of Amn Goodwater, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 27 clients and is presently assigned 13 cases pending brief before this Court. Five cases pending before this Court currently have priority over the present case:

1. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. The appellant is confined. Undersigned counsel has reviewed the record and is drafting assignments of error with lead civilian appellate defense counsel.
2. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. The appellant is confined and undersigned counsel is reviewing the record.
3. *United States v. George Jr.*, No. ACM 40397 – The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. The appellant is not confined.
4. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.

5. *United States v. Gubicza*, No. ACM 40464 – The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 6 December 2023.

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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8 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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.

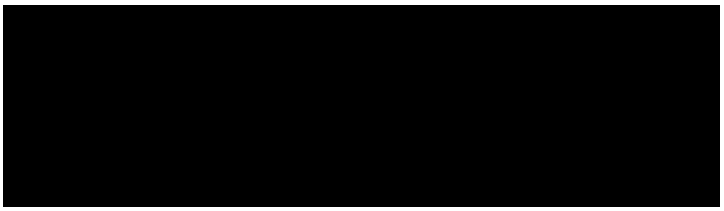
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 December 2023.



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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40304 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan P. GOODWATER	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 4 January 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The motion further states: "Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, [Appellant], hereby moves for his *fourth* enlargement of time (EOT) to file Assignments of Error." (Emphasis added). The court finds counsel's reference to a "fourth" enlargement of time to be a scrivener's error and that the enlargement of time is Appellant's fifth request. However, counsel are reminded to be more attentive to their filings.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 5th day of January, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 February 2024**.

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

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	4 January 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Jordan P. Goodwater, Appellant, hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **15 February 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 198 days have elapsed. On the date requested, 240 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Amn Goodwater was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years and eight months' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. R. at 413. The convening authority took no action on the findings or sentence.

Convening Authority Decision on Action, 28 April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Amn Goodwater is confined.

Through no fault of Amn Goodwater, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 30 clients and is presently assigned 15 cases pending brief before this Court. Four cases pending before this Court currently have priority over the present case:

1. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. The appellant is confined and the brief on his behalf will be filed by 22 January 2024.
2. *United States v. George Jr.*, No. ACM 40397 – The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. The appellant is not confined.
3. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.
4. *United States v. Gubicza*, No. ACM 40464 – The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 January 2024.

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

4 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 January 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40304 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan P. GOODWATER	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 2 February 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Sixth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 5th day of February, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Sixth) is **GRANTED**. Appellant shall file any assignments of error not later than **16 March 2024**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	2 February 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Jordan P. Goodwater, Appellant, hereby moves for a sixth enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **16 March 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 227 days have elapsed. On the date requested, 270 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Amn Goodwater was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years and eight months' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. R. at 413. The convening authority took no action on the findings or sentence.

Convening Authority Decision on Action, 28 April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Amn Goodwater is confined.

Through no fault of Amn Goodwater, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 36 clients and is presently assigned 17 cases pending brief before this Court. Three cases pending before this Court currently have priority over the present case:

1. *United States v. George Jr.*, No. ACM 40397 – The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. The appellant is not confined and undersigned counsel is reviewing his record and anticipates filing his assignments of error no later than 27 February 2024.
2. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.
3. *United States v. Gubicza*, No. ACM 40464 – The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

Since requesting Amn Goodwater's fifth enlargement of time, undersigned counsel participated in four moot arguments; drafted assignments of error in *United States v. Donley*, No.

ACM 40350 (a case which involved 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, 66 appellate exhibits, and 1233 transcript pages), filed on 22 January 2024; and researched, assisted in drafting, and edited the Petitioner's Reply Brief before the U.S. Supreme Court in *Martinez et. al. v. United States*, No. 23-242, filed 9 January 2024.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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CERTIFICATE OF FILING AND SERVICE

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

SAMANTHA P. GOLSETH, Maj, USAF
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5 February 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40304 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan P. GOODWATER	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

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

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 5th day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **15 April 2024**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	1 March 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Jordan P. Goodwater, Appellant, hereby moves for a seventh enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **15 April 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 255 days have elapsed. On the date requested, 300 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Amn Goodwater was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years and eight months' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. R. at 413. The convening authority took no action on the findings or sentence.

Convening Authority Decision on Action, 28 April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Amn Goodwater is confined.

Through no fault of Amn Goodwater, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 30 clients and is presently assigned 17 cases pending brief before this Court. Three cases pending before this Court currently have priority over the present case:

1. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.
2. *United States v. Carlisle*, Misc. Dkt. No. _____, – Undersigned counsel has been detailed to represent the real party in interest, following the Government's notice of Article 62 appeal and anticipates this case will become her second priority based on the timing requirements of this Court's Rules of Practice and Procedure, assuming the Government indeed files an Article 62 appeal.
3. *United States v. Gubicza*, No. ACM 40464 – The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

Since requesting Amn Goodwater's seventh enlargement of time, undersigned counsel participated in five moot arguments; drafted assignments of error in *United States v. George*, No.

ACM 40397 (a case which involved 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, 22 appellate exhibits, and 779 transcript pages), filed on 27 February 2024; and drafted reply briefs in *United States v. Donley*, No. ACM 40350, filed on 28 February 2024, and *United States v. Kight*, No. ACM 40337, filed on 29 February 2024.

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

Respectfully submitted,

[redacted]

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

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 1 March 2024.

SAMANTHA P. GOLSETH, Maj, USAF
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5 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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 opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

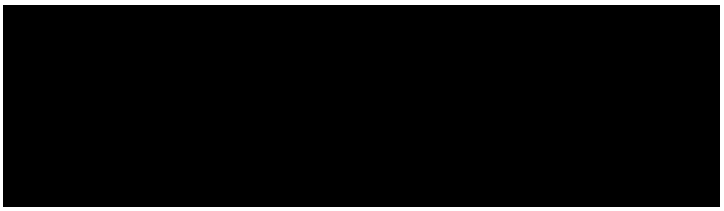
The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300days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

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

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

CERTIFICATE OF FILING AND SERVICE

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



J. PETE FERRELL, Lt Col, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40304 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan P. GOODWATER	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 March 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Prosecution Exhibits 2 and 18, and Appellate Exhibit IV which were reviewed by trial and defense counsel at Appellant's court-martial.

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

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

Accordingly, it is by the court on this 28th day of March, 2024,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibits 2 and 18, and Appellate Exhibit IV**, subject to the following conditions:

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

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304
	)	27 March 2024

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1(c)(2), 23.1(b), and 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel to examine Prosecution Exhibits 2 and 18, and Appellate Exhibit IV.

Facts

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Airman (Amn) Jordan P. Goodwater, Appellant, was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ) [1], 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years and eight months' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. R. at 413. During the proceedings, the military judge

[1] All references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

sealed Prosecution Exhibits 2 and 18, which were each admitted into evidence and include contraband. R. at 189-90, 387. The military judge also sealed Appellate Exhibit IV, which was presented and reviewed by the parties at trial. R. at 19-20.

Law

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

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[4] These requirements are consistent with those imposed by the state bar to which undersigned counsel belongs.[5]

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

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

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

Analysis

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

The Government consents to both parties viewing the sealed materials detailed above.

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

Respectfully submitted,

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

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

Respectfully submitted,

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

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	5 April 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Jordan P. Goodwater, Appellant, hereby moves for an eighth enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **15 May 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 290 days have elapsed. On the date requested, 330 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Amn Goodwater was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years ight months' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad- discharge. R. at 413. The convening authority took no action on the findings or sentence.

GRANTED
8 APR 2024

Convening Authority Decision on Action, 28 April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Amn Goodwater is confined.

Through no fault of Amn Goodwater, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This EOT is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. Amn Goodwater was advised of his right to a timely appeal and this request for an EOT. He agrees with this request for an EOT.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 28 clients and is presently assigned 18 cases pending brief before this Court. Six cases currently have priority over the present case:

1. Before the United States Court of Appeals for the Armed Forces (CAAF), undersigned counsel has drafted a petition and supplemental brief and is incorporating edits from her leadership in *United States v. Bickford*, No. ACM 40326. Undersigned counsel anticipates filing this petition and supplemental brief today.
2. Before the CAAF, undersigned counsel is currently drafting a petition and supplemental brief in *United States v. Stanford*, No. ACM 40327, which is due on 9 April 2024.
3. *United States v. Carlisle*, Misc. Dkt. No. 2024-03 – Before this Court, the government filed the record of trial and notice of its intent to appeal pursuant Article 62, UCMJ, 10 U.S.C. § 862. The government's supporting brief is due in two days, on 7 April 2024. Undersigned counsel represents the appellee and anticipates the appellee's answer will be due on 27 April 2024, or sooner if the government's brief is filed early. In accordance

with Article 62(b), UCMJ, and Rule 20(d) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel will give priority to this appeal.

4. *United States v. Gubicza*, No. ACM 40464 – The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined. Undersigned counsel has completed her review of this case, however, the appellant has yet to receive a copy of his record of trial, impeding his ability to consult with undersigned counsel and raise potential issues. To resolve this issue, the government consented to and this Court granted a motion for an EOT to allow the government time to serve the appellant with his record of trial and allow time for the appellant to consult with undersigned counsel upon receipt.
5. Before the CAAF, undersigned counsel anticipates filing a petition and supplemental brief in *United States v. Kight*, No. ACM 40337, which is due on 8 May 2024. Civilian appellate defense counsel is taking lead on this brief and undersigned counsel has already provided her first round of edits and suggestions.
6. *United States v. Galera*, No. ACM 40477 – The record of trial consists of three prosecution exhibits, five defense exhibits, three appellate exhibits, and three court exhibits. The transcript is 174 pages. The appellant is confined but will soon be released.

In addition to the above-listed case progress, since requesting Amn Goodwater's seventh EOT, undersigned counsel completed her review, researched all potential issues, and advised the appellant in *United States v. Christensen*, No. ACM 40408; filed one merits brief in *United States v. Portillos*, No. ACM 40305 (f rev) after conducting research and advising the appellant; reviewed four records of trial in order to advise servicemembers regarding their opportunity to appeal; researched a potential motion; drafted a reply brief in *United States v. George*, No. ACM 40397,

filed on 3 April 2024; prepared for and participated in one roundtable and three moot arguments; and attended one-day of arguments at the CAAF and one argument before this Honorable Court.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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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 Appellate Government Division on 5 April 2024.

SAMANTHA P. GOLSETH, Maj, USAF
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5 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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 opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

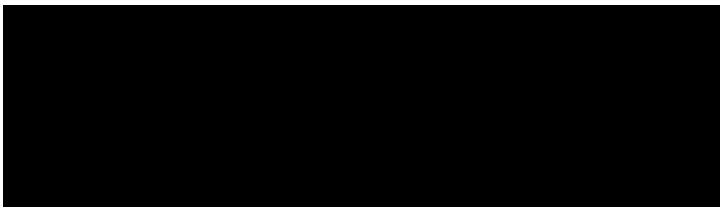
The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days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

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

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

CERTIFICATE OF FILING AND SERVICE

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



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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40304 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jordan P. GOODWATER	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

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

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

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **14 June 2024**.

Appellant's counsel is advised that given the number of enlargements granted thus far, any further requests for enlargement of time may necessitate a status conference.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	1 May 2024

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Jordan P. Goodwater, Appellant, hereby moves for a ninth enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 30 days, which will end on **14 June 2024**. The record of trial was docketed with this Court on 20 June 2023. From the date of docketing to the present date, 316 days have elapsed. On the date requested, 360 days will have elapsed.

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Amn Goodwater was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge, not guilty to Specification 2 of the Charge, and guilty to the Charge. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications of possessing and distributing child pornography under Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years and eight months' confinement, reduction to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. R. at 413. The convening authority took no action on the findings or sentence.

Convening Authority Decision on Action, 28 April 2022. The record of trial consists of 26 appellate exhibits, 18 prosecution exhibits, and 5 defense exhibits. The transcript is 413 pages. Amn Goodwater is not confined.

Through no fault of Amn Goodwater, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. Though counsel has begun her review, this EOT is necessary to allow undersigned counsel to fully review Amn Goodwater's case and advise him regarding potential errors. Moreover, undersigned counsel will need time to draft, and edit after internal review, any assignments of error. Amn Goodwater was advised of his right to a timely appeal and this request for an EOT. He agrees with this request for an EOT.

Undersigned counsel currently represents 28 clients and is presently assigned 17 cases pending brief before this Court. Four cases currently have priority over the present case:

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

3. *United States v. Blackburn*, 40303 (f rev) – Due not later than 29 May 2024, before the United States Court of Appeals for the Armed Forces (CAAF), undersigned counsel will file a petition and supplemental brief. The appellant previously raised ten issues before this Court and undersigned counsel needs time to research and draft the appellant's supplemental brief.
4. *United States v. Galera*, No. ACM 40477 – The record of trial consists of three prosecution exhibits, five defense exhibits, three appellate exhibits, and three court exhibits. The transcript is 174 pages. The appellant is not confined. Undersigned counsel anticipates filing not later than 2 June 2024.

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

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

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

Since requesting Amn Goodwater's eighth enlargement of time, undersigned counsel filed a petition and supplemental brief at CAAF in *United States v. Bickford*, No. ACM 40326, *United States v. Stanford*, No. ACM 40327, and *United States v. Kight*, No. ACM 40337; appellee's answer

to the United States' Appeal under Article 62, UCMJ, in *United States v. Carlisle*, Misc. Dkt. No. 2024-03; a brief on further review in *United States v. Donley*, No. ACM 40350 (f rev); and nine detailed enlargements of time in other cases before this Court. She also prepared for and participated in three moot arguments and attended one argument before this Court.

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

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

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3 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40304 (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 opposition to Appellant's Motion for Enlargement of Time.

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

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

PETE FERRELL, Lt Col, USAF
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Government Trial and Appellate Operations Division
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

PETE FERRELL, Lt Col, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

Airman (E-2)
JORDAN P. GOODWATER,
United States Air Force,
Appellant.

No. ACM 40304 (f rev)

BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER,** United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev)
	)	14 June 2024

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

Assignments of Error

I.

WHETHER PROSECUTION EXHIBITS 1 AND 2 WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION, OVER DEFENSE OBJECTION.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING PROSECUTION EXHIBITS 2, 4, 5, AND 6 WITHOUT PROPER FOUNDATION, OVER DEFENSE OBJECTION.

III.

WHETHER APPELLANT'S CONVICTION FOR DISTRIBUTION OF CHILD PORNOGRAPHY IS LEGALLY AND FACTUALLY SUFFICIENT.

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL, MEANING ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, WHEN APPELLANT WAS CONVICTED OF NON-VIOLENT OFFENSES; AND THIS COURT CAN DECIDE THAT QUESTION.

Statement of the Case

On 3 December 2021, 4 January 2022, and 11-13 April 2022, Airman (Amn) Jordan P. Goodwater, Appellant, was tried by a general court-martial composed of a military judge alone at Nellis Air Force Base, Nevada. R. at 1, 18, 92. On 12 April 2022, Amn Goodwater pleaded guilty to Specification 1 of the Charge (possession of child pornography), not guilty to Specification 2 of the Charge (distribution of child pornography), and guilty to the Charge, Article 134, Uniform Code of Military Justice (UCMJ)[1], 10 U.S.C. § 934. R. at 133. On 13 April 2022, the military judge found Amn Goodwater guilty of the Charge and its Specifications. R. at 366. The same day, the military judge sentenced Amn Goodwater to two years and eight months of confinement, reduction in pay grade to E-1, forfeiture of all pay and allowances, and a bad-conduct discharge. R. at 413. The convening authority took no action on the findings or sentence and denied Amn Goodwater's request to set aside the guilty finding for Specification 2 of the Charge and defer his reduction in pay grade. Convening Authority Decision on Action, 28 April 2022. The military judge entered the above findings and sentence in the entry of judgment. Entry of Judgment (EoJ), 18 May 2022.

Statement of Facts

Discord's Report to the National Center for Missing and Exploited Children (NCMEC)

Discord Inc. ("Discord") reported an incident of child pornography to the NCMEC, which can be found within NCMEC's CyberTipline Report. Pros. Ex. 1; R. at 198. Discord reported the incident occurred on 24 April 2020 at 06:55:45 UTC. *Id*. at 3. Discord reported the suspect's email was "ilovelolicons@gmail.com" and the suspect's screen/username was "Xianxia#1." *Id*.

[1] References to the punitive articles of the UCMJ are to those printed in the *Manual for Courts-Martial, United States* (2019 ed.). Unless otherwise noted, all other references to the UCMJ are to the *Manual for Courts-Martial, United States* (2024 ed.) (*MCM*).

Discord further reported the suspect's user ID on Discord, the suspect's IP address, the file which was alleged to be child pornography, and information related to that file (including the file name, MD5 hash value, file location and its public accessibility). Pros. Ex. 1 at 3-4; *see* R. at 193. The file in question (an image) was admitted as Prosecution Exhibit 2. Pros. Ex. 2.

Special Agent C.P.

C.P., a Special Agent with the Air Force Office of Special Investigations (OSI), reviewed a NCMEC tip that came to him from the OSI headquarters. R. at 204, 206. C.P. "called the FBI who had reviewed the image, and they verified the image was suspected child pornography." R. at 207. C.P. determined that the IP address reported by Discord to NCMEC belonged to the "99th FSS" at Nellis Air Force Base and that Amn Goodwater resided in a dormitory on Nellis Air Force Base. R. at 207-08. C.P. never reviewed the materials that Discord produced for the investigation. R. at 209. C.P. never saw the image, the link, or whether anyone clicked or followed the link to view the image. *Id*.

Special Agent N.C.

N.C., an OSI special agent and the case agent for this case, opened an investigation against Amn Goodwater after he received the NCMEC CyberTipline Report as well as subpoenas and responses to the subpoena from Google, Discord, T-Mobile, and Cox Communications. R. at 216.

Google provided subscriber information associated with the email address, "ilovelolicons@gmail.com". Pros. Ex. 3. This information shows the email account was logged into from the same IP address (216.5.34.125) that was reported by Discord to NCMEC. *Id*.; Pros. Ex. 1. Discord provided user information for the user ID (465960318389059613), which it had reported. Pros. Ex. 8. This information included a phone number and showed the user had logged in from the same IP address that Discord had itself reported. *Id*.; *see* Pros. Ex. 1. N.C. testified

that a T-Mobile subpoena returned Amn Goodwater's phone number, which OSI compared to the Nellis AFB alpha roster, however, no evidence of the T-Mobile's subpoena response or the alpha roster was admitted. R. at 220. Cox provided information for IP address (70.165.7.162). Pros. Ex. 9. This IP address belonged to "Nellis-99 Fss," and it could not be traced to any one individual. R. at 276.

OSI searched Amn Goodwater's dorm room, vehicle, work section, and cellphone. R. at 220. OSI located a sign in Amn Goodwater's work section that read "XIANXIA." R. at 221; Pros. Ex. 4. OSI located playing cards with "anime women in suggested [sic] poses" in Amn Goodwater's dorm room. R. at 225; *see* Pros. Ex. 5. OSI also located what "appears to be an open webpage with [Amn Goodwater's] different email accounts," "one of which is 'ilovelolicons@gmail.com.'" R. at 228; *see* Pros. Ex. 6.

