UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40247 (reh)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Douglas G. LARA	)	**DOCKETING**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 9 July 2024 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 10th day of July, 2024,

ORDERED:

That the Record of Trial in the above styled matter is referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
RAMÍREZ, ROBERTO, Lieutenant Colonel, Appellate Military Judge
GRUEN, PATRICIA A., Colonel, Appellate Military Judge

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 Special Panel
Staff Sergeant (E-5) **DOUGLAS G. LARA** United States Air Force *Appellant.*	)	No. ACM 40247 (reh) 28 August 2024

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, Staff Sergeant (SSgt) Douglas G. Lara, Appellant, hereby moves for an enlargement of time to file assignments of error. SSgt Lara requests an enlargement for a period of 60 days, which will end on **7 November 2024**. The record of trial was docketed with this Court on 10 July 2024. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

NICOLE J. HERBERS, 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 were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 28 August 2024.

NICOLE J. HERBERS, Maj, USAF
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29 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
Staff Sergeant (E-5) DOUGLAS G. LARA, USAF, *Appellant.*	)	ACM 40247 (reh)
	)	Before Special Panel

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 29 August 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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United States Air Force
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40247 (reh)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Douglas G. LARA	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 16 September 2024, counsel for Appellant filed a Consent Motion to Examine Sealed Material in the above-referenced case. Appellant requests permission for counsel for both parties to examine Attachment 6 to Prosecution Exhibit 1, which was reviewed by the by trial and defense counsel at Appellant's trial. The Government consents to counsel for both parties viewing this sealed material.

Appellate counsel may examine sealed materials released to counsel at trial "upon a colorable showing . . . 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 the sealed material is reasonably necessary to fulfill appellate counsel's responsibilities.

Accordingly, it is by the court on this 17th day of September, 2024,

ORDERED:

Appellant's Consent Motion to Examine Sealed Material dated 16 September 2024 is **GRANTED**.

Counsel for Appellant and counsel for the Government may examine **Attachment 6 to Prosecution Exhibit 1** subject to the following conditions:

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

No counsel granted access to the sealed material 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]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIAL**
v.	)	Before Special Panel
Staff Sergeant (E-5) **DOUGLAS G. LARA** United States Air Force *Appellant.*	)	No. ACM 40247 (reh) 16 September 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, 23.1(b), and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Douglas G. Lara, Appellant, hereby moves leave for both the Government and Appellant's counsel to examine sealed material, Prosecution Exhibit 1, Attachment 6, in SSgt Lara's record of trial. This attachment was sealed by the military judge.

Pursuant to R.C.M. 1113(B)(3)(B)(i), "materials presented or reviewed at trial and sealed…may be examined by appellate counsel upon a colorable showing to the reviewing or appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities[.]" A review of the entire record is necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d) to act with respect to the findings and sentence as entered into the record, and the record on appeal consists exhibits that were received in evidence. *See* R.C.M. 1112(b)(5). Counsel must therefore examine "the entire record."

Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the

> importance of adequate representation. Independent review is not the same as competent appellate representation. *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987).

United States v. May, 47 M.J. 481 (C.A.A.F. 1998). The sealed material that was entered as an exhibit at trial must be reviewed in order for counsel to provide "competent appellate representation." *Id.* Therefore, the examination of sealed materials is reasonably necessary to fulfill appellate defense counsel's responsibilities in this case, since counsel cannot perform her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

The Government consents to the relief requested by this motion.

WHEREFORE, SSgt Lara respectfully requests that this Honorable Court grant the consent motion to view sealed materials.

Respectfully submitted,

JOYCLIN N. WEBSTER, Capt, 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 16 September 2024.

Appellate Defense Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **DOUGLAS G. LARA** United States Air Force *Appellant.*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Special Panel No. ACM 40247 (reh) 30 October 2024

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Douglas G. Lara, Appellant, hereby moves for an enlargement of time (EOT) to file Assignments of Error. SSgt Lara requests an enlargement for a period of 30 days, which will end on **7 December 2024**. The record of trial was docketed with this Court on 10 July 2024. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 30 April 2024,[1] SSgt Lara was tried by a general court-martial at Hurlburt Field, Florida. In accordance with his pleas, the military judge found SSgt Lara guilty of one charge and specification of attempt to view child pornography in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880; and of one charge and specification of dereliction of duty in violation of Article 92, UCMJ, 10 U.S. C. § 892. R. at 11, 49; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), dated 20 May 2024. The military judge sentenced SSgt Lara to be

[1] A rehearing on this case was ordered by General Court-Martial Order No. 1, Headquarters Air Force Special Operations Command, dated 8 September 2023.

reduced to the grade of E-1, to be confined for a total of six months,[2] and to be discharged from the service with a bad-conduct discharge. R. at 61. The convening authority took no action on the findings. ROT Vol. 1, Convening Authority Decision on Action - *United States v. Douglas* G. *Lara*, dated 13 May 2024. The convening authority suspended the reduction in grade until the entiy of judgment, granted the defe1ment in the reduction in grade and automatic foifeitures, and waived automatic fo1feitures for the benefit of SSgt Lara's dependents. *Id.*

The record of ti·ial on rehearing is four