Amn Goodwater admitted to N.C. that he thought N.C. "read" him, because "I am in possession of it. It's on my phone." R. at 239. When confronted that "back in April of this year, something was uploaded from your Discord account through Discord servers, you know, that was flagged as the same kind of thing we're talking about right now," Amn Goodwater stated:

> I think I got mad at a server – or there was some server I was part of, I got mad, so I bot spammed them with those. I found a picture. Like, I didn't even upload it based on the actual image, I uploaded it based on a link. Not like, a web browser link, but a Discord link. So, it was like, you know, when you copy images on Discord, you get like the Discord.com/attachment/blahblah/blah, it was one of those. And so yeah, I just copied and pasted that over into Discord and my bot just spammed it in the server.

Id. at 240. When asked about this further, Amn Goodwater explained, "Like, you send it to an empty chat that nobody's in, then you're able to right-click it, then you can copy the link and it turns it into a link image." R. at 245. Amn Goodwater clarified he never sent any of the "stuff" he had on his phone to other people, "besides the spamming." R. at 243.

Amn Goodwater's cellphone was sent to "DC3" for a forensic extraction. R. at 254. The DC3 Forensics Laboratory (DC3) recovered images of child pornography from the phone. *Id*. N.C. compared a sanitized copy[2] of the image from the NCMEC CyberTipline Report with the images the DC3 located on Amn Goodwater's phone, and N.C. located an image that appeared to be the same. R. at 258. The MD5 hash value of the image found by DC3 also matched the MD5 hash value from the NCMEC CyberTipline Report. *Id*.

N.C. also searched Amn Goodwater's cellphone while Amn Goodwater was still in the interview room. R. at 261. N.C. searched the Discord application on Amn Goodwater's phone, but he could not find any evidence that the image had been uploaded onto Discord. R. at 262. N.C. also could not find any evidence that Amn Goodwater sent a link of child pornography on the Discord application or that anyone clicked the hyperlink. *Id*. at 262-63.

N.C. also thoroughly reviewed a search warrant response from Discord, spending at least dozens of hours reviewing it. R. at 265. N.C. expected this search warrant response would include pictures Amn Goodwater sent and conversations he had. *Id*. However, N.C. did not find the image of child pornography that Amn Goodwater allegedly uploaded. R. at 266. He did not find any images or hash value numbers associated with an image of child pornography. *Id*. He also did not see evidence of Amn Goodwater sending a link, nor of anyone clicking the link, despite having access to the messages that Amn Goodwater sent. R. at 266, 271. There was no evidence of internet traffic to the linked webpage. R. at 266. The information contained in the NCMEC CyberTipline Report regarding the URL link, hash value of the image, and the image itself were not found in the information provided by Discord. R. at 266-67.

[2] "Sanitized copy" meant the child's genitalia had been covered so it was not visible. R. at 257.

Government Expert Witness in Digital Forensics

K.M., a computer forensic examiner from the DC3 Forensics Laboratory, was recognized as an expert witness in digital forensics and testified that Discord's information is stored on a "cloud server." R. at 283, 293-94. Consequently, an examiner is not going to find 100% of the media associated with a device when it is not connected to a network because the examiner cannot access the cloud-based server without that connection. R. at 293-94. However, K.M. agreed that information would be found if the examiner had the digital data from the server. R. at 299.

Defense Expert Witness in Digital Forensics

E.H., a digital forensics examiner for Roloff Digital Forensics, LLC, was recognized as an expert witness in digital forensics. R. at 331. E.H. reviewed the Discord data return—all the data from the Discord servers or cloud that the government had requested in this case. *Id*. E.H. was able to open every file that Discord provided using his forensic tools, including multiple multimedia files, and in his review, E.H. never found the file name, MD5 hash value number, original file name, or hyperlink that was reported by Discord to NCMEC. R. at 332-33.

Argument

I.

PROSECUTION EXHIBITS 1 AND 2 WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION, OVER DEFENSE OBJECTION.

Additional Facts

The NCMEC is funded by Congress to "operat[e] a tipline to—(I) provide . . . an effective means of reporting internet-related and other instances of child sexual exploitation . . . and (II) make reports received through the tipline available to the appropriate law enforcement agency for its review and potential investigation." 34 U.S.C. §11293(b)(1)(K)(i) (contained within App. Ex. XIII at 2). This tipline is different than the "24-hour toll-free hotline" that operates for the reporting and coordination related to missing children. *Cf*. 34 U.S.C. §11293(b)(1)(A) (contained within App. Ex. XIII at 1).

The CyberTipline webpage for reporting a child sexual exploitation incident to NCMEC states in bold font at the top of the webpage, "Information entered into this report will be made available to law enforcement for possible investigation." App. Ex. XIV at 1. The webpage also explains to call the NCMEC *hotline phone number* "[i]f you think you have seen a missing child" and to "[u]se the *CyberTipline* to report child sexual exploitation." *Id*. (emphasis added).

B.F. submitted an incident report, on behalf of Discord, Inc., via NCMEC's CyberTipline. Pros. Ex. 1 at 3-4 (Section A). The only email address B.F. provided was "lawenforcement@discordapp.org." *Id*. at 3. B.F. reported information for the "Suspect," listing the suspect's email address, screen/username, electronic service provider user ID, and IP address. *Id*. at 3-4. B.F. uploaded one file, depicting the suspected child pornography, and listed the file name, "MD5" number for the file, and the original URL where the file was located. *Id*. B.F. also

confirmed they had viewed the contents of the uploaded file and that the entire contents of the uploaded file were publicly accessible. *Id*. The incident time and incident type were chosen by the reporting party (presumably B.F.) who submitted this report on behalf of Discord. *Id*. at 3; *see also* R. at 191.

B.F. was not called to testify, and the military judge made no findings regarding B.F.'s availability or whether the defense had a prior opportunity to cross-examine B.F. NCMEC's systems utilized the IP address provided by B.F. (repeating the IP address) to automatically generate geolocation data for the reported IP address. Pros. Ex. 1 at 5 (Section B). The NCMEC CyberTipLine Report also contained "additional information that was collected through queries by the cyber tip line analyst who reviewed [the] report." *Id*. at 6-7 (Section C); R. at 194.

The government moved to admit the NCMEC CyberTipline Report made in this case and one image as Prosecution Exhibits 1 and 2. R. at 163. Defense counsel objected to Prosecution Exhibits 1 and 2 based on testimonial hearsay in violation of *Crawford v. Washington*, 541 U.S. 36 (2004) and the Sixth Amendment. R. at 164-80, 182, 184, 189. After hearing argument from counsel, the military judge overruled Amn Goodwater's objections and admitted Prosecution Exhibits 1 and 2. R. at 187, 189.

Standard of Review

This Court reviews whether admitted evidence violates the Confrontation Clause de novo. *See, e.g., United States v. Baas*, 80 M.J. 114, 120 (C.A.A.F. 2020); *United States v. Harcrow*, 66 M.J. 154, 158 (C.A.A.F. 2008); *United States v. Rankin*, 64 M.J. 348, 351 (C.A.A.F. 2007).

Law and Analysis

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. "Testimonial statements of witnesses absent

from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (footnote omitted).

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.***

Meléndez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (quoting *Crawford*, 541 U.S. at 51-52) (emphasis added in bold italics). Further, the "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." *Crawford*, 541 U.S. at 56 n.7.

1. B.F.'s report, including the uploaded file, was testimonial.

To determine whether a statement is testimonial, this Court asks, "whether it would 'be reasonably foreseeable to an objective person that the purpose of any individual statement . . . is evidentiary,' considering the formality of the statement as well as the knowledge of the declarant." *Baas*, 80 M.J. at 121 (quoting *United States v. Katso*, 74 M.J. 273, 279 (C.A.A.F. 2015)).

a. B.F.'s primary purpose was evidentiary.

The factual background of this case 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 52. B.F. utilized NCMEC's CyberTipline, which operates to "make reports received

through the tipline available to the appropriate law enforcement agency for its review and potential investigation." Pros. Ex. 1 at 3-4; 34 U.S.C. §11293(b)(1)(K)(i) (contained within App. Ex. XIII at 2). This purpose is unique to NCMEC's CyberTipline and differentiates it from NCMEC's mission, for example, to find missing children through the use of its 24-hour toll-free hotline and coordination with the national communications system. 34 U.S.C. §11293(b)(1)(A) (contained within App. Ex. XIII at 1).

When B.F. submitted the report in this case, B.F. would have encountered the bold notice present at the top of the CyberTipline webpage that states, "Information entered into this report will be made available to law enforcement for possible investigation," and have understood the formality of this report. App. Ex. XIV at 1. In that sense, this case differs from *United States v. Scheurer*, 62 M.J. 100, 104-06 (C.A.A.F. 2005), where the CAAF held casual remarks to an acquaintance were not testimonial because the declarant had made the statements without contemplation that they would be available for use at a later trial. Here, B.F.'s out of court statements were made for the purpose of reporting the suspected child pornography and the "suspect['s]" [3] information, understanding that this report would be made available to law enforcement, and that law enforcement may need to contact Discord as a result, at "lawenforcement@discordapp.org." Pros. Ex. 1 at 3.

Furthermore, when B.F. reported to NCMEC's CyberTipline, NCMEC was acting as an arm of the government. NCMEC is "a governmental entity" with "special law enforcement duties

[3] In *United States v. Cameron*, 699 F.3d 621, 644 (1st Cir. 2012), the First Circuit noted "suspect" is "one who is suspected; esp. one suspected of a crime or of being infected." The First Circuit then found that Yahoo!'s use of the word "suspect" when sent to NCMEC ("an organization that is given a government grant to forward any such reports to law enforcement") clearly demonstrated under the objective test that the primary purpose for Yahoo!'s reporting was to "establish[] or prov[e] past events potentially relevant to later criminal prosecution." *Id*. (quoting *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (alterations in original)).

and powers." *United States v. Ackerman*, 831 F.3d 1292, 1296, 1298 (10th Cir. 2016). The Tenth Circuit—with then-Judge Neil Gorsuch authoring the opinion—found:

> 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. at 1296 (emphasis added).

A similar finding was also made by the First Circuit, which found that "NCMEC effectively acted as an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them along to law enforcement." *Cameron*, 699 F.3d at 645. Given the NCMEC CyberTipline's posture as an arm of the government, B.F.'s reporting "bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford*, 541 U.S. at 51; *see Scheurer*, 62 M.J. at 105-06.

Moreover, the government provided no business record affidavit from Discord and no evidence that B.F.'s reporting was made for the "systematic conduct of the business as a business." *See Cameron*, 699 F.3d at 646 (quoting *Palmer v. Hoffman*, 318 U.S. 109, 113-14 (1943); citing *Meléndez-Díaz*, 557 U.S. at 321). Rather, like *Palmer* and *Cameron*, the primary utility of B.F.'s reporting was a report of crimes to law enforcement. *Id*. (citing *Palmer*, 318 U.S. at 114).

Finally, unlike *Davis v. Washington*, 547 U.S. 813, 828 (2006), where the Supreme Court determined the primary purpose of an out of court statement was to enable police assistance to meet an ongoing emergency, there was no ongoing emergency that necessitated law enforcement's attention. Rather, B.F.'s reporting was intended to lead to "an investigation into possibly criminal past conduct." *See id.* at 829.

b. B.F.'s statements were not machine-generated nor chain of custody documents.

"[M]achine-generated data and printouts are not statements and thus not hearsay—machines are not declarants—and such data is therefore not 'testimonial.'" *United States v. Blazier*, 69 M.J. 218, 224 (C.A.A.F. 2010) (footnote and citations omitted). Chain of custody documents may also be non-testimonial. *United States v. Tearman*, 72 M.J. 54, 59 (C.A.A.F. 2013). B.F.'s statements were not machine-generated. B.F. is a person who identified themselves as the submitter. Pros. Ex. 1 at 3. Moreover, B.F.'s statements are not mere chain of custody documents. B.F.'s statements contained within Prosecution Exhibits 1 and 2 attest to a "fact in question." *Meléndez-Diaz*, 557 U.S. at 310. They provide substantive evidentiary information, to include for example, the email address and screen/username of the "suspect," whether the contents of the file were publicly available, and what the file was via Prosecution Exhibit 2. Pros. Ex. 1 at 3-4; Pros. Ex. 2. This is quintessential testimonial evidence that B.F. or Discord should have provided in a forum and manner where Amn Goodwater had the opportunity to confront such statements. *Meléndez-Diaz*, 557 U.S. at 310. B.F.'s statements specifically identified someone has child pornography, *this is* the child pornography, this is when the alleged distribution of the child pornography occurred, and here is how to identify the perpetrator. These are analytical steps and "one small analytical step for man can sometimes be one giant leap for Confrontation Clause purposes." *Cameron*, 699 F.3d at 649.

2. The military judge did not make an unavailability determination.

"[N]o 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." *Blazier*, 69 M.J. at 222. While the military judge seemed to focus on the NCMEC CyberTipline Report itself, defense counsel was clear that its objection extended to the information submitted by B.F.,

contained in Section A of Prosecution Exhibit 1 and Prosecution Exhibit 2, and B.F. was not present to testify. R. at 170, 189. There is no evidence that B.F. was subject to prior cross-examination and the military judge made no finding regarding B.F.'s availability or unavailability. Therefore, B.F.'s report—responses to the NCMEC CyberTipline, including the alleged child pornography—should not have been admitted into evidence.

3. The NCMEC CyberTipline Report further contained testimonial hearsay from a NCMEC analyst who was not called to testify.

The NCMEC CyberTipline Report contained an executive summary and "additional information that was collected through queries by the cyber tip line analyst who reviewed [the] report." Pros. Ex. 1 at 1, 6-7; R. at 194. These are statements by the NCMEC analyst.

While the government submitted a business record affidavit from NCMEC as Appellate Exhibit XII, and "[b]usiness and public records are generally admissible," "that is not the case if the regularly conducted business activity is the production of evidence for use at trial." *Meléndez-Díaz*, 557 U.S. at 321, 324. Here, NCMEC's CyberTipline operates for the purpose of "mak[ing] reports received through the tipline available to the appropriate law enforcement agency for its review and potential investigation." 34 U.S.C. §11293(b)(1)(K)(i) (contained within App. Ex. XIII at 2). The statements made by the author of the NCMEC CyberTipline Report (which do not include Section A, B.F.'s testimonial statements, and Section B, machine-generated information) were testimonial, this author was not called to testify, and the military judge made no availability determination. Rather, B.A. the director of the Child Victim Identification Program at NCMEC testified for the government and conceded she was not the analyst who authored the report. R. at 197.

In *Cameron*, another NCMEC employee similarly "admitted that he was 'not the original analyst who processed' the Yahoo! CP Reports in this case," and the government failed to call the

analyst who had processed the case. 699 F.3d at 651-52. The First Circuit found "the admission of the CyberTipline Reports in these circumstances violated the Confrontation Clause." 699 F.3d at 651-52. The same is true here where B.A. was not the NCMEC analyst who authored the statements contained within the report, the author was not called to testify, and the military judge made no availability determination.

4. The NCMEC CyberTipline Report is tainted by the inclusion of B.F.'s testimonial hearsay.

In *Cameron*, the First Circuit determined that the government could not admit a NCMEC CyberTipline Report that contained "testimonial statements made by Yahoo!" because the CyberTipline Report was derived from and tainted by Yahoo!'s testimonial statements. 699 F.3d at 649-50. The same is true here. The government admitted NCMEC's CyberTipline Report, while addressing only the first level of hearsay and in violation of Amn Goodwater's constitutional right to confrontation.

5. The government cannot prove this violation was harmless beyond a reasonable doubt.

Because the error is constitutional in nature, the government must show that the error was harmless beyond a reasonable doubt. *See United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011). Among the factors this Court must consider are "the importance of the unconfronted testimony in the prosecution's case, whether that testimony was cumulative, the existence of corroborating evidence, the extent of confrontation permitted, and the strength of the prosecution's case." *Id*. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)).

B.F.'s statements contained in the NCMEC CyberTipline Report were introduced to prove the truth of the matter asserted: that a certain IP address, email address, and username were associated with the image that is contained in Prosecution Exhibit 2, the image in Prosecution Exhibit 2 was uploaded to Discord, and that image was located at a certain publicly accessible

URL at a certain date and time. *See* Pros. Ex. 1 and 2. This information was not in the Discord response to a subpoena nor was it found on Amn Goodwater's devices. R. at 266-67, 298, 332-33.

The rest of the government's case focused on comparing and confirming the information contained within the NCMEC Report. Prosecution Exhibit 3, the Google subscriber information for "ilovelolicons@gmail.com," and Prosecution Exhibit 6, the picture of "ilovelolicons@gmail.com" on the computer in Amn Goodwater's dorm room, are immaterial if you cannot compare them to the email address and IP address reported on the NCMEC CyberTipline Report. Pros. Ex. 1, 3, 6. Discord's user ID information in Prosecution Exhibit 8, including Amn Goodwater's phone number, is similarly immaterial if you cannot compare it to the NCMEC CyberTipline Report to connect it to the incident. Pros. Ex. 1, 8. Prosecution Exhibit 9, which shows another IP address for Nellis AFB, is similarly immaterial if Prosecution Exhibit 8 cannot be compared to the IP address in the NCMEC CyberTipline Report. Pros. Ex. 1, 8, 9. Prosecution Exhibit 4, the "XIANXIA" sign, is also immaterial if it cannot be compared to the suspect's username identified in the NCMEC CyberTipline Report. Pros. Ex. 1, 4. Moreover, without Prosecution Exhibit 2, the government may not have been able to prove the image was child pornography because Amn Goodwater stated he could not remember the image. R. at 240-41. Amn Goodwater's statements were compared to Prosecution Exhibit 1 and 2 and served to fill evidentiary gaps that remained in his statements. Furthermore, B.A. only explained the type of information contained in the CyberTipline Report. R. at 190-204 (for example, that a "ESP user ID" is a "unique user ID associated with the electronic service provider"). B.A. did not, however, testify to the contents of Prosecution Exhibit 1, such as the user ID number, other than to confirm Discord uploaded one file, which it reported as child pornography. *Id*.

In *United States v. Henderson*, the Army Court of Criminal Appeals (ACCA) faced a similar question. No. ARMY 20090613, 2012 CCA LEXIS 205, at *13 (A. Ct. Crim. App. 1 Jun. 2012) (unpub. op.). The ACCA recognized "the government introduced substantial evidence that did not violate the Confrontation Clause, including appellant's own incriminating admissions and the portions of the reports that are not testimonial. This evidence might have been sufficient to uphold the conviction if that were all that the panel had seen." *Id*. However, the CAAF in *Sweeney* emphasized:

> In assessing harmlessness in the constitutional context, the question is not whether the evidence was legally sufficient to uphold a conviction without the erroneously admitted evidence. *See Fahy v. Connecticut*, 375 U.S. 85, 86 (1963). Rather, "the question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy*, 375 U.S. at 86-87).

Sweeney, 70 M.J. at 304 (cleaned up). Recognizing this, the ACCA reasoned, "Having reviewed the record as a whole, and applying this high standard, we determine that there is a reasonable probability that at least some of the evidence complained of contributed to the finding of guilty." *Henderson*, 2012 CCA LEXIS 205, at *14. The ACCA therefore found prejudice and this Court should do the same here. *Id*. While Amn Goodwater admitted to sending a link over Discord, Prosecution Exhibit 1 and 2 provided information about this link and its contents that the government relied on to prove Specification 2. The admission of the NCMEC CyberTipline Report and accompanying image violated Amn Goodwater's right to confrontation and there is a reasonable probability that at least some of this evidence contributed to the finding of guilty on this specification.

WHEREFORE, Amn Goodwater requests this Honorable Court find that the Government's introduction Prosecution Exhibits 1 and 2 violated the Confrontation Clause, this

violation was not harmless beyond a reasonable doubt, and set aside the finding for Specification 2 and the sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING PROSECUTION EXHIBITS 2, 4, 5, AND 6 WITHOUT PROPER FOUNDATION, OVER DEFENSE OBJECTION.

Additional Facts

Prosecution Exhibit 2, the Child Pornography Image

J.S., Vice President of the Exploited Children Division at the NCMEC, attested "CyberTipline Reports contain 4 sections: Section A, Section B, Section C, and Section D." App. Ex. XII at 2. In this case, Discord uploaded one file, however, J.S. did not attest that this file was a part of any of the four sections of this report. *Id*. at 3. Moreover, he attested that NCMEC staff did not view the file. *Id*.

B.A. explained "one file was provided by the electronic service provider," however, B.A. did not receive the report when it was received by NCMEC and did not have any personal involvement in this case up until Amn Goodwater's court-martial. R. at 190-91, 197-98. B.A. posited that if an image was provided by an electronic service provider, the image would be included in the CyberTipline Report. R. at 163. B.A. appears to be the only employee at NCMEC who reviewed the image, however, she did not testify whether the image in Prosecution Exhibit 2 was the image that she reviewed. *See* Pros. Ex. 1; App. Ex. XII; R. at 163, 197.

The CyberTipline Report itself reflects that one file was uploaded by Discord, but it does not contain that file. Pros. Ex. 1. Rather, it only contains information about the file, such as the filename and MD5 hash value. Pros. Ex. 1. Moreover, the last page of the CyberTipline Report includes a statement that "[t]his concludes CyberTipline Report 70830620." *Id*. at 7.

The government offered Prosecution Exhibit 2 relying on Appellate Exhibit XII and B.A.'s testimony. R. at 163, 188. No witness attested or testified that Prosecution Exhibit 2 was a fair and accurate representation of the image that was found on Discord.[4] Defense counsel objected to the admission of this exhibit based on several bases, to include lack of foundation. R. at 186, 189. The military judge overruled the defense's objections and admitted Prosecution Exhibit 2. R. at 189.

Prosecution Exhibit 4, the photograph of the "XIANXIA" sign

N.C. testified the picture contained within Prosecution Exhibit 4 was taken during a search of Amn Goodwater's work section. R. at 221. N.C. testified, "I wasn't personally at the search, but the individuals who did search his work section brought [the images] back." *Id*. N.C. agreed Prosecution Exhibit 4 is "a fair and accurate representation *of the picture* that was taken of – in the accused's work center." R. at 222 (emphasis added). Defense counsel objected to the admission of this exhibit based on a lack of foundation and personal knowledge. R. at 223. The military judge overruled the defense's objections and admitted Prosecution Exhibit 4. *Id*.

Prosecution Exhibit 5, the photograph of suggestive anime playing cards

N.C. testified that the pictures contained within Prosecution Exhibit 5 were taken during a search of Amn Goodwater's dorm room. R. at 224. N.C. was also not personally present for this search. *Id*. N.C. reviewed the photographs with the agents that conducted the search after it was completed and agreed Prosecution Exhibit 5 is "a fair and accurate representation *of the photographs* that were taken from the accused dorm room." R. at 226 (emphasis added). Defense counsel objected to the admission of this exhibit based on a lack of foundation and personal

[4] *Cf.* R. at 259 (After Prosecution Exhibit 2 was admitted, N.C. testified Prosecution Exhibit 2 appeared to be the same image that was found on Amn Goodwater's phone, that corresponds with the sanitized version that he received as "associated with the cyber tip.")

knowledge.[5] *Id*. The military judge overruled the defense's objections and admitted Prosecution Exhibit 5. R. at 227.

Prosecution Exhibit 6, the photograph of Amn Goodwater's computer

N.C. testified the picture contained within Prosecution Exhibit 6 was also taken during the search of Amn Goodwater's dorm room, that he was not present for. R. at 224, 228. N.C. explained this picture "appears to be an open webpage with . . . Airman Goodwater's different email accounts, Google accounts, one of which is the ILoveLolliCons@gmail.com account from the NCMEC report." R. at 228. N.C. agreed Prosecution Exhibit 6 was a fair and accurate representation of that photograph that was maintained on the [OSI] drive." R. at 228. Defense counsel objected to the admission of this exhibit based on a lack of foundation and personal knowledge, articulating "this is not a result of [N.C.]'s search. He did not participate in the search directly. He was not in the room, he did not look at his computer screen when it was open, and he did not take the photograph." R. at 229. The military judge overruled the defense's objections and admitted Prosecution Exhibit 6. R. at 229.

Standard of Review

"A military judge's decision to admit evidence is reviewed for an abuse of discretion." *United States v. Upshaw*, 81 M.J. 71, 74 (C.A.A.F. 2021). "An abuse of discretion occurs when a military judge either erroneously applies the law or clearly errs in making his or her findings of fact." *United States v. Smith*, 83 M.J. 350, 355 (C.A.A.F. 2023) (citations omitted).

[5] Defense counsel also objected to page 3 of Prosecution Exhibit 5 for identification based on lack of foundation and personal knowledge, as well as lack of Military Rule of Evidence 404(b) notice because the images on page 3 were not noticed prior to the government's attempt to admit them. R. at 226. The government withdrew page 3 of the exhibit. R. at 226-27.

Law and Analysis

"The proponent of the evidence, in this case the Government, has the burden of demonstrating that the evidence is admissible." *United States v. Ayala*, 81 M.J. 25, 28 (C.A.A.F. 2021) (citing *United States v. Finch*, 79 M.J. 389, 394 (C.A.A.F. 2020)); *United States v. Lubich*, 72 M.J. 170, 173 (C.A.A.F. 2013) (citation omitted).

Military Rule of Evidence 901 requires that the proponent of an evidentiary item "must produce evidence sufficient to support a finding that the item is what the proponent claims it is." MIL. R. EVID. 901(a). Evidence may be authenticated through the "testimony of a witness with knowledge" "that an item is what it is claimed to be." MIL. R. EVID. 901(b)(1).

"[T]he testimony of the actual photographer is unnecessary" and "a photograph may be authenticated by the testimony of a witness who is familiar with the scene depicted and states that the photograph is an accurate representation of that scene." *United States v. Richendollar*, 22 M.J. 231, 232 (C.M.A. 1986) (citations omitted).

There are two common methods for verifying photographs: "the pictorial testimony method and the silent witness method." 1 Military Evidentiary Foundations § 4-18 (2024).

Military Evidentiary Foundations explains the pictorial testimony method:

> [This method] simply requires a witness to testify that the photograph fairly and accurately depicts the scene. This method assumes that the witness is personally familiar with the scene depicted and can testify to that fact. Under this theory of admissibility, the picture is illustrating what the witness could have testified to. The proponent need not produce the person who actually took the picture. Any person familiar with the scene or object depicted may verify the photograph.

Id.

The elements of foundation for the pictorial testimony method are:

1. The witness is familiar with the object or scene.

2. The witness explains the basis for his or her familiarity with the object or scene.

3. The witness recognizes the object or scene in the photograph or video.

4. The photograph or video is a "fair," "accurate," "true," or "correct" depiction of the object or scene at the relevant time.

Id.

Comparatively, the silent witness method provides:

> [T]he picture speaks for itself, even where no human was present to see what took place. This method would be available, for example, where the proponent is attempting to show who made a withdrawal from an ATM (an automatic teller machine). This method requires the proponent to show what process or system was used to record the event and that the resulting photograph was reliable. This usually means that the proponent will call a witness competent to testify about the system used. While the focus under the pictorial testimony method is on the testimony of the witness on the stand, under the silent witness method, the focus is on the reliability of the camera system.

Id.

The elements of foundation for this method are:

1. The manner of loading the medium or film into the camera.

2. How the camera system works and is activated.

3. How the medium or film was removed.

4. How the medium or film was subsequently handled and developed.

5. Whether the development process produced reliable results.

Id.

1. The government failed to authenticate Prosecution Exhibit 2, therefore it was an abuse of discretion for the military judge to admit it over defense objection, and Amn Goodwater was materially prejudiced by its admission.

The government failed to introduce evidence that Prosecution Exhibit 2 was the image that was found on Discord and uploaded to NCMEC as a part of the CyberTipline Report. The government did not call anyone to testify that Prosecution Exhibit 2 was the image that was found

on Discord. B.A. appears to be the only witness who reviewed the image that was uploaded to NCMEC, and she did not testify about the contents of Prosecution Exhibit 2. *See* R. at 163, 197. Furthermore, NCMEC's business record affidavit does not authenticate the image and could not, because in that same affidavit, J.S. attested that NCMEC staff did not view the file. App. Ex. XII at 3. The government had the burden of demonstrating that Prosecution Exhibit 2 was admissible, for example, through the "testimony of a witness with knowledge" "that an item is what it is claimed to be." *Ayala*, 81 M.J. at 28; MIL. R. EVID. 901(b)(1). The government did not meet that burden and the military judge abused his discretion when he admitted Prosecution Exhibit 2. The admission of Prosecution Exhibit 2 materially prejudiced Amn Goodwater because Prosecution Exhibit 2 was the only evidence of the child pornography that Amn Goodwater was convicted with distributing.

Material prejudice occurs:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence.

United States v. Cole, __ M.J. __, 2024 CAAF LEXIS 312, at *20 (C.A.A.F. 2024) (alteration in original) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)).

This Court "cannot say, with fair assurance . . . that the judgment was not substantially swayed by the error, [and thus] it is impossible to conclude that substantial rights were not affected." *Cole*, 2024 CAAF LEXIS 312, at *21 (quoting *Kotteakos*, 328 U.S. at 765).

2. *The government failed to authenticate Prosecution Exhibits 4, 5, and 6 therefore it was an abuse of discretion for the military judge to admit them over defense objection, and Amn Goodwater was materially prejudiced by their admission.*

The government also failed to authenticate Prosecution Exhibits 4, 5, and 6. Prosecution Exhibits 4, 5, and 6 are pictures that were taken during OSI's search of Amn Goodwater's work section and dorm room. These pictures were not taken by an automated photography system, such as surveillance camera footage, and the government did not introduce any evidence that would satisfy the silent witness method of authentication for these photographs. Instead, the government appears to have attempted to introduce these photographs via the pictorial testimony method. *See* R. at 222, 226, 228-29 (asking N.C. if the photographs were fair and accurate depictions of the photographs that other OSI agents had taken and maintained on the OSI drive). However, it is not sufficient to merely show that the photographs are essentially fair and accurate copies of photographs saved at the OSI detachment. While N.C. did not need to take the photographs himself, the government needed to show that N.C. had personal knowledge of the objects depicted in the photographs. However, N.C. was not present for the searches of Amn Goodwater's vehicle and dorm room, and there was no evidence that he had this knowledge. R. at 221, 224, 228. No witness testified that the images were fair and accurate depictions of the objects.

The government had the burden of demonstrating that Prosecution Exhibits 4, 5, and 6 were admissible and the government did not meet that burden. The military judge abused his discretion when he admitted these exhibits, and Amn Goodwater was materially prejudiced by their admission because each exhibit suggested his identity as the suspect. Prosecution Exhibit 4, a sign that reads "XIANXIA," linked Amn Goodwater to the suspect's username ("Xianxia#1"), which was reported by Discord. Pros. Ex. 1, 4. Prosecution Exhibit 5, playing cards with "anime women in suggested [sic] poses," demonstrated identity because someone who has anime play

cards may also have the email address ilovelolicons@gmail.com, which was reported by Discord. Pros. Ex. 1, 5. "[O]ne definition of 'lolicon' means a fascination with cartoons of very young-looking girls engaged in varying degrees of erotic behavior." App. Ex. V at 11. Finally, Prosecution Exhibit 6, a picture of an open webpage showing the email address "ilovelolicons@gmail.com," showed the email address that Discord reported. Pros. Ex. 1, 6.

This Court cannot say the error in admitting Prosecution Exhibits 4, 5, and 6 did not have a substantial influence because these exhibits may have led the military judge determine that the government had met its burden of proving Amn Goodwater guilty beyond a reasonable doubt. *See Cole*, 2024 CAAF LEXIS 312, at *20-21 (quoting *Kotteakos*, 328 U.S. at 765). ("In this case, the military judge's erroneous view of the elements of the offense *may have* led him to sentence Appellant for the offense of aggravated assault with a dangerous weapon, an offense for which Appellant was not found guilty. . . . '[thus] it is impossible to conclude that substantial rights were not affected.'" (emphasis added)).

WHEREFORE, Amn Goodwater requests this Honorable Court find that the military judge abused his discretion when he admitted Prosecution Exhibits 2, 4, 5, and 6, and set aside the finding for Specification 2 and the sentence.

III.

APPELLANT'S CONVICTION FOR DISTRIBUTION OF CHILD PORNOGRAPHY IS LEGALLY AND FACTUALLY INSUFFICIENT.

Additional Facts

N.C. testified he was familiar with Discord, and he had used it frequently for six or seven years. R. at 246-47. N.C. explained a Discord link is "when you upload an image to a Discord server or to your own server and a URL link is generated, which you can then send to other individuals, that links that individual *back to the image that you upload*." R. at 249 (emphasis

added). N.C. further explained that when an individual *clicks* on a Discord image link, "it should display the image on the computer, it *redirects a user to a webpage*, if you will, with primarily just the image displayed." R. at 250 (emphasis added). After N.C.'s testimony on this topic, the government also called K.M., the government's expert witness in digital forensics. R. at 276-277, 283. K.M. was also familiar with Discord, and he did not contest N.C.'s testimony. *See* R. at 294-97.

Standard of Review

This Court reviews issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). The "assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "In determining whether any rational trier of fact could have determined that the evidence at trial established guilt beyond a reasonable doubt, . . . the term 'reasonable doubt' does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (citation omitted). The legal sufficiency assessment "draw[s] every reasonable inference from the evidence of record in favor of the prosecution." *Id.* (alternation in original) (citations and internal quotations omitted). As a result, "[t]he standard for legal

sufficiency involves a very low threshold to sustain a conviction." *Id.* (alteration in original) (citation omitted).

This Court may consider the factual sufficiency of a conviction "upon request of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ. This Court may provide relief where it is "clearly convinced that the finding of guilty was against the weight of the evidence." Article 66(d)(1)(B)(iii), UCMJ. Article 66 "does not require Appellant to demonstrate the entire absence of evidence supporting an element of the offense, a requirement which would be redundant with legal sufficiency review." *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *17 (A.F. Ct. Crim. App. 29 Apr. 2024) (unpub. op.) (citing *United States v. Harvey*, 83 M.J. 685, 691 (N.M. Ct. Crim. App. 2023), rev. granted, ___ M.J. ___, No. 23-0239/NA, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024)). "Rather, the statute requires Appellant 'identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.'" *Id*. This Court has inferred "Congress intended [for] the beyond a reasonable doubt standard to continue to apply in questions of factual sufficiency." *Id*. at *22.

Amn Goodwater was charged with distributing child pornography, which required the government to prove the following elements beyond a reasonable doubt: (1) that Amn Goodwater knowingly and wrongfully distributed child pornography to another; and (2) that, under the circumstances, Amn Goodwater's conduct was of a nature to bring discredit upon the armed forces. Charge Sheet; *MCM*, part IV, para. 95.b.(3). "'Distributing' means delivering to the actual or constructive possession of another." *MCM*, part IV, para. 95.c.(6).

1. The link did not contain child pornography as that term is defined in Article 134, UCMJ, and therefore, Amn Goodwater did not distribute child pornography.

In *United States v. Navrestad*, Navrestad sent a hyperlink that contained child pornography to an undercover law enforcement officer. 66 M.J. 262, 264 (C.A.A.F. 2008). Navrestad was charged with violating the Child Pornography Prevention Act of 1996 (CPPA), which like the specification in this case, required the government to prove the material contained a visual depiction of a minor engaging in sexually explicit conduct. *Id.* at 265. The definition for visual depictions, like the specification in this case, included digital or electronic data "capable of conversion into a visual image." *Cf. id.* at 265 *with MCM*, part IV, para. 95.c.(11). The issue in the case "center[ed] on what was actually distributed when Navrestad sent the hyperlink." *Naverstad*, 66 M.J. at 265.

In *Navrestad*, the government's witness who provided relevant technical support "defined a hyperlink as an address or a 'way that you can display a web site,' which the recipient can click on to go to the particular site." *Id*. This witness further "agreed that a hyperlink is a shortcut to typing in the website address manually and that clicking on it does not move any documents on the user's computer." *Id*. The CAAF noted that "while clicking on a hyperlink may create a file in the recipient's temporary Internet file folder, clicking this hyperlink does not move images or documents from the sender's computer to the recipient's computer." *Id*. at 265 n.8. "[I]t was an accurate analogy to say that sending a hyperlink is like sending someone an address of a store or of a location of a building." *Id*. at 265. The witness further admitted "a picture is not sent to the recipient when a hyperlink is sent '[b]ecause a hyperlink is nothing more than . . . just a shortcut to get somewhere.' . . . [A] hyperlink is a 'direct shortcut to a location.'" *Id*. (first omission in original).

The CAAF reasoned:

> Unlike an e-mail attachment, the sending of a hyperlink in a chat session does not move a file or document from one location to another. As such, the data contained in the hyperlink is an electronic address that allows the recipient to direct his browser to the new location without having to type in the website of that location. The data contained in the hyperlink is not capable of conversion into any type of visual image. Rather, the data provides the recipient with the path to a website on a server distinct from Navrestad's own computer. It is this separate server that contained the visual images of child pornography, not the hyperlink Navrestad sent. In contrast, a file received as an e-mailed attachment is self-contained and capable of conversion into an image independent of other factors. The difference between a hyperlink and a file that is sent as an e-mailed attachment is significant because the attached picture or graphics file is a complete image that is just not opened yet. When that complete image is received, it is housed on the recipient's computer.

Id. at 265-66. The CAAF further distinguished the hyperlink from cases involving GIF files, because unlike GIFs, the hyperlink "was simply a shortcut to a particular web address." *Id*. at 266.

The CAAF rejected the government's argument that "once the hyperlink was sent, the recipient was 'just a click away' from the child pornography images," explaining "the Government confuses the manner of the alleged distribution with what is allegedly being distributed." *Id*. Navrestad did not dispute that he sent the hyperlink. *Id*. His position was "that the hyperlink did not contain child pornography as that term is defined in the CPPA and therefore cannot constitute the distribution of child pornography." *Id*. The CAAF agreed. *Id*.

Like *Navrestad*, Amn Goodwater was alleged to have distributed child pornography via a link, which did not move the image from one location to another. *See id*. at 265. According to the government's own witness, N.C., the Discord link had to be clicked to be viewed and clicking the link would take "that individual *back to the image that you upload*"; "it *redirects a user to a webpage*." R. at 249-50 (emphasis added). Like *Navrestad*, the link here "is nothing more than . . . just a shortcut to get somewhere." 66 M.J. at 265. The link was "not capable of conversion into any type of visual image. Rather, the data provide[d] the recipient with the path to a website on a

server . . . that contained the visual image[] of child pornography." *See id*. at 266. This is precisely what N.C. testified to when he explained when an individual *clicks* on a Discord image link, "it *redirects a user to a webpage*" (or server) where the image exists. R. at 250 (emphasis added). As CAAF recognized, the link "was simply a shortcut to a particular web address," and that cannot constitute the distribution of child pornography because it is not "capable of conversion into a visual image." 66 M.J. at 265-66; *MCM*, part IV, para. 95.c.(11). Therefore, because the link was not a visual depiction, this Court cannot find that sending the link in this case is sufficient to prove Amn Goodwater was guilty of distributing child pornography.

2. Two digital forensic experts and OSI's lead agent each confirmed that they found no evidence that anyone had received the Discord link.

"[A]nother person must actually receive files of child pornography for a distribution offense to have been committed." *United States v. Williams*, 74 M.J. 572, 578 (A.F. Ct. Crim. App. 2014). In *Williams*, this Court determined the appellant's conviction for distributing child pornography was sufficient where the appellant possessed child pornography, which could be accessed through a peer-to-peer network he participated in, and a law enforcement officer downloaded four videos from the appellant. *Id.* at 574.

Unlike *Williams*, the government presented no evidence that the link in this case was accessed by any other user nor law enforcement. The government's digital forensics expert, K.M., found no evidence of the other users accessing the image on Discord. R. at 298. K.M. asserted Discord is a cloud server and in his knowledge of cloud servers, information about the link would be found if the parties got digital data from Discord. R. at 294-95, 299. The parties did receive this information from Discord, and N.C. and E.H. both reviewed it. R. at 265, 331. N.C. thoroughly reviewed this information, spending at least dozens of hours reviewing it. R. at 265. N.C. did not find any evidence of internet traffic to the linked webpage. R. at 266. E.H., a digital

forensics expert, employed forensic tools to review the data from Discord and he also found no evidence. R. at 333. Therefore, because the government did not prove another person received child pornography, this Court cannot find that the offense of distributing child pornography was committed.

WHEREFORE, Amn Goodwater requests this Honorable Court set aside the finding for Specification 2 and the sentence.

IV.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL, MEANING ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, WHEN APPELLANT WAS CONVICTED OF NON-VIOLENT OFFENSES; AND THIS COURT CAN DECIDE THAT QUESTION.

Additional Facts

After his conviction, the government made the determination that Amn Goodwater's convictions met the firearm prohibition under 18 U.S.C. § 922. Statement of Trial Results (STR), 14 April 2022, at 3; EoJ, 18 May 2022, at 3. The government did not specify why, or under which section this case met the requirements of 18 U.S.C. § 922, but it did state Amn Goodwater's convictions do not trigger 18 U.S.C. § 922(g)(9). *Id.*

Standard of Review

This Court reviews questions of jurisdiction, statutory interpretation, and proper completion of post-trial processing de novo. *United States v. Vanzant*, __ M.J. __, No. 22004, 2024 CCA LEXIS 215, at *22 (A.F. Ct. Crim. App. 28 May 2024).

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."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (citation omitted).

1. 18 U.S.C. § 922 is unconstitutional as applied to Amn Goodwater.

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to Amn Goodwater, who stands convicted of possession and distribution of child pornography, which are not violent offenses. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The Third Circuit recently concluded that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *petition for cert. filed*, No. 23-374 (U.S. 5 Oct. 2023).[6] Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals."

[6] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent David Bryan Range, No. 23-374 (U.S. 18 Oct. 2023.)

Id. at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In addition to the distinction on violence, 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 categorizing crimes as felonies has not only increased, but done so 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 this country's history and tradition.

This is not the only provision of § 922 to have come under fire in light of *Bruen*. The Fifth Circuit recently held that § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted), *cert. granted*, 143 S. Ct. 2688 (2023). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448–49.

In reaching that conclusion, 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 461 (quoting *Bruen*, 597 U.S. at 8). Therefore, the government bears the burden of justifying its regulation "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id*.

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 451. 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.* at 452. 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. *See 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 460. 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 a domestic violence restraining order, then it likely cannot prove that its firearm prohibition on Amn Goodwater for a non-violent offense would be constitutional.

In addition to *Rahimi*, the Fifth Circuit has found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at 340. He was later charged and

convicted of a violation of § 922(g)(3). *Id*. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. The reasoning in both *Rahimi* and *Daniels* further supports the limited scope of relevant historical firearms regulation.

In light of *Bruen*, § 922(g)(1) is unconstitutional as applied to Amn Goodwater.

2. This Court may order correction of the EOJ.

In *United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), citing to the 2016 edition of the Rules for Courts-Martial, this Court held, "[T]he 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." 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. Recently, this Court further concluded that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review." *Vanzant*, 2024 CCA LEXIS 215, at *24.

However, in *United States v. Lemire*, 82 M.J. 263, at n* (C.A.A.F. 2022), the CAAF "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." The CAAF's direction to fix the promulgating order is at odds with this Court's holding in *Lepore* and *Vanzant*, and it 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 the appellant register as a sex offender. Third, if the CAAF and the Courts of Criminal Appeals 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.[7]

WHEREFORE, Amn Goodwater requests this Court find the government's firearm prohibition is unconstitutional as applied and order that the government correct the STR and EoJ to indicate that no firearm prohibition applies in his case.

Respectfully submitted,

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[7] This issue is currently pending review before the CAAF in multiple cases. *See*, *e.g.*, *United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. 24 Jan. 2024) (order granting review of jurisdiction to review the application of 18 U.S.C. § 922).

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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15 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	Panel No. 2
Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant*.	)	ACM 40304 (f rev)

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Airman (E-2) JORDAN P. GOODWATER, USAF, *Appellant*.	)	ACM 40304 (f rev)

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

ISSUES PRESENTED

I.

WHETHER PROSECUTION EXHIBITS 1 AND 2 WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION, OVER DEFENSE OBJECTION?

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING PROSECUTION EXHIBITS 2, 4, 5, AND 6 WITHOUT PROPER FOUNDATION, OVER DEFENSE OBJECTION?

III.

WHETHER APPELLANT'S CONVICTION FOR DISTRIBUTION OF CHILD PORNOGRAPHY IS LEGALLY AND FACTUALLY SUFFICIENT?

IV.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL, MEANING ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, WHEN APPELLANT WAS CONVICTED OF NONVIOLENT OFFENSES; AND THIS COURT CAN DECIDE THAT QUESTION?

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant pled guilty to possessing child pornography between on or about 1 January 2019 and on or about 27 August 2020 in Las Vegas, Nevada. (R. at 142.) Appellant admitted that he downloaded the visual depictions, which included approximately 1,700 images and videos, using his computer and phone. (R. at 142, 145.) Appellant stated, "I understand that the digital forensic examiner assigned reviewed my Samsung Galaxy S9 cell phone, Hewlett Packard Omen Laptop, and a SanDisk memory card. Child pornography was possessed on each of these devices." (R. at 143.) Appellant stated he "got most of the images from downloading from other people on Discord." (R. at 148.)

The Government then sought to prove Appellant also distributed child pornography by first calling Ms. BA, the director of the Child Victim Identification Program at the National Center for Missing and Exploited Children (NCMEC). (R. at 159.) Ms. BA explained that the "Child Victim Identification Program is a clearinghouse of information on identified victims of child sexual abuse material that are submitted into us by law enforcement." (Id.) Ms. BA said child sexual abuse material (which she is commonly referred to as "child pornography") is also "submitted to NCMEC by electronic service providers or members of the public through the cyber tip line." (R. at 161.)

Ms. BA explained that the CyberTipline is "an online reporting mechanism, where members of the public or electronic service providers can report instances of online child sexual exploitation." (Id.) She said a CyberTipline report is "a report that is coming in, again either from a member of the public or from a company, that would pertain to online child sexual

exploitation." (Id.) Ms. BA explained that if an image was provided by an electronic service provider (ESP) when the provider made the report, the image would be associated with the report. (R. at 163.) Ms. BA testified that NCMEC in the past year had received over 29.1 million reports from ESPs. (R. at 201.)

Ms. BA explained that the CyberTipline report is "automatically created within the system when the electronic service provider makes that report," adding, "The system generates a cyber tip line report number and a cyber tip line report upon receipt of that information." (R. at 165.) Ms. BA agreed that a human does not input any information on NCMEC's behalf and that the reports are securely maintained at NCMEC. (Id.)

Appellate Exhibit XII is a business records affidavit from Mr. JS, the Vice President of the Exploited Children Division of NCMEC. (R. at 162; App. Ex. XII.) Prosecution Exhibit 1 is a seven-page document titled "Cyber Tip Line Report 70830620." (Id.) Prosecution Exhibit 2 is a disc containing the image affiliated with the report. (R. at 163.)

In his affidavit, Mr. JS stated that NCMEC is a private, nonprofit corporation, incorporated under the laws of the District of Columbia, and that NCMEC's mission is to "help find missing children, reduce child sexual exploitation, and prevent child victimization." (App. Ex. XII at 1.)

Mr. JS stated that the tip line began operating in 1998 in furtherance of NCMEC's mission and was "created to allow persons to report online (and via toll-free telephone) the enticement of children for sexual acts, child sexual molestation, child pornography, child sex tourism, child sex trafficking, unsolicited obscene materials sent to a child, misleading domain names, misleading words or digital images on the internet." (Id.) Mr. JS said that majority of reports relate to apparent child pornography and are received from ESPs.

Mr. JS further stated the NCMEC staff cannot alter or change information submitted by a reporting party to the tip line and does not direct or mandate the type of information submitted by the public or an ESP. (Id.)

With relation to the report 70030620, Mr. JS said the report was generated in the regular course of business and is a true and correct duplicate of the original. (Id. at 2.) Mr. JS stated the report was submitted by Discord, Inc. on or about 24 April 2020 and related to someone with a username "Xianxia#1" and an email address "ilovelolicons@gmail.com." (Id.) Discord, Inc. uploaded one file when making the report, responded "Yes" to the question "Did Reporting ESP view entire contents of uploaded file," and "Yes" to the question "Were entire contents of uploaded file publicly available." (Id.)

Appellant's defense counsel objected to the introduction of Prosecution Exhibits 1 and 2 on the basis of testimonial hearsay. (R. at 164.) The Government countered that the report did not contain any testimonial hearsay and that the business record affidavit cured any foundational or testimonial hearsay concerns. (R. at 174-76.) The trial counsel specifically highlighted that the business record affidavit stated the purpose of the tip line was to report the enticement of children for sexual acts and molestation, not "an eye for prosecuting cases." (R. at 176-77.)

The military judge overruled the objection and admitted Prosecution Exhibits 1 and 2. (R. at 188-89.) The military judge reasoned as follows:

> I had an opportunity to review all of the documents that were provided to me by both counsel and to consider their arguments. I find that the report, Prosecution Exhibit 1 for identification was created for the administration of NCMEC affairs and not for the purpose of establishing or proving some fact at a trial.
>
> This report meets the exception of hearsay under M.R.E. 803(6), record of regularly conducted activity; the record was made at or near the time of the event, the record was kept in the course of regular conducted activity of the NCMEC nonprofit organization,

> the record was and is a regular practice of that activity. All is testified to by the witness on the stand, Ms. [BA], and found in Appellate Exhibit XII. The affidavit of Mr. [JS] [phonetic], the vice president of the Exploited Children Division at NCMEC and that Ms. [BA] was the director of the Child Victim Identification Program at NCMEC. There was no showing of a lack of trustworthiness.

(R. at 187.) Since Prosecution Exhibit 2 was an image that was submitted along with the report, the military judge admitted that exhibit as well. (R. at 189.)

In relation to Prosecution Exhibit 1, Ms. BA stated the information contained in Section A was information provided by Discord. (R. at 191; Pros. Ex. 1 at 3.) Discord reported the email address at issue was "ilovelolicons@gmail.com" and the screen/user name was Xianxia#1. (R. at 192.) Ms. BA also testified that the uploaded image had a "MD5" attached to it, which "is a hash tagging technology" that creates a "digital fingerprint for a file." (R. at 193.) Ms. BA testified that the "Yes" answer to the question "Did reporting ESP view entire contents of uploaded file," meant that "the company is indicating that they viewed the contents, the entire contents of the reported file." (Id.) Likewise, the "Yes" answer to the question "Were entire contents of uploaded file publicly available," meant that "the company is indicating that the contents of the file were publicly available." (Id.)

Within the "Submitter" portion of Section A, the name "Discord, Inc." was listed along with a name, BF, and Discord's business address. (Pros. Ex. 1 at 3.) When asked on cross-examination about the name BF and whether the entries made by Discord were by a human being named BF, Ms. BA replied, "That is possible," adding that while some companies "may report manually through a reporting form," they "do also have automated processes of reporting, in some instances." (R. at 200.) On redirect examination, Ms. BA continued, "To my knowledge, they made a report via a manual reporting form, a secure manual reporting form. There are also

some automated ways in which they may report." (R. at 201.)

As to Section B of the report, Ms. BA said this section "contains automated information run by the NCMEC systems." (R. at 194.) As to Section C, Ms. BA testified that the note "files not reviewed by NCMEC" meant that "at the time this report was processed by analysist, the files were not visually reviewed." (Id.)

However, Ms. BA said that she eventually viewed the file. (R. at 194, 202.) Ms. BA stated the file was viewed "for the completion of a child identification report request from enforcement," and that she viewed it around June of 2020 when filling out an affidavit. (R. at 195, 202.) When asked on cross-examination, "And you've actually never seen the image at issue in this case," Ms. BA replied, "I have." (R. at 197.)

Air Force Office of Special Investigations (AFOSI) Special Agent (SA) CP became involved in the case after OSI headquarters provided the local detachment a NCMEC tip. (R. at 206.) SA CP first called the Federal Bureau of Investigation (FBI), who viewed the image and verified that the image was suspected child pornography. (R. at 207.) Additionally, SA CP stated the IP address associated with the Discord account provided in the NCMEC report "came back to 99th FSS here at Nellis Air Force Base." (Id.) SA CP determined Appellant lived in a dormitory on Nellis Air Force Base. (R. at 208.)

AFOSI SA NC testified that the Nellis Air Force Base AFOSI detachment received a NCMEC CyberTipline report in August 2020 from AFOSI headquarters. (R. at 214.) SA NC stated subpoenas were sent to Google, Discord, T-Mobile, and Cox Communications. (R. at 216.)

Based on information obtained by these subpoenas, SA NC said the information led to Appellant. (R. at 220.) Prosecution Exhibit 8 is a document provided by Discord for the same

Discord user identification listed in the NCMEC tip line report (ending in "59613"). The Discord report included the same IP address listed in the NCMEC tip line report. (Pros. Ex. 8.) Prosecution Exhibit 9 is a document provided by Cox Communication that relates to the IP address found in the NCMEC tip line report and the Discord report. The subscriber's name is "Nellis - 99 FSS." (Pros. Ex. 9.) SA NC said these findings showed the Discord account was "accessed by an IP that came back to 99th FSS here at Nellis Air Force Base." (R. at 207.)

The Discord report also included a phone number ending in "3429." (Pros. Ex. 8.) SA NC testified, "The T-Mobile subpoena returned his cell phone number, which we then compared to the Nellis alpha roster, which the cell phone number was listed as [Appellant's] cell phone number at that time." (R. at 220.)

AFOSI prepared search authorizations and then searched Appellant's dorm room, vehicle, work station and cellular phone. (Id.) Within Appellant's work station, AFOSI found a sign with the letters "XIAXIA." (R. at 221; Pros. Ex. 4.) SA NC testified that the sign matched the words of Appellant's discord account. (R. at 224.)

Prosecution Exhibit 6 is a photo taken during the search of Appellant's dorm room. (R. at 228.) SA NC said the photo "appears to be an open webpage with . . . [Appellant's] different email accounts, Google accounts, one of which is the ILoveLolloCons@gmail.com account from the NCMEC report." (R. at 228; Pros. Ex. 6.)

Prosecution Exhibit 7 is SA NC's interview with Appellant. SA NC initially read Appellant his Article 31, UCMJ, rights and stated, "I am investigating the alleged offense of Article 134, possession of child pornography, of which you are suspected." (R. at 236; Pros. Ex. 7.) The conversation later continued:

> SA NC: Yeah. So, you'll remember when I read you, so why you think I'm reading you for that exactly.

> Appellant: Because I am in possession of it. It's on my phone. Yes. Sure. That's the only place I'm pretty sure it's on, my phone. Yeah.
>
> SA NC: Okay.
>
> Appellant: I totally say it's true. It's a mental illness, actually. I don't actually like, use it, but it is like a hobby, like collecting it, just for fun.

(R.at 239-40; Pros. Ex. 7.)

Later in the interview, an AFOSI SA asked Appellant, "back in April of this year, something was uploaded from your Discord account through Discord servers, you know, that was flagged as the same kind of thing we're talking about right now. Why would that be?" (R. at 240; Pros. Ex. 7.) Appellant responded as follows:

> For April? I think I got mad at a server — or there was some server I was part of, I got mad, so I bot spammed them with those. I found a picture. Like, I didn't even upload it based on the actual image, I uploaded it based on a link. Not like, a web browser link, but a Discord link. So, it was like, you know, when you copy images on Discord, you get like the Discord.com/attachment/blahblahblah, it was one of those. And so yeah, I just copied and pasted that over into Discord and my bot just spammed it in the server.

(Id.) Appellant said he did not remember what the picture was. (R. at 241; Pros. Ex. 7.) Appellant stated that he uploaded the image from his phone. (R. at 245; Pros. Ex. 7.) Appellant and an AFOSI SA continued:

> AFOSI SA: So, here's the thing, I know that you had to have been in one of the folders more recently than that. I don't know if it was the cloud or your phone necessarily. But the image that got referred to us from Discord, it wasn't like, a link, like you were saying before. It was like the actual image was uploaded, like from your phone.
>
> Appellant: Yeah, so, it's uploaded from my phone, like from the gallery, but like, I didn't actually go in there. I just went to my recents and just clicked on one. And then, I just copied that image, and that's how I did it.

AFOSI SA: Okay.

Appellant: Because like, you ——

[Indiscernible. Speaking over each other.]

AFOSI SA: —— It wasn't a link, you copied the image?

Appellant: So, I copied the image from Discord. I don't know if that's hard to understand. Like, you send it to an empty chat that nobody's in, then you're able to right-click it, then you can copy the link and it turns it into a link image.

AFOSI SA: All right. So, you first put the image on Discord from your recents?

Appellant: Yeah. So, I first put the image ——

AFOSI SA: Like an empty chat?

Appellant: Yeah. And then I right-clicked it, and then I copied the link, and then I put it in the chat.

AFOSI SA: But you see where I'm coming from, in order for you to do that, you had to be in the album ——

Appellant: —— Yeah, yeah, yeah ——

AFOSI SA: —— more recently than that. Is that something that you do often when you're going in ——

Appellant: No. Just randomly going in, just picking a photo and putting it on there just so I can get the server banned.

(R. at 245-46.)

Regarding Appellant's statement about Discord images and links, SA NC testified that "when you upload an image to a Discord server or to your own server and a URL link is generated, which you can then send to other individuals, that links that individual back to

the image that you upload." (R. at 249.) When someone clicks on that link, SA CP said, "it should display the image on the computer, it redirects a user to a webpage, if you will, with primarily just the image displayed." (R. at 250.)

AFOSI also searched Appellant's cellular phone. (R. at 254.) The phone was sent to DC3 for a forensic extraction. SA NC said he received back from DC3 a hard drive "with all of their findings, all of the images of child pornography they were able to recover from his phone, the SD card . . . ." (R. at 256.)

SA NC said he viewed the image associated with the NCMEC tip line report and an image contained on the hard drive received from DC3. SA NC said he received a "sanitized" version of the image associated with the CyberTipline report, adding that "sanitized" meant that a sticky note had been placed over the child's genitalia, "but you could still see the color of her shirt, the way her legs were arranged, her hair, things of that nature." (R. at 257.) SA NC said he first "compared the sanitized copy to the image we had identified in the DC3 report, the physical aspects of both images were exactly the same, including her, like her shirt color, her hair, the arrangement of her legs." (R. at 258.) SA NC additionally reviewed the MD5 hash values of the two images, stating, "the MD5 hash value of the DC3 image that was returned matched the hash value from the NCMEC cyber tip report." (Id.) SA NC then testified that the image at Prosecution Exhibit 2 is the same image that was reviewed in the DC3 return as well as the same image that corresponded with the sanitized version he received that was associated with the NCMEC tip line report. (R. at 259.)

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

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING PROSECUTION EXHIBITS 1 AND 2.

Standard of Review

Whether a statement is testimonial for purposes of the Sixth Amendment is a question of law this Court review de novo. United States v. Baas, 80 M.J. 114, 120 (C.A.A.F. 2020) (citation omitted). If a violation of the Confrontation Clause is found, this Court cannot affirm the decision unless it is convinced beyond a reasonable doubt that the error was harmless. *See* United States v. Rankin, 64 M.J. 348, 353 (C.A.A.F. 2007). This "standard is met where a court is confident that there was no reasonable possibility that the error might have contributed to the conviction." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (*citing* United States v. Chapman, 386 U.S. 18, 24 (1967)).

Law

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (footnote omitted).

"Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). "Although not every business record is necessarily

nontestimonial . . . the characteristics that distinguish documents prepared 'in the course of a regularly conducted business activity' from those prepared 'in anticipation of litigation' under [Mil. R. Evid.] 803(6) . . . are also indicative of an administrative purpose rather than an evidentiary purpose." United States v. Tearman, 72 M.J. 54, 61 (C.A.A.F. 2013).

"[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) (*quoting* United States v. Blazier, 68 M.J. 439, 442 (C.A.A.F. 2010)). "[M]achine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not 'testimonial.'" United States v. Blazier, 69 M.J. 218, 224 (C.A.A.F. 2010) (*citing* United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008); United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008); 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")). Chain of custody documents may also be non-testimonial. Tearman, 72 M.J. at 59.

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

Appellant contends the military judge erred by admitting Prosecution Exhibit 1, the NCMEC CyberTipline report, and Prosecution Exhibit 2, the accompanying image to the report,

because Prosecution Exhibit 1 contained testimonial statements in violation of the Confrontation Clause. Appellant's claim does not warrant relief.

- *Prosecution Exhibit 2*

Prosecution Exhibit 2 is an image, not a statement, and is therefore not hearsay. *See* United States v. Clotaire, 963 F.3d 1288, 1295 (11th Cir. 2020), cert. denied, 141 S. Ct. 1743, 209 L. Ed. 2d 508 (2021) ("Still frame pictures are not statements"); United States v. Lizarraga-Tirado, 789 F.3d 1107, 1109 (9th Cir. 2015) ("a photograph isn't hearsay because it makes no 'assertion'").

Recently, this Court faced a similar set of circumstances in United States v. Fernandez, ACM 40290 (f rev), 2024 CCA LEXIS 7 (A.F. Ct. Crim. App. 9 January 2024). There, Facebook, like Discord, Inc. here, sent NCMEC a CyberTip and uploaded videos to accompany the report. There, like here, the Government introduced a similar NCMEC CyberTipline report as a prosecution exhibit (there Prosecution Exhibit 4), and introduced the accompanying videos uploaded with the report as a separate prosecution exhibit (there Prosecution Exhibit 5).

Though he did not object at trial, the appellant claimed a Confrontation Clause violation on appeal. Id. at *23-24. Noting that the appellant and the Government disagreed as to whether the CyberTipline report contained "testimonial statements" for Confrontational Clause purposes, this Court instead assumed error as it related to the report and jumped to a prejudice analysis. Recognizing that even under a plain error review that the prejudice analysis remained under a "harmless beyond a reasonable doubt" standard (due to the issue being constitutional), this court, citing Tovarchavez, found no reasonable possibility that the asserted error influenced the guilty finding. As it relates to the videos accompanying the CyberTipline Report, this Court held the exclusion of CyberTipline report (Prosecution Exhibit 4) would not have been fatal to the

admission of the two videos of apparent child pornography in Prosecution Exhibit 5, which the Government admitted through the testimony of a New Mexico Attorney General criminal analysis. This Court held the videos were not testimonial statements and therefore did not implicate the Confrontation Clause.

Here, like in Fernandez, the image at Prosecution Exhibit 2 is not a testimonial statement and, thus, does not implicate the Confrontation Clause. His claim here that the image was testimonial and admitted in violation of his right to confrontation is unsupported and should be denied.

- *Prosecution Exhibit 1*
    - *Prosecution Exhibit 1 was offered as and is a business record that is admissible absent confrontation because it was created as part of the administration of NCMEC's affairs and not "in anticipation of litigation." See Melendez-Diaz, 557 U.S. at 324; see also Tearman, 72, M.J. at 61.*

Mr. JS's affidavit states that the CyberTipline began operating in 1998 in furtherance of NCMEC's mission and was "created to allow persons to report online (and via toll-free telephone) the enticement of children for sexual acts, child sexual molestation, child pornography, child sex tourism, child sex trafficking, unsolicited obscene materials sent to a child, misleading domain names, misleading words or digital images on the internet." (App. Ex. XII at 1.)

Further, the report itself highlights the purpose of the CyberTipline and the overall Child Victim Identification Program. (*See* Pros. Ex. 1.) The report states:

> To further our mission to *help finding missing children, reduce child sexual exploitation, and prevent future victimization*, NCMEC operates the CyberTipline and Child Victim Identification Program. NCMEC makes information submitted to the CyberTipline and Child Victim Identification Program available to law enforcement and also uses this information to *help identify trends and create child safety and prevention message*. As a clearinghouse, NCMEC

> also works with Electronic Service Providers, law enforcement and the public in a combined effort *to reduce online child abuse images*.

(Id.) (emphasis added.) Notably, the words "litigation," "prosecution," or "trial" are not mentioned. While NCMEC does make information submitted to the CyberTipline "available to the appropriate law enforcement agency for its review and *potential* investigation,"[1] the primary purpose of the CyberTipline is to (1) "To further our mission to help finding missing children, reduce child sexual exploitation, and prevent future victimization,;" (2) "to help identify trends and create child safety and prevention message;" and (3) "to reduce online child abuse images." (*See* Pros. Ex. 1 at 1.)

This use is quite opposite to the records at issue in Melendez-Diaz, Blazier, Sweeney, and Tearman. In Melendez-Diaz, the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to the petitioner was cocaine of a certain quality. Melendez-Diaz, 557 U.S. at 305. In Blazier, the evidence at issue was a drug testing report, including a cover memoranda that was prepared in response to a Government request for use at a court-martial. Blazier, 69 M.J. at 220. In Sweeney, the evidence at issue was a DD Form 2624 certification that was completed and signed by a laboratory official after all testing was complete, indicated that the sample tested positive for cocaine and codeine, id., and certified that the "laboratory results [on the DD Form 2624] were correctly determined by proper laboratory procedures, and that they are correctly annotated." Sweeney, 70 M.J. at 299, 304.

Here, in contrast, NCMEC did not review the image at issue prior to creating the report, and there was (1) no testing done on the image; (2) no certificates of analysis (or any analysis at all for that matter) done regarding the image; (3) no certification that the image was, in fact,

[1] *See* 34 U.S.C. §11293(b)(1)(K)(i) (contained within App. Ex. XIII at 2.) (emphasis added.)

child pornography; and (4) most importantly, nothing was prepared in response to a Government request for use at trial. Instead, as was its normal and regular course of business for *millions* of tips received from ESPs each year[2], NCMEC received a tip from Discord, Inc. in this case and automatically created the report contained in Prosecution Exhibit 1. The military judge, having reviewed the exhibit, Mr. JS's affidavit, and hearing Ms. BA's testimony firsthand, found as such when he correctly held the "report meets the exception of hearsay under M.R.E. 803(6), record of regularly conducted activity; the record was made at or near the time of the event, the record was kept in the course of regular conducted activity of the NCMEC nonprofit organization, the record was and is a regular practice of that activity." (R. at 187.)

As shown, the record shows the NCMEC report was not generated in anticipation of litigation, but was instead generated (1) to further NCMEC's "mission to help finding missing children, reduce child sexual exploitation, and prevent future victimization,;" (2) "to help identify trends and create child safety and prevention message;" and (3) "to reduce online child abuse images." (*See* Pros. Ex. 1 at 1.) Accordingly, the report is a business record that is not testimonial in nature. As such, Appellant's claim must fail.

- *Even if this Court finds the report does not qualify as a business record, the report is still not 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.[3] (App. Ex. XII, ¶ 6.) Section A contains information submitted by the reporting ESP (in this case, Discord, Inc.). (Id. at ¶ 7.)

[2] Ms. BA testified that NCMEC "received over 29.1 million reports" from ESPs in the past year. (R. at 201.)

[3] The Government did not seek to admit Section D of the report and Section D is not contained in Prosecution Exhibit 1.

The affidavit states, "NCMEC staff cannot revise or edit any information contained in Section A." (Id. at ¶ 7.) While the record is unclear whether the information provided by Discord, Inc., was submitted by an automated process or by a human (BP, as Appellant believes), all the account and file information Discord provided to NCMEC in Section A of the CyberTipline report appears to be machine-generated information such as a user email address, screenname, user ID, file names, MD5 hashtag information, a URL address, and an IP address. (*See* Pros. Ex. 1, Section A.) Since machines are not declarants, the account and file information provided by Discord, Inc., are not "statements," are not hearsay, and the data is therefore not "testimonial." Blazier, 69 M.J. at 224.

Section B contains "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. 1 at 5.) 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.[4]

Section C contains "additional information compiled and documented by NCMEC based on the information submitted in Section A." (Id. at ¶ 9.) According to the report itself, Section C "contains information collected by NCMEC staff based on the information electronically submitted by the Reporting Person, NCMEC Call Center or Reporting ESP. Section C may contain a variety of additional information, including data gathered from queries or publicly-available, open-source websites." (Pros. Ex. 1 at 6.)

[4] Appellant seems to concede Section B is machine-generated information within his brief at page 13.

At first blush, this section could certainly contain testimonial hearsay if a human from NCMEC provided analysis or input. However, at the time this report was generated, no one from NCMEC had viewed the suspected images flagged by Discord, Inc. In Section C, under "Additional Information Provided by NCMEC," the report reads: "Please be advised that NCMEC staff have not opened or viewed any uploaded files submitted with this report at this time and have no information concerning the content of the uploaded files other than information provided in the report by the ESP." (Pros. Ex. 1 at 6.) The CyberTipline report again repeats on pages 1 and 7 that no one from NCMEC had viewed the uploaded files. (Id. at 1, 7.) Since no one from NCMEC ever viewed the suspected images, Prosecution Exhibit 1 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. The report was also not admitted to prove that the

image at Prosecution Exhibit 2 was, in fact, child pornography. Therefore, Prosecution Exhibit 1 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 classifying that the image at Prosecution Exhibit 2 was, in fact, child pornography. On the contrary, the NCMEC system classified the images Discord reported as "Apparent Child Pornography (Unconfirmed)." (Pros. Ex. 1 at 1.) 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 file at

issue was child pornography. *See* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11, (2009).

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. 7 April 2023). However, it is unclear what information was contained in the CyberTipline report offered in Moss. More important, the issue of whether the report qualified as a business record hearsay exception was never raised in that case because the appellant and his counsel, for defense strategy purposes, never objected to the introduction of the report into evidence. Had the defense in that case objected to the introduction of the CyberTipline report, the business record exception would have undoubtedly come into play from the Government's standpoint, as well as whether or not the report was testimonial in nature.

- *Appellant's Arguments*

The crux of Appellant's arguments seems to center on Section A of the CyberTipline report, namely the information provided by Discord, Inc. (which Appellant continuously refers to as BR's actions), as Appellant argues that "B.F's report, including the uploaded file, was testimonial." (App. Br. at 9.) However, in doing so, Appellant continually conflates Discord Inc.'s actions with NCMEC's actions. For instance, Appellant first claims that Discord, Inc.'s primary purpose in utilizing NCMEC's CyberTipline was for "evidentiary purposes," but then backs his argument by stating the purpose of NCMEC's CyberTipline. (Id. at 9-10.)

Yet, even then, Appellant misstates the purpose of the CyberTipline by claiming that it is "unique" to NCMEC's overall mission "to find missing children through the use of its 24-hour

toll-free hotline and coordination with the national communications system." (App. Br. at 10.) However, as noted above, Mr. JS's affidavit shows otherwise as he states that the CyberTipline began operating in 1998 in furtherance of NCMEC's mission and was "created to allow persons to report online (and via toll-free telephone) the enticement of children for sexual acts, child sexual molestation, child pornography, child sex tourism, child sex trafficking, unsolicited obscene materials sent to a child, misleading domain names, misleading words or digital images on the internet." (App. Ex. XII at 1.)

Further, the report itself highlights the purpose of the CyberTipline and the overall Child Victim Identification Program, stating that the primary purpose of the CyberTipline is to (1) "To further our mission to help finding missing children, reduce child sexual exploitation, and prevent future victimization,;" (2) "to help identify trends and create child safety and prevention message;" and (3) "to reduce online child abuse images." (*See* Pros. Ex. 1 at 1.). Notably, "evidentiary purposes" is not mentioned.

Appellant next claims "when B.F. reported to NCMEC's CyberTipline, NCMEC was acting as an arm of the government" and that NCMEC is a "government entity." (App. Br. at 10.) To start, Appellant's argument here goes against a statement made by Appellant's own counsel at trial who stated, "So, first off, it's been established here today that Discord and NCMEC are not law enforcement agents, right?" (R. at 310.) Yet, aside from his defense counsel's statement, Appellant's argument here focuses on NCMEC, not Discord, Inc. In doing so, Appellant relies on a federal circuit case that held that NCMEC qualified as a government entity. (Id. at 10-11.) But the case Appellant 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 were a government or law enforcement entity, that has no bearing on sections B and C of the CyberTipline report (i.e., the sections auto-generated by NCMEC) because they were machine-generated data and machine-generated data, even those made by law enforcement entities, are still not testimonial hearsay.

Yet, Appellant's claim ("B.F.'s report . . . was testimonial)[5] centers on Discord Inc.'s submission to NCMEC that is contained in Section A of the report. Thus, even if NCMEC is considered a government entity, the same can hardly be said for Discord, Inc. Moreover, Appellant cannot claim that Discord, Inc. acted as an agent to NCMEC's principal since NCMEC participation in this case began only after Discord, Inc. sent NCMEC the CyberTip.

The Government also acknowledges another federal circuit case, United States v. Cameron, 699 F.3d 621 (1st Cir. 2012), in which the First Circuit held that an ESP's (in that case Yahoo's) report to NCMEC's CyberTipline constituted testimonial hearsay because the report was made by a person at Yahoo with knowledge of the contents. That court also held that Yahoo's report to NCMEC did not qualify as a business record because it was made for the primary purpose to establish or prove past events potentially relevant to later criminal prosecution. Id. at 643. That court then held that the NCMEC CyberTipline report was testimonial because it contained the Yahoo report. Id. at 649.

To start, the Cameron decision, which is not binding on this Court, was a sharply divided 2-1 decision where the dissenting judge held that the business records at issue did not contain

[5] *See* App. Br. at 9.

testimonial statements. *See* Cameron 699 F.3d at 654. Further, to undersigned counsel's knowledge, no other federal Court has ever held that NCMEC's report is not a business record.

Moreover, the reports at issue in Cameron (it appears that case involved multiple reports from NCMEC) appear to be different reports than the report at issue in this case. While the Cameron court refers to the report in that case similarly as a "CyberTipline Report," it appears multiple reports were introduced that included "separate, independent statements" from NCMEC employees who also "analyzed the underlying information in the Image Upload Data." Id. at 650. Moreover, the NCMEC reports at issue in that case stated on their face, "Law enforcement officials please be advised: this Report is being provided solely for the purpose of a law enforcement investigation into possible criminal behavior." Id. at 651.

Here, however, the record shows no NCMEC employee reviewed the uploaded image or performed any analysis. More importantly, the report at issue in this case has a wholly different purpose than the reports in Cameron. Here, the record provides significant evidence that the NCMEC report in this case was generated (1) to further NCMEC's "mission to help finding missing children, reduce child sexual exploitation, and prevent future victimization,;" (2) "to help identify trends and create child safety and prevention message;" and (3) "to reduce online child abuse images." (Pros. Ex. 1; *see also* App. Ex. XII.) Thus, as opposed to the reports at issue in Cameron, the report in this case was *not* generated in anticipation of litigation. This evidence separates Appellant's case from Cameron and highlights how the report at issue in this case was a business record that did not contain testimonial hearsay.

- *Prejudice*

Yet, even if this Court finds Prosecution Exhibit 1 was admitted in error, there is no reasonable possibility that the asserted error influenced the guilty finding. First, as detailed

above, the exclusion of the CyperTipline Report would not have been fatal to the admission of the image at Prosecution 2 since it was admitted through other testimony.[6]

Next, even if Prosecution Exhibit 1 had not been admitted, the Government introduced a bevy of more probative evidence showing Appellant distributed the image of child pornography, starting with Appellant's statement to AFOSI. *See* United States v. Bates, 665 Fed. Appx. 810, 815 (11th Cir. Fla., Nov. 29, 2016) ("But unlike Cameron, the reports here were not "the only evidence that was introduced"" to prove the government's charges." (*quoting* Cameron, 699 F.3d at 653.)

Appellant told AFOSI that he had child pornography pictures on his phone and that he uploaded a picture to Discord from his phone. Though he could not remember exactly what picture he uploaded, Appellant stated that he uploaded the particular picture for the express purpose of getting a Discord server banned. Next, the image that was uploaded to Discord and reported by Discord to NCMEC matched an image found of Appellant's cellular phone. Ms. BA stated that she viewed the image associated with the CyberTipline report and that both the report and the image were forwarded to law enforcement. SA NC testified that the FBI received the report and image from NCMEC and then forwarded the report to AFOSI Headquarters. (R. at 214-215.) SA CP testified that the FBI reviewed the image received by NCMEC and verified that image was suspected child pornography. (R. at 207.) SA NC then testified that he reviewed a "sanitized" version of the image (which had a sticky note over the child's genitalia but otherwise showed the remainder of the image) and stated that it matched both the image at

[6] While Appellant challenges the admissibility of Prosecution Exhibit 2 on authentication grounds in Issue II, the Government's response to Appellant's claims there show the military judge did not err in admitting Prosecution Exhibit 2.

Prosecution Exhibit 2 and an image that was found on Appellant's phone through the DC3 report. (R. at 258-59.)

Additionally, the Discord account report at Prosecution Exhibit 8 is Appellant's account based on the account having a phone number ending in "3429." SA NC testified that this cellular phone number matched Appellant's phone number found on the Nellis alpha roster. (R. at 220.) The Discord account report shows Appellant had numerous sessions on Discord in April 2020 using an IP address associated with Nellis Air Force Base. (*See* Pros. Exs. 8, 9.)

Thus, even if Prosecution Exhibit 1 was not admitted, evidence independent of the CyberTipline report overwhelming prove Appellant distributed child pornography on Discord. Appellant said he intentionally uploaded a picture with the express purpose to get a server banned in April 2020. The child pornography image uploaded to Discord matched a child pornography image found on Appellant's phone. And Discord account documents show Appellant's Discord account accessed Discord numerous times in April 2020 from Nellis Air Force Base. While Prosecution Exhibit 1 provided additional ties between Appellant and the account that uploaded the image (including the "ilovelolicons" email address and the Discord user id and user name), these added ties were cumulative to other evidence independent of Prosecution Exhibit 1 that directly tied Appellant to the uploaded child pornography image (including Appellant's own admission, Prosecution Exhibit 2, images found on Appellant's phone, the Discord account report, and the Nellis Alpha Roster). Thus, there is no reasonable possibility that the admission of Prosecution Exhibit 1 might have contributed to the conviction.

Still, Appellant believes he was prejudiced, citing to an unpublished case from our sister Court, United States v. Henderson, No. ARMY 20090613, 2012 CCA LEXIS 205, at *13 (A. Ct. Crim. App. 1 June 2012). That case, centering on drug use, involved the admission of three

litigation packets that the prosecution conceded included "substantial testimonial evidence." The Army Court found prejudice because, even though the Government introduced evidence that did not violate the Confrontation Clause, "including appellant's own incriminating admissions and the portions of the reports that are not testimonial," "there is a reasonable probability that at least some of the evidence complained of contributed to the finding of guilty." Id. However, from the Army Court's initial decision in Henderson, the corroboration for the appellant's confession appears to have come in large part from the litigation packets that were later ruled inadmissible. *See* United States v. Henderson, No. ARMY 20090613, 2011 CCA LEXIS 107, at *20 (A. Ct. Crim. App. 1 June 2012).

Here, however, in contrast to Henderson where corroboration of the Appellant's admissions appears to hinge on inadmissible evidence, Appellant's incriminating admissions can be corroborated independent of the CyperTipline report. As detailed above, the child pornography image at Prosecution 2, which is not testimonial, matched an image found on Appellant's phone. This, along with Appellant's admission that he had child pornography images on his phone and uploaded an image to Discord for the expressed purpose of getting a server banned, along with his Discord account being accessed numerous times during the timeframe Appellant said he uploaded the image from an IP address located on Nellis Air Force Base, shows a vast difference from the scenario in the unpublished Henderson case.

All told, the NCMEC CyberTipline Report is a business record and not testimonial hearsay. However, even if this Court were to assume it was inadmissible, there is "no reasonable possibility the asserted error influenced the guilty finding" in this judge alone case.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING PROSECUTION EXHIBITS 2, 4, 5, AND 6.

Standard of Review

This court reviews a military judge's decision to admit evidence for an abuse of discretion. United States v. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013) (citation omitted).

However, in order to preserve a claim of error resulting from a military judge's decision to admit evidence, Mil. R. Evid. 103(a)(1) generally requires a party to make a timely objection and state the specific ground for the objection unless it is apparent from the context. If the party fails to preserve such a claim, it is forfeited and the ruling is reviewed for plain error. United States v. Reynoso, 66 M.J. 208, 210 (C.A.A.F. 2008).

Law

A general objection for lack of foundation, while not mentioning any issue of authentication, forfeits any authentication claim absent plain error. *See* United States v. Dadona, ACM 39202, 2018 CCA LEXIS 325 (A.F. Ct. Crim. App. 2 July 2018) ("Because the Defense objected to the admission of Prosecution Exhibits 1 and 3 for lack of foundation, not authentication, and because authentication was not an apparent basis for the objection, we consider Appellant's instant claim forfeited. Accordingly, we reviewed the military judge's ruling to admit Prosecution Exhibits 1 and 3 for plain error."); *see also* United States v. Eberhart, 467 F.3d 659, 667 (7th Cir. 2006) (holding that plain error review is appropriate when general "foundation" objections did not "sufficiently advise[] the district court and the government that Eberhart was contesting the authentication of the tapes," and that a "foundation" objection is "simply a loose term for preliminary questions designed to establish that evidence is admissible"

and is not usually specific enough to preserve an alleged error on appeal") (*citing* A.I. Credit Corp. v. Legion Ins. Co., 265 F.3d 630, 637-38 (7th Cir. 2001); United States v. Barker, 27 F.3d 1287, 1292 (7th Cir. 1994).)

"When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." United States v. Hays, 62 M.J. 158, 166 (C.A.A.F. 2005) (*quoting* United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000)). This is because a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence . . . ." Robbins, 52 M.J. at 457 (citation omitted). Therefore, "plain error before a military judge sitting alone is rare indeed." Id. (*quoting* United States v. Raya, 45 M.J. 251, 253 (C.A.A.F. 1996)) (additional citation omitted).

The requirement of authentication is satisfied by "evidence sufficient to support a finding that the item is what the proponent claims it is." Mil. R. Evid. 901(a). The proponent "needs only to make a prima facie showing" for the item to be admitted as authenticated, and any "flaws in the authentication . . . go to the weight of the evidence instead of its admissibility." United States v. Lubich, 72 M.J. 170, 174 (C.A.A.F. 2013).

Analysis

- *Prosecution Exhibit 2*

Additional Facts

When the Government sought to admit Prosecution Exhibits 1 and 2, Appellant's counsel objected on the basis of testimonial hearsay. (R. at 163-64.) After further discussion, Appellant's counsel added "lack of foundation" as he discussed various portions of Prosecution Exhibit 1. (R. at 168-69, 171, 172, 175.) After additional argument, the military judge asked Appellant's counsel again the basis for his objection. Appellant's counsel responded,

"Testimonial hearsay, foundation, and to the extent it's being used for effect on the listener, lacks foundation, and relevance." (R. at 186.)

As noted in Issue I, the military judge held the CyberTipline report met the business record hearsay exception. (R. at 187.) The Government then sought to introduce the image at Prosecution Exhibit 2. Appellant's counsel first stated, "Prosecution Exhibit 2, there's no objection to hearsay there . . . The NCMEC report contained the image. So, to that end, again . . . This is a continuing objection . . . Same as Prosecution Exhibit 1." (R. at 188-89.) The military judge overruled the objection and admitted Prosecution Exhibit 2. (R. at 189.)

Analysis

Here, Appellant again attacks Prosecution Exhibit 2, this time arguing that the Government "failed to authenticate" it.[7] (App. Br. at 21.) Appellant claims the Government failed to introduce evidence that Prosecution Exhibit 2 was the image that was found on Discord and uploaded to NCMEC as a part of the CyberTipline Report," adding that the Government "did not call anyone to testify that Prosecution Exhibit 2 was the image that was found on Discord." (Id. at 21-22.)

However, Appellant never objected to Prosecution Exhibit 2 for the purpose of authentication. Instead, Appellant only objected to Prosecution Exhibit 2 as he did to Prosecution Exhibit 1 (considering Appellant's counsel stated, "This is a continuing objection . . . Same as Prosecution Exhibit 1"), which was limited to "Testimonial hearsay, foundation, and to

[7] While Appellant titled his issue with the word "foundation," Appellant's arguments claim that the "government failed to authenticate Prosecution Exhibit 2." (*See* App. Br. at 21.) The word "foundation" is not mentioned in the analysis section discussing Prosecution Exhibit 2, that being under the "1." subheading. (*See* Id. at 21-22.)

the extent it's being used for effect on the listener, lacks foundation, and relevance." (*See* R. at 186.)

Since Appellant never objected to the admission of Prosecution Exhibit 2 due to authentication issues, this Court should view his instant claim as forfeited and review only for plain error. *See* Dadona, ACM 39202, 2018 CCA LEXIS 325; *see also* Eberhart, 467 F.3d at 667.

Here, Ms. BA stated that she viewed the image associated with the CyberTipline report and that both the report and the image were forwarded to law enforcement. SA NC testified that the FBI received the report and image from NCMEC and then forwarded the report to AFOSI Headquarters. (R. at 214-215.) SA CP testified that the FBI reviewed the image received by NCMEC and verified that image was suspected child pornography. (R. at 207.) SA NC then testified that he reviewed a "sanitized" version of the image (which had a sticky note over the child's genitalia but otherwise showed the remainder of the image) and stated that it matched both the image at Prosecution Exhibit 2 and an image that was found on Appellant's phone through the DC3 report.[8] (R. at 258-59.)

Additionally, Appellant's argument that the Government "did not call anyone to testify that Prosecution Exhibit 2 was the image that was found on Discord" is one more centered toward factual sufficiency, not the authentication of the image itself. Here, the Government, at a minimum, produced "evidence sufficient to support a finding that the item is what the proponent

[8] Though any authentication concern is cured by the facts above, should this Court find the NCMEC CyberTipline report at Prosecution Exhibit 1 was not admitted in error, the report provides additional authentication. For instance, SA NC testified that he reviewed the MD5 hash values of the image found on Appellant's phone and the image from the CyberTipline report and stated, "the MD5 hash value of the DC3 image that was returned matched the hash value from the NCMEC cyber tip report." (R. at 258.)

claims it is," and provided the military judge a "prima facie showing" for the item to be admitted as authenticated. *See* Mil. R. Evid. 901(a); Lubich, 72 M.J. at 174. Further, as addressed in Lubich, "flaws in the authentication . . . go to the weight of the evidence instead of its admissibility." As a result, Appellant has failed to overcome his particularly high hurdle of showing plain error in the military judge's admission of Prosecution Exhibit 2.

- *Prosecution Exhibits 4, 5 and 6*

Additional Facts

When the Government sought to admit Prosecution Exhibit 4, Appellant's counsel objected on the basis of "foundation" and "personal knowledge." (R. at 223.) The military judge overruled the objection and admitted Prosecution Exhibit 4. (Id.)

When the Government sought to admit Prosecution Exhibit 5, Appellant's counsel again objected on the basis of "foundation" and "personal knowledge." (R. at 226-27.) The military judge overruled the objection and admitted Prosecution Exhibit 5. (R. at 227.)

When the Government sought to admit Prosecution Exhibit 6, Appellant's counsel again objected on the basis of "foundation." (R. at 229.) The military judge overruled the objection and admitted Prosecution Exhibit 6. (Id.)

Analysis

Here, Appellant attacks Prosecution Exhibits 4, 5, and 6 as a group, arguing that the Government "failed to authenticate" them.[9] (App. Br. at 23.) Appellant claims that SA NC did not have personal knowledge of the objects depicted in the photographs, was not present at the

[9] Again, while Appellant titled his issue with the word "foundation," Appellant's arguments claim that the "government failed to authenticate Prosecution Exhibits 4, 5, and 6." (*See* App. Br. at 23.) The word "foundation" is not mentioned in the analysis section discussing Prosecution Exhibits 4, 5, and 6, that being under the "2." subheading. (*See* Id. at 23-24.)

search of Appellant's work station or dorm room, and that no one testified that the images were fair and accurate depictions of the objects. (Id. at 23.)

However, Appellant never objected to these Prosecution exhibits for the purpose of authentication. Instead, Appellant only objected to these exhibitions for foundation purposes. As Appellant never objected to the admission of these exhibits due to authentication issues, this Court should view his instant claim as forfeited and review only for plain error. *See* Dadona, ACM 39202, 2018 CCA LEXIS 325; *see also* Eberhart, 467 F.3d at 667.

Here, SA NC testified that Prosecution Exhibit 4 was taken during the search of Appellant's work station and that, while he was not "personally at the search," "the individuals who did search [Appellant's] work section brought them back, so we keep them together." (R. at 221.) SA NC explained that once pictures are taken "they're put onto our drive so that we can collate them, collect them into one document and include them in our report of investigation," adding that the photos are maintained digitally, physically (printed out) and retained on the camera. (R. at 222.) SA NC testified that only AFOSI members have access to the pictures and that the picture at Prosecution Exhibit 4 was a fair and accurate representation of the picture that was taken at Appellant's work center. (Id.) SA NC testified similarly to Prosecution Exhibits 5 and 6, both of which were taken at Appellant's dorm room. (R. at 225-226.)

Here, SA NC confirmed that the pictures at issue were taken during the searches of Appellant's work section and dorm room and that they were maintained in accordance with AFOSI procedures. Thus, the Government, at a minimum, produced "evidence sufficient to support a finding that the item is what the proponent claims it is," and provided the military judge a "prima facie showing" for the item to be admitted as authenticated. *See* Mil. R. Evid. 901(a); Lubich, 72 M.J. at 174. Further, as addressed in Lubich, "flaws in the authentication . . .

go to the weight of the evidence instead of its admissibility." As a result, Appellant has failed to overcome his particularly high hurdle of showing plain error in the military judge's admission of Prosecution Exhibits, 4, 5, and 6, a feat that is "rare indeed" with a military judge sitting alone. *See* Robbins, 52 M.J. at 457.

Moreover, Appellant has shown no material prejudice; that is, a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *See* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). While these exhibits linked Appellant to the CyberTip report (Prosecution Exhibits 4 and 6) and showed his affinity for anime women (Prosecution Exhibit 5), this evidence was ancillary to the hardest hitting evidence against Appellant – (1) Appellant's admission to having child pornography pictures on his phone and that he uploaded a picture to Discord from his phone for the express purpose of getting a server banned; (2) the child pornography image that was uploaded to Discord and reported by Discord to NCMEC matched a child pornography image found on Appellant's cellular phone; and (3) Appellant's Discord account report, which showed Appellant had numerous sessions on Discord in April 2020 using an IP address associated with Nellis Air Force Base. Considering this evidence, there is no "reasonable probability" that the admission of Prosecution Exhibits 4, 5 or 6 would have changed the outcome of the proceeding, especially considering this was a judge alone trial where plain error is "rare indeed."

Here, Appellant has failed to show any plain error on the part of the military judge and likewise has shown no material prejudice. Thus, his claim must fail.

III.

APPELLANT'S CONVICTION IS FACTUALLY AND LEGALLY SUFFICIENT.

Standard of Review

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

Law[10]

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993). The standard for legal sufficiency involves a very low threshold to sustain a conviction. *See* Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is "convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

[10] Appellant's brief discusses the new standards for a factually sufficiency review. However, because Appellant's offenses occurred prior to 1 January 2021, the prior factual sufficiency review standards apply.

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

Distribution of child pornography is an enumerated Article 134, UCMJ, offense which has two elements: (1) that the accused knowingly and wrongfully distributed child pornography to another; and (2) that under the circumstances the conduct was (as charged) of a nature to bring discredit upon the armed forces. Manual for Courts-Martial (MCM), United States (2019 ed.), pt. IV, para. 95.b.(3). "Distributing" means delivering to the actual or constructive possession of another. Id. at para. 95.c.(6).

"Child pornography" means material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct. Id. at para.c.(4). A "visual depiction" includes any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image. Id. at para.c.(11).

Analysis

A military judge sitting alone at Appellant's court-martial correctly found Appellant guilty of distributing child pornography, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the military

judge with ample evidence to convince him of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's conviction.

Here, Appellant does not question whether the image at Prosecution Exhibit 2 is an image of child pornography nor does he question, if he distributed the child pornography, whether his conduct was of a nature to bring discredit upon the armed forces. Instead, Appellant claims he did not distribute child pornography because, as he claims, "The link did not contain child pornography," and because there is "no evidence that anyone had received the Discord link." (App. Br. at 28-29.) Appellant is incorrect on both counts.

First, relying solely on United States v. Navrestad, 66 M.J. 262, 264 (C.A.A.F. 2008), Appellant claims "the link" Appellant sent "was not a visual depiction." (App. Br. at 28-29.) However, Appellant confuses the evidence in this case, namely his own admissions to AFOSI.

During his interview with AFOSI, Appellant stated that when one uploads an image to Discord, it generates a Discord link. (R. at 240.) However, Appellant then stated, "when you *copy images on Discord*, you get like the Discord.com/attachment/blahblahblah." (Id.) (emphasis added.) Appellant then stated that he "just *copied that image*." (R. at 245.) (emphasis added.) During the interview, the AFOSI SA seemed confused by what Appellant was saying and asked, "It wasn't a link, you copied the image?" (Id.) Appellant then explained that he "copied the image" by going to "an empty chat that nobody's in, then you're able to right-click it, then you can copy the link and *it turns into a link image*." (Id.) (emphasis added.) Appellant then said he "put it in the chat." (R. at 246.)

In other words, Appellant stated that when he copied the Discord link into the chat box within the chat room, the Discord link then "turn[ed] into a link image." From his own admissions, Appellant plainly stated that he did not copy just a link, but instead "copied that

image" by copying the Discord link into the chat that, once posted in the chat, turned into an image.

Yet, even if this Court is not convinced an actual image was posted in the chat within the server, Appellant's case is distinguishable from Navrestad, a sharply divided 3-2 decision based on "unique facts." *See* United States v. Yohe, ACM 37950 (recon), 2015 CCA LEXIS 360 (A.F. Ct. Crim. App. 3 September 2015). There, the appellant sent a hyperlink that led to a Yahoo Briefcase folder that contained images of child pornography. Navrestad, 66 M.J. at 264. Our superior Court held that the hyperlink in question led only "to a website and not a file that contains data that is 'capable of being converted' into visual images." Id. at 266. The Court continued, "the hyperlink here did not start or end as pornography, but was simply a shortcut to a particular web address." Id. Finally, the Court noted that "the hyperlink in this case did not take the recipient directly to any child pornography images," but instead took a user "to a directory of files and had to click on an individual file name in order to view the image." Id.

This case is vastly different. First, the Discord link in this case "starts" *and* "ends" as child pornography. Appellant admitted that when he uploaded the image, which is an image of child pornography, the Discord link was created. Then, testimony showed that once this Discord link was clicked, that a user was taken directly to the child pornography image. Thus, while in Navrestad, the link to a Yahoo Briefcase "did not start or end as pornography," the Discord link in this case both started *and* ended as child pornography.

Second, unlike Navrestad, the Discord link in this case is not simply a link "to a website and not a file." Indeed, a review of the Discord link, which is contained in Prosecution Exhibit 1 at page 4, shows the link ends with the file extension ".jpg." The Navrestad Court noted that a "jpg" is a picture file format used to place images on the internet. *See* Navrestad, 66 M.J. at 266,

fn 9. Here, the Discord link was not only a file, but was a child pornography image. Moreover, again, testimony showed that once this Discord link was clicked, a user was taken directly to the child pornography image file. Further, the file that this Discord link led to was not just to a file that contained "data capable of conversion into a visual image" but, in fact, *was* a file *of* a visual child pornography image.

Finally, unlike Navrestad, the Discord link in this case took a user directly to a child pornography image, not simply a "directory of files" that a user then "had to click on an individual file name in order to view the image." *See* Id. at 266.

As shown, Appellant's attempt to liken his case to Navrestad is unsupported. Therefore, this Court should deny his claim.

Next, Appellant claims that there was no evidence that anyone received the Discord link. (App. Br. at 29.) Appellant is again mistaken.

First, Appellant overstates and places out of context this Court's opinion in United States v. Williams, 74 M.J. 572 (A.F. Ct. Crim. App 2014). In his brief, Appellant states, "[A]nother person must actually receive files of child pornography for a distribution offense to have been committed." (App. Br. at 29, *citing* Williams, 74 M.J. at 578.) However, Appellant leaves out a key piece of that quote, as the full quote from this Court begins, "As these cases indicate, another person must . . . ." *See* Williams, 74 M.J. at 578.

Indeed, in that portion of Williams, this Court was discussing what was at issue in that case – an appellant who was using a peer-to-peer file sharing network and had shared a folder on his computer hard drive. This Court, citing to a litany of cases, was simply stating that in such cases, where an appellant had not proactively done anything besides sharing a folder on his hard drive, another person must actually receive those child pornography files before a distribution

offense is committed. Williams, 74 M.J. at 577-78 (*citing*, for example, United States v. Gorski, 71 M.J. 729, 732 (A. Cr. Crim. App. 2012), which also involved a peer-to-peer sharing system, where our sister court found there was "no evidence that a third party actually downloaded or obtained appellant's contraband files.") Such a holding in that instance is fitting as there would not be "another" who would either actively or constructively possess those files, which is required by the definition of "distributing."

Except here, there is no peer-to-peer sharing software and there is no image that was only on Appellant's hard drive waiting for "another" to come along and download it. Instead, in this case, Appellant took the proactive step to upload the child pornography image to servers owned and controlled by Discord, LLC. Here, Appellant distributed the child pornography image to Discord, LLC, when he uploaded the image to the company's servers, therein "delivering to the actual . . . possession of another," that being Discord, LLC. This act completes the offense and defeats Appellant's claim.

Finally, even without Prosecution Exhibit 1, other testimony and evidence still show that Discord made a report to NCMEC involving a suspected child pornography picture, which serves as circumstantial evidence that someone within Discord received Appellant's Discord link and viewed the image Appellant uploaded. To find otherwise would call into question how or why Discord's report was made in the first place.

In sum, the evidence adduced at trial shows Appellant distributed child pornography. Here, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. Further, this Court, after weighing the evidence in the record of trial and making allowances for not personally observing the witnesses, should equally be convinced of Appellant's guilt beyond a reasonable doubt.

IV.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ.

Law and Analysis

- *Irrespective of its constitutionality, the firearms prohibition is a collateral matter outside the scope of this Court's authority under Article 66, UCMJ.*

This Court has repeatedly rejected the same claim Appellant raises now. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet, Appellant argues here that because our superior Court in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Appendix at 8-9).

In doing so, Appellant repeats similar arguments this Court rejected in multiple cases. In United States v. Maymi, ACM 40332, 2023 CCA LEXIS 491 (A.F. Ct. Crim. App. 5 October 2023), this Court summarily dispatched this issue by stating, "As recognized in United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to direct modification of the 18 U.S.C. § 922 prohibition noted on the staff judge advocate's indorsement."

In United States v. Casillas, ACM 40302, 2023 CCA LEXIS 527 (A.F. Ct. Crim. App. 15 December 2023), this Court denied Appellant's claim, stating that it did not require discussion or warrant relief.

In United States v. Saul, ACM 40341, 2023 CCA LEXIS 546 (A.F. Ct. Crim. App. 29 December 2023), this Court summarily dispatched this issue by stating, "consistent with our reasoning in United States v. Lepore, we find this court lacks authority under Article 66, UCMJ, 10 U.S.C. § 866, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition in the staff judge advocate's indorsement to the STR."

In United States v. Fernandez, ACM 40290 (f rev), 2024 CCA LEXIS 7 (A.F. Ct. Crim. App. 9 January 2024), this Court again denied the claim, finding that no aspect of that appellant's case "cause us to revisit or overrule the decision in Lepore."

In United States v. Jackson, ACM 40310, 2024 CCA LEXIS 9 (A.F. Ct. Crim. App. 11 January 2024), this Court cited Lepore and held, "this court lacks authority under Article 66, UCMJ, to direct modification of that portion of the staff judge advocate's indorsement to the Statement of Trial Results." This Court continued, "We do not read United States v. Lemire, 82 M.J. 263 n* (C.A.A.F. 2022) (unpub. op.), to provide a basis to consider Appellant's claim, as Appellant suggests, when in that case the CAAF merely directed the court-martial promulgating order 'be corrected.'"

In United States v. Denney, ACM 40360, 2024 CCA LEXIS 101 (A.F. Ct. Crim. App. 8 March 2024), this Court denied Appellant's claim, stating that it did not require discussion or warrant relief.

In United States v. Vanzant, __ M.J. __, ACM 22004, 2024 CCA LEXIS 215 (A.F. Ct. Crim. App. 28 May 2024), this Court denied Appellant's claim, stating, "For the reasons stated in Fernandez, we are not persuaded the CAAF's decision in Lemire gives us cause to revisit or overrule Lepore.

Finally, in United States v. Douglas, ACM 40324 (f rev), 2024 CCA LEXIS 254 (A.F. Ct. Crim. App. 27 June 2024), this Court denied Appellant's claim, stating, "As we recognized in Vanzant and Lepore, this court lacks authority to directly modify the 18 U.S.C. § 922 prohibition notation on the staff judge advocate's indorsement to the entry of judgment and Statement of Trial Results." (citations omitted).

Here, Appellant reiterates the same argument from these cases that an asterisk footnote in a summary decision provides this Court jurisdiction to review his claim.[11] However, as this Court has repeated stated over the last six months, it does not. Consistent with those decisions, this Court should continue to follow Lepore and find that it lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. Accordingly, Appellant's claim must fail.

- *The firearms prohibition is constitutional as applied to Appellant because this nation has a historical tradition of disarming the dangerous*.[12]

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald

[11] Appellant also repeatedly relies on United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), a case the Supreme Court recently reversed. *See* United States v. Rahimi, No. 22-915, 2024 U.S. LEXIS 2714 (June 21, 2024).

[12] Although analysis of this assignment of error should start and end with the scope of this Court's jurisdiction, the United States addresses, *arguendo*, Appellant's claim that 18 U.S.C. § 922 is unconstitutional as applied to him.

v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion). "[T]he right was *never* thought to sweep indiscriminately." Rahimi, No. 22-915, 2024 U.S. LEXIS 2714 (June 21, 2024).

While the Amendment guarantees "the right of *law-abiding, responsible citizens* to use arms for self-defense," Bruen, 597 U.S. at 26 (emphasis added), the same cannot be said for those who have broken the law. The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added).

As someone whose right to possess firearms was restricted as a consequence of his conviction, Appellant is in a fundamentally different position than the law-abiding, non-criminal petitioners in Bruen, Heller, and McDonald. Instead, Appellant now falls into a class of non-law-abiding, "irresponsible persons." Barrett, 423 U.S. at 220. And despite his suggestions to the contrary, the fact that Appellant's crime did not involve *physical* violence does not change his situation. Indeed, this nation has a historical tradition of disarming not only violent offenders, but also "dangerous persons." *See* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting "Dangerous" Groups and Outsiders*, DUKE LAW SCHOOL PUBLIC & LEGAL THEORY SERIES NO. 2020-80 (2020). This tradition of disarming the dangerous endures today—in part, through the "longstanding prohibitions on the possession of firearms by felons," which the Supreme Court has identified as "presumptively lawful regulatory measures." Heller, 554 U.S. at 626, 627 n.26.

In the modern age, dangerousness cannot be defined by physical violence alone. As the world has evolved, crime has evolved with it. There are more laws to violate than there were in

the Founding Era and more ways to be dangerous as a result. This is why "the Second Amendment permits more than just those regulations identical to ones that could be found in 1791," because "[h]olding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers." Rahimi, 2024 U.S. LEXIS 2714, at *16.

Appellant's own crime is a prime example of why dangerousness cannot be defined by physical violence alone. The proliferation of child pornography via new media technology is "a relatively recent, albeit pernicious, development." United States v. Leonard, 64 M.J. 381, 383 (C.A.A.F. 2007). It is a "tragedy" that is "sustain[ed] and aggravate[ed]" by "everyone who reproduces, distributes, [and] possesses the images of the victim's abuse." Paroline v. United States, 572 U.S. 434, 436 (2014). Thus, those convicted of such offenses are required to register as sex offenders—even if they did not personally abuse the child. *See* 34 U.S.C. § 20911. Such sex offenders "are a serious threat in this Nation." McKune v. Lile, 536 U.S. 24, 32 (2002).

Further, the materials produced are "a permanent record of the depicted child's abuse, and the harm to the child is exacerbated by [its] circulation." Id. at 440 (alteration in original) (internal quotation marks and citation omitted). Consequently, Appellant poses a real threat to our most vulnerable demographic—the children. *See* McKune, 536 U.S. at 32 ("[T]he victims of sexual assault are most often juveniles.").

Appellant may not be a physically violent offender, but he is a danger to our society nonetheless. *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) ("[The] use of children as … subjects of pornographic materials is very harmful to both the children and the society as a

whole."). Given this nation's historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.[13]

Ultimately, the constitutional question posed here is unrelated to the actual findings and sentence in the case, and therefore outside the scope of this Court's authority. Thus, as discussed above, Appellant is not only unentitled to relief, but also powerless to obtain any from this Court at all.

CONCLUSION

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

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[13] Appellant's citations to various federal circuit court cases are irrelevant, given that they deal with other subsections of 18 U.S.C. § 922 that are not at issue in this case.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 15 July 2024 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 2
Airman (E-2) **JORDAN P. GOODWATER**, United States Air Force, *Appellant.*	)	No. ACM 40304 (f rev) 22 July 2024

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

Appellant, Airman (Amn) Jordan P. Goodwater, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the government's answer, dated 15 July 2024 (Ans.). In addition to the arguments in his opening brief, filed on 14 June 2024 (App. Br.), Amn Goodwater submits the following arguments for the issues listed below.

I.

PROSECUTION EXHIBITS 1 AND 2 WERE TESTIMONIAL AND INTRODUCED INTO EVIDENCE IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION, OVER DEFENSE OBJECTION.

The government and Amn Goodwater agree that this Honorable Court must determine whether the statements contained within the exhibits in question are testimonial. App. Br. at 8-9; Ans. at 11-12. If a statement within the exhibit is testimonial, then it is not admissible absent confrontation, regardless of whether the exhibit qualifies as a business or official record. *Meléndez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009) ("Whether or not they qualify as business or official records, the analysts' statements here--prepared specifically for use at

petitioner's trial--were testimony against petitioner, and the analysts were subject to confrontation under the Sixth Amendment.")

To determine whether a statement is testimonial requires asking whether the statement 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." App. Br. at 9 (citing *Meléndez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)); Ans. at 12 (citing *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011) (quoting *United States v. Blazier*, 69 M.J. 439, 442 (C.A.A.F. 2010), *Crawford*, 541 U.S. at 51-52). Under this test, the focus is on the witness who makes the statement, not the entity that takes or receives the statement.

While the government incorrectly focuses its argument solely on NCMEC's actions and beliefs in creating its report (Ans. at 15 ("NCMEC did not review…"), 16 ("the NCMEC report was not generated in anticipation of litigation"), 23 ("no NCMEC employee reviewed the uploaded image or performed any analysis . . . the report was not generated in anticipation of litigation"), there are multiple statements contained within Prosecution Exhibit 1 that must be analyzed: (1) statements by B.F. contained in Section A of the report and (2) statements by a NCMEC analyst contained in the executive summary of the report and Section C of the report. Pros. Ex. 1.

1. B.F.'s statements are testimonial.

B.F., acting on behalf of Discord Inc., made the statements in question in Section A of Prosecution Exhibit 1. Pros. Ex. 1. Therefore, the focus must be on an objective witness under the same circumstances as B.F. *See Meléndez-Diaz*, 557 U.S at 310 (asking whether the statement 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.") This is why Amn Goodwater focuses his

argument on the circumstances of which an objective witness in B.F.'s position would have been aware, all of which center around what goes into making a CyberTipline report. These circumstances include what Congress's stated purpose was for the NCMEC CyberTipline: to "make reports received through the tipline available to the appropriate law enforcement agency for its review and potential investigation." 34 U.S.C. §11293(b)(1)(K)(i) (contained within App. Ex. XIII at 2). And because B.F. was making a report through the unique medium of the CyberTipline Report webpage, these circumstances include the plainly visible contents of that webpage. *See* App. Ex. XIV. This webpage includes several key pieces of information that would have informed an objective witness in B.F.'s position of the formality of their statements and that their statements would be available for use at a later trial (*see Meléndez-Diaz*, 557 U.S at 310):

a. An objective witness would have encountered the bold notice present at the top of the CyberTipline webpage that states, "Information entered into this report will be made available to law enforcement for possible investigation." App. Ex. XIV at 1.

b. They also would have encountered the messages located in the box on the far right of the page which provides different guidance for the reporting party, depending on what they are reporting. *Id*.

    i. "If you think you have seen a missing child, contact [NCMEC] 24-hours a day, 7 days a week," at the NCMEC 24-Hour Hotline phone number, versus,

    ii. "Report Child Sexual Exploitation," "Use the CyberTipline to report child sexual exploitation. Reports may be made 24-hours a day, 7-days a week online at www.cybertipline.org." *Id*.

c. An objective witness would also have to choose from a dropdown box to confirm what type of child exploitation they were reporting. *Id*. As demonstrated on

Appellate Exhibit XIV, when a witness selects "Child Pornography," a message is displayed which provides the definition of child pornography, citing to 18 U.S.C. § 2256. *Id*. This message also states, "It is a federal crime to possess, manufacture, and/or distribute child pornography," citing to 18 U.S.C. § 2251 et. seq. *Id*.

d. The bottom of this webpage would also explain the website is funded, in part, "through a grant from the Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice."[1] *Id*. at 2.

Moreover, contrary to the government's assertion (Ans. at 20-21), neither J.S.'s affidavit (App. Ex. XII) nor the footer that NCMEC places on the CyberTipline Report (Pros. Ex. 1 at 1) are relevant for this Court's determination of whether B.F.'s statement is testimonial. Both J.S.'s affidavit and the CyberTipline Report were created after B.F.'s statements had already been made. A statement's testimonial nature is evaluated "when made." *Davis v. Washington*, 547 U.S. 813, 822 (2006). Here, because there is no evidence that an objective witness in B.F.'s position would have been aware of this information, this after-the-statement information does not change its original nature from being made with "a focus on court." *Smith v. Arizona*, 602 U.S. ___, 219 L. Ed. 2d 420, 438 (2024) (citation omitted).

Furthermore, contrary to the government's assertion that "all the account information and file information Discord provided to NCMEC in Section A . . . appears to be machine-generated" (Ans. at 17), the information in Section A was not machine-generated. Rather, it was created by

[1] Amn Goodwater is not asserting that B.F. or Discord, Inc. acted as a government agent but rather that an objective witness under the same circumstances would reasonably view NCMEC as an agent of the government, similar to the Tenth Circuit's determination that NCMEC is "a governmental entity" with "special law enforcement duties and powers." *United States v. Ackerman*, 831 F.3d 1292, 1296, 1298 (10th Cir. 2016). Amn Goodwater asserts this impacts an objective witness' understanding of the formality of their statement.

B.F. Pros. Ex. 1 at 3. There is no evidence that Discord Inc. employs named robots, therefore, the only reasonable interpretation of this information is that B.F. is a human-being. B.F. reviewed the uploaded file and determined it was child pornography, presumably considering the definition provided on the CyberTipline reporting webpage. Pros. Ex. 1 at 1; App. Ex. XIV at 1. B.F. then provided whether the contents of the file were publicly available, identified who had the file, what the file was, and when the file was present on Discord. *Id*. These are analytical steps and as the First Circuit explained in *United States v. Cameron*, 699 F.3d 621, 649 (1st Cir. 2012), "[O]ne small analytical step for man can sometimes be one giant leap for Confrontation Clause purposes." In concert with the First Circuit, the Eighth Circuit in *United States v. Juhic*, 954 F.3d 1084, 1089 (8th Cir. 2020), similarly recognized that "[m]achine-generated records usually do not qualify as 'statements' for hearsay purposes but can become hearsay when developed with human input." In *Juhic*, "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*. The same is true here where only after B.F. determined that a file contained child pornography did B.F. provide the information contained in Section A of the CyberTipline report via the CyberTipline. While NCMEC may not have altered the information in Section A, B.F.'s statements within Section A nevertheless remain testimonial hearsay.

2. The NCMEC report also contains testimonial hearsay from NCMEC.

In the executive summary of the CyberTipline Report, provided on page 1 of Prosecution Exhibit 1, the incident type was listed as "Apparent Child Pornography." Pros. Ex. 1. The summary then provides this "NCMEC Incident Type is based on NCMEC's review of the report OR a 'Hash Match' of one or more uploaded files." *Id*. This is an analytical step by NCMEC.

See Cameron, 699 F.3d at 649. Similarly, the inputs in Section C of the report are not machine-generated, but rather are the result of "queries conducted by NCMEC staff." *Id*. at 6. Furthermore, the NCMEC analyst who provided this additional information evidenced their own understanding of the formality of their statements and that their statements would be available for use at a later trial, advising that they had not viewed the file submitted with the report and "[t]his has been left for federal review." *Id*. at 6-7. Moreover, it makes sense that the NCMEC analyst would have understood that their statements would be available for use at a later trial because "[u]nder 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." *Ackerman*, 831 F.3d at 1298.

3. The government has not proven that this error was not harmless beyond a reasonable doubt, therefore, Amn Goodwater was prejudiced.

Because the error is constitutional in nature, the government must show that the error was harmless beyond a reasonable doubt. *See Sweeney*, 70 M.J. at 304. The government asserts that "even if Prosecution Exhibit 1 was not admitted, evidence independent of the CyberTipline report overwhelming [sic] prove Appellant distributed child pornography on Discord." Ans. at 25. But the question for this Court is not whether the conviction could stand on its own, but rather whether "the evidence complained of might have contributed to the conviction." *Sweeney*, 70 M.J. at 304.

The military judge's ruling on the evidence, which came after he recessed the court-martial to consider the defense counsel's objections, demonstrates his belief that this evidence was relevant for his consideration as the factfinder. R. at 186, 188-89. B.F.'s statements contained in the CyberTipline Report were introduced to prove that a certain IP address, email address, and username were associated with the image that is contained in Prosecution Exhibit 2, the image in Prosecution Exhibit 2 was uploaded to Discord, and that image was located at a certain publicly

accessible URL at a certain date and time. *See* Pros. Ex. 1 and 2. This information was not in the Discord response to a subpoena nor was it found on Amn Goodwater's devices. R. at 266-67, 298, 332-33.

Moreover, the government's case focused on comparing and confirming the information contained within the CyberTipline Report, therefore, it is not reasonable to conclude that there is no possibility that evidence contributed to the conviction. *See* App. Br. at 15 (detailing the government's focus on confirming the information in Prosecution Exhibit 1). As part of making that connection, the government repeatedly pointed the military judge to the CyberTipline Report in its findings and findings rebuttal argument. R. at 344 (arguing the image at issue was not included in the information obtained directly from Discord, but was part of the CyberTipline Report), 345 (arguing the case agent compared an image found on Amn Goodwater's phone with the image in the CyberTipline Report; comparing the username provided in the CyberTipline Report with a sign allegedly found in Amn Goodwater's workplace (Prosecution Exhibit 4); comparing the email address provided in the CyberTipline Report with a picture of a computer displaying the same email address (Prosecution Exhibit 5)); R. at 361 (arguing "you should consider the information" in reference to the CyberTipline report and that the "cyber tip" was corroborated).

Even more significantly, the government relied on B.F.'s assertion in Prosecution Exhibit 1 in an attempt to prove distribution to Discord, arguing Discord had "flagged" the image and transferred it to NCMEC. R. at 352-53. The government argued, "the reason that that's important, Your Honor, is because it shows that that image was publicly accessible, and that's in the NCMEC cyber tip." R. at 353. The emphasis throughout the government's argument demonstrates this evidence might have contributed to the conviction; therefore, Amn Goodwater was prejudiced.

WHEREFORE, Amn Goodwater requests this Honorable Court set aside the finding for Specification 2 and the sentence.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION BY ADMITTING PROSECUTION EXHIBITS 2, 4, 5, AND 6 WITHOUT PROPER FOUNDATION, OVER DEFENSE OBJECTION.

Amn Goodwater preserved each claimed error therefore the appropriate standard of review is for an abuse of discretion.

Under MIL. R. EVID. 103(a)(1), "a party may claim error in a ruling to admit evidence . . . if the error materially prejudices a substantial right of the party" and "a party, on the record . . . timely objects" and "states the specific ground, unless it was apparent from the context." "On its face, [MIL. R. EVID.] 103 does not require the moving party to present every argument in support of an objection, but does require argument sufficient to make the military judge aware of the specific ground for objection, 'if the specific ground was not apparent from the context.'" *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005).[2] In *Datz*, the CAAF explained:

> To require counsel for either side to identify all available arguments in support of his or her objection is unnecessary in a context where the military judge is presumed to know the law and follow it. In the heat of trial, where counsel face numerous tactical decisions and operate under time pressure, we do not require such elaboration to preserve error on appeal.

Id.

Defense counsel's "duty is met when 'all parties at trial fully appreciate the substance of the defense objection and the military judge has full opportunity to consider it.'" *Id*. (quoting *United States v. Brandell*, 35 M.J. 369, 372 (C.M.A. 1992)).

[2] In *Datz*, the United States Court of Appeals for the Armed Forces (CAAF) was reviewing an earlier version of MIL. R. EVID. 103. Nevertheless, the substance of this rule has not materially changed.

1. Amn Goodwater preserved his objection to Prosecution Exhibit 2.

Amn Goodwater was tried by a military judge who is presumed to know the law and follow it. In this context, it is unnecessary "to require counsel for either side to identify all available arguments in support of his or her objection." *Datz*, 61 M.J. at 42. This is especially true here because the military judge asked defense counsel to repeat each objection and then recessed to consider the defense's objections. R. at 186. Had the military judge not understood the bases for defense counsel's objections, the military judge would have asked defense counsel for further clarification. *See*, *e.g.*, R. at 186 (asking trial and defense counsel questions regarding their positions before recessing to consider the defense counsel's objections). Furthermore, the government demonstrated its understanding that this objection included authentication, arguing in response that Appellate Exhibit XII "satisfied all the requirements providing foundation, authentication, and hearsay . . . there isn't a question regarding anything regarding foundation, authentication, and that includes . . . the image that's associated. So there's no question regarding foundation or authentication." R. at 175-76. All parties were aware of Amn Goodwater's objection and the military judge had a full opportunity to consider it. *Id*. Nevertheless, the military judge overruled Amn Goodwater's objection. R. at 189.

2. Amn Goodwater preserved his objection to Prosecution Exhibit 4.

Amn Goodwater's defense counsel objected to Prosecution Exhibit 4 based on a lack of foundation, elaborating that the witness (N.C.) did not have personal knowledge: "The witness said he was not present when [the picture] was taken, he also did not take the picture. He cannot testify that this was the situation in which the sign was found in the context of what was taken, it lacks personal knowledge of how it was taken." R. at 223. The basis for this objection was apparent from the context because just moments before the defense counsel objected to the

admission of Prosecution Exhibit 4, N.C. had been asked how he recognized Prosecution Exhibit 4 and N.C. explained he was not personally at the search of Amn Goodwater's work center. R. at 221. N.C. had not testified to any personal knowledge of what was depicted in Prosecution Exhibit 4. Moreover, trial counsel evidenced their understanding of the objection, arguing in response that the witness did have personal knowledge. R. at 223. All parties were aware of Amn Goodwater's objection and the military judge had a full opportunity to consider it. *Id*. Nevertheless, the military judge overruled Amn Goodwater's objection. *Id*.

3. Amn Goodwater preserved his objection to Prosecution Exhibit 5.

Amn Goodwater's defense counsel objected to Prosecution Exhibit 5 based on a lack of foundation and personal knowledge, also referring to foundation as "validation." R. at 226. Like Prosecution Exhibit 4, Amn Goodwater's defense counsel elaborated, "[N.C.] was not the one who searched the room, was not the one to take the photographs, he was here at the OSI station when that occurred," highlighting that the objection was his to N.C.'s ability to authenticate the exhibit. *Id*. The basis for this objection was also apparent from the context because N.C. had moments earlier testified that he was also not at the search of Amn Goodwater's dorm room. R. at 224. Again, the military judge had a full opportunity to consider Amn Goodwater's objection, but nevertheless, Amn Goodwater's objection was overruled. R. at 226-27.

4. Amn Goodwater preserved his objection to Prosecution Exhibit 6.

Amn Goodwater's defense counsel objected to Prosecution Exhibit 6 based on a lack of foundation, explaining that "this is not a result of [N.C.]'s search. He did not participate in the search directly. He was not in the room, he did not look at his computer screen when it was open, and he did not take the photograph." R. at 229. Again, in context, the basis for this objection was apparent. The military judge had a full opportunity to consider Amn Goodwater's objection, but

nevertheless, Amn Goodwater's objection was overruled. *Id*.

Amn Goodwater's defense counsel met their burden under MIL. R. EVID. 103 to preserve Amn Goodwater's objections to Prosecution Exhibits 2, 4, 5, and 6, therefore, the military judge's ruling on the admissibility of evidence is reviewed for an abuse of discretion. *Datz*, 61 M.J. at 42.

The military judge's rulings were clearly erroneous and materially prejudicial.

1. The military judge erred in admitting Prosecution Exhibit 2.

The military judge erred in admitting Prosecution Exhibit 2, over defense objection, because no witness *with knowledge* testified that Prosecution Exhibit 2 is what it is claimed to be—the image provided by B.F. *See* MIL. R. EVID. 901(b)(1) (Evidence may be authenticated through the "testimony of a witness with knowledge" "that an item is what it is claimed to be.").

NCMEC's business record affidavit, in Appellate Exhibit XII, does not authenticate the image. To begin, the affiant attested that NCMEC staff did not view the file, therefore, there is no description of the file. App. Ex. XII at 3. There is also no other descriptor for the file contained in the affidavit. App. Ex. XII at 3. Instead, the affidavit is focused on the CyberTipline Report, explaining the sections of the report, which do not include the file itself. App. Ex. XII at 3.[3] A NCMEC representative, B.A., stated she reviewed an image but she did not testify about the contents of Prosecution Exhibit 2, nor any identifying information regarding the image, such as its file name or hash value. R. at 197.

Despite this lack of authentication, a condition precedent to establishing foundation, the military judge admitted Prosecution Exhibit 2 and therefore, abused his discretion. R. at 189.

[3] The affiant discusses "Section D" on page 3 of the affidavit, explaining NCMEC made the report "available to the Las Vegas Metropolitan Police Department in Las Vegas, Nevada." However, Prosecution Exhibit 1 contains only Sections A, B, and C and the report states it is concluded after Section C. Pros. Ex. 1. Defense counsel did not object to the completeness of this exhibit.

Amn Goodwater was unquestionably prejudiced by the admission of Prosecution Exhibit 2 because without the admission of Prosecution Exhibit 2, the government could not prove the image was child pornography as defined in the *Manual for Courts-Martial, United States* (2019 ed.), part IV, para. 95.c.

2. The military judge erred in admitting Prosecution Exhibits 4, 5, and 6.

Amn Goodwater maintains the witness, N.C., did not have personal knowledge of the items portrayed in Prosecution Exhibits 4, 5, and 6, as required by MIL. R. EVID. 901(b)(1) (nor did the government satisfy any other example presented in MIL. R. EVID. 901[4]). App. Br. at 23-24. N.C. therefore could not testify that the pictures were fair and accurate depictions of the items portrayed in them. This issue is not a chain-of-custody issue, but rather, an issue of the government's failure to meet it's burden to produce a witness with personal knowledge of the items depicted. The military judge abused his discretion when he admitted Prosecution Exhibits 4, 5, and 6. R. at 223, 227, 229.

The government posits that the admission of these exhibits did not change the outcome of the proceeding. Ans. at 33. The standard for prejudice is not whether there would have been a different result, but rather, "whether the error itself had a substantial influence." *United States v. Cole*, __ M.J. __, 2024 CAAF LEXIS 312, at *20 (C.A.A.F. 2024) (quoting *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). The military judge's admission of these exhibits demonstrates his belief that this evidence was relevant for his consideration as the factfinder. *See* R. at 223, 227, 229. Moreover, this evidence did not lay dormant as the government argued its case. Rather, in its findings argument, the government pointed to this evidence to prove Amn Goodwater's

[4] Of note, the government also did not satisfy MIL. R. EVID. 901(b)(9) because no testimony was provided of a system or process nor was there any showing that a system or process produces an accurate result.

identity, as it related to this specific allegation. The government argued, "[W]e have the username of the individual who uploaded the image of child pornography. And that matches a wooden sign found in the accused's workplace," referring to Prosecution Exhibit 4. R. at 345. The government further argued, "The 'ILoveLolliCons@gmail.com,' the email address that uploaded the image of child pornography. Well, when OSI went to search the accused's room, open on his computer was his Gmail accounts that had the exact same Gmail account address," referring to Prosecution Exhibit 6. *Id*. The government relied on this information and encouraged the military judge to do the same, arguing, "All of these different documents. All of these different data points can all be taken together and they point directly at Airman Goodwater. He's the individual that uploaded image of child pornography." R. at 346. This Court cannot say the error in admitting Prosecution Exhibits 4, 5, and 6 did not have a substantial influence on the outcome because the military judge believed this evidence was relevant for consideration and the government emphasized this evidence as data points that "taken together . . . point directly to Airman Goodwater."

WHEREFORE, Amn Goodwater requests this Honorable Court set aside the finding for Specification 2 and the sentence.

III.

APPELLANT'S CONVICTION FOR DISTRIBUTION OF CHILD PORNOGRAPHY IS LEGALLY AND FACTUALLY INSUFFICIENT.

Amn Goodwater agrees that the offenses in his case are alleged to have occurred prior to 1 January 2021, therefore, the factual sufficiency standard that this Court must apply is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [this Court is] convinced of [Amn Goodwater]'s guilt beyond a reasonable doubt." *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

1. The link did not contain child pornography as that term is defined in Article 134, UCMJ, and therefore, Amn Goodwater did not distribute child pornography.

The government asserts that a "link image" turns into an image once posted in a chat, with no supporting evidence and in direct contradiction to the testimony of the government's witnesses. Ans. at 36-37. N.C., a government witness who was familiar with Discord and interviewed Amn Goodwater, testified to the facts of this case. *See*, *e.g.*, R. at 230, 249-50, 268. N.C. testified a Discord link[5] is "when you upload an image to a Discord server or to your own server and a URL link is generated, which you can then send to other individuals, that links that individual *back to the image that you upload*." R. at 249 (emphasis added). N.C. further explained that when an individual *clicks* on a Discord image link, "it should display the image on the computer, it *redirects a user to a webpage*, if you will, with primarily just the image displayed." R. at 250 (emphasis added). "[A] user who have [sic] not clicked on that link wouldn't have known where it was going to go. Only by clicking on it would you see the image." R. at 268.

After N.C.'s testimony on this topic, the government also called K.M., the government's expert witness in digital forensics. R. at 276-277, 283. K.M. was also familiar with Discord, and he did not contest N.C.'s testimony. *See* R. at 294-97. Neither K.M. nor N.C. support the government's argument that once-posted-in-the-chat, the link became an image.

Moreover, the government seems to recognize this argument is without merit, as it concedes in its alternative argument that the testimony showed the link must be clicked. Ans. at 37 ("testimony showed that once this Discord link was clicked, that a user . . . ."), 38 ("testimony showed that once this Discord link was clicked, a user . . . .").

[5] "Link" and "hyperlink" are used interchangeably by the parties at trial and before this Court. The technical term is a "hyperlink or URL." R. at 333.

The government's attempt to distinguish this case from *United States v. Navrestad*, 66 M.J. 262 (C.A.A.F. 2008) is also without merit. The government asserts the hyperlink in this case, "'starts' and 'ends' as child pornography," because if the Discord link was clicked, the recipient would be taken directly to the image. Ans. at 37. However, this argument misses the crux of the holding in *Navrestad*. In *Navrestad*, the CAAF reasoned that the distribution of a link was not equivalent of the distribution of a visual depiction because "the sending of a hyperlink in a chat session does not move a file or document from one location to another." 66 M.J. at 265. The CAAF explained the significance of this distinction is that when a file is sent, a "complete image is received, *it is housed on the recipient's computer*." *Id*. at 266 (emphasis added). By comparison, when a hyperlink is sent, the recipient has not received a complete image and nothing is housed on the recipient's computer. *See id*. This reasoning is not limited by the type of file that is present at the other end of the hyperlink, but rather, that the hyperlink itself is not a visual depiction and "does not move a file or document from one location to another." *Id*. at 265-66. The CAAF explained hyperlinks also differ from GIF files in this way, where in GIF files "[t]he visual image transported in binary form starts and ends pornographically," hyperlinks are "simply a shortcut to a particular web address." *Id*. at 266. This description of a hyperlink is akin to N.C.'s explanation that when an individual clicks on a Discord image link, "it *redirects a user to a webpage*," and "[o]nly by clicking on [the link] would you see the image." R. at 250 (emphasis added), 268.

Moreover, while the government tries to assert that Amn Goodwater distributed a "file" via the distribution of a Discord link (Ans. at 38), this confuses the terminology used by the CAAF. In *Navrestad*, the CAAF referred to a "file" as, for example, an e-mail attachment that is moved from one location to another when sent. 66 M.J. at 265-66.

Finally, the government's argument "that once this Discord link was clicked, a user was taken directly to the child pornography image file" (Ans. at 37, 38) was wholly rejected in *Navrestad*. There, the government, as they do against Amn Goodwater, "argued that once the hyperlink was sent, the recipient was 'just a click away' from the child pornography images." 66 M.J. at 266. The CAAF rejected this argument because, just as they do against Amn Goodwater, "the Government confuses the manner of the alleged distribution with what is allegedly being distributed"—a hyperlink. *Id*. In *Navrestad*, the appellant did not contest that he sent a hyperlink. *Id*. Rather, his position was that the *hyperlink* did not contain child pornography because the hyperlink was not itself a visual depiction and for the reasons discussed above, the CAAF agreed, confirming the number of clicks was not a factor in determining whether the hyperlink contained child pornography. *Id*. The same should hold here.

2. The government conceded at trial that when Amn Goodwater uploaded an image to Discord, it remained in his exclusive possession. The government's sole theory was that Amn Goodwater distributed child pornography by sending a hyperlink.

The theory the government now puts forward on appeal, that distribution of the image to Discord itself is sufficient, was not a theory raised during Amn Goodwater's court-martial. Instead, during his court-martial, the government conceded that Amn Goodwater "had possession of the initial image of child pornography, the exclusive possession was on his device. He uploaded it to the private chat, so once again, *still exclusive possession* of the device — of the image and then transferred it into the possession of other individuals." R. at 350 (emphasis added). In this statement, the government conceded that any upload of the image was still in Amn Goodwater's exclusive possession and therefore, it had not been distributed to Discord. *See id*. This Court cannot now affirm a conviction on a theory was not presented to the factfinder and here, this theory was conceded to not be the government's theory. *See Chiarella v. United States*, 445 U.S. 222,

236 (1980) (holding that "[an appellate court] cannot affirm a criminal conviction on the basis of a theory not presented to the jury"); *United States v. English*, 79 M.J. 116, 122 (C.A.A.F. 2019) ("Expanding the scope of the specification on appeal beyond that which was presented to the trier of fact is akin to the violation of due process that occurs when an appellate court affirms a conviction based on a different legal theory than was presented at trial.")

The theory the government presented to the factfinder was that Amn Goodwater distributed a link to Discord and "other users." R. at 348 (trial counsel arguing that the Discord link is what was transmitted), 350 (playing Amn Goodwater's statement that he "copied the link, and then [he] put it in the chat" and then arguing that putting it in the chat was the transfer of possession to other individuals), 351 (arguing that the link was also accessible to moderators of the chat room), 352 (arguing "when the accused distributed the image into the chat room, he transferred possession of the image from him to those other users" and "moderators."). Nevertheless, as articulated above, distribution of a hyperlink is not sufficient to prove this offense, therefore, the government failed to prove the alleged child pornography was distributed and this Court cannot be convinced of Amn Goodwater's guilt beyond a reasonable doubt.

However, if this Court disagrees, the alleged upload of an image to Discord is nonetheless insufficient to prove distribution of child pornography. In *United States v. Williams*, 74 M.J. 572, 577 (A.F. Ct. Crim. App. 2014), the appellant stored child pornography files in a shared folder in an "Ares program." In *Williams*, this Court determined it was not sufficient to have simply shared child pornography with a network program, rather the question was whether law enforcement or another user had received the files. *See id*. at 578 ("another person must actually receive files of child pornography for a distribution offense to have been committed."). Here, it is similarly not sufficient to have merely uploaded an image to Discord.

Moreover, even if it was (and the government had presented this theory), the government has not proven beyond a reasonable doubt that this image was uploaded to Discord. First, the government's digital forensics expert, K.M., conceded there was no evidence of an uploaded image to Discord (and no evidence of other users accessing the image) on the cellphone searched. R. at 283, 298. Second, the defense's digital forensics expert, E.H., used forensic tools to review information returned from Discord following a search request, and though K.M. had asserted that information about the link would be found if the parties received this information from Discord, E.H. found no evidence of the image or hyperlink. R. at 299, 331-33. N.C. similarly spent dozens of hours reviewing the Discord information and did not find any evidence of the image or hyperlink. R. at 265-66. The government called no witnesses from Discord to explain this anomaly and a reasonable doubt remains.

Conclusion

The theory of guilt that the government presented (that Amn Goodwater sent a hyperlink to Discord moderators and other users) is insufficient to prove distribution of child pornography under Article 134, UCMJ, because the hyperlink redirected the recipient to a webpage and did not move a file or document from one location to another. R. at 250, 268; *see Navrestad*, 66 M.J. at 265-66. Alternatively, uploading an image to Discord alone is not sufficient, nor was it proved beyond a reasonable doubt. As a result, this Court cannot be convinced of Amn Goodwater's guilt beyond a reasonable doubt.

WHEREFORE, Amn Goodwater requests this Honorable Court set aside the finding for Specification 2 and the sentence.

Respectfully submitted,

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I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Government Trial and Appellate Operations Division on July 22, 2024.

Respectfully submitted,

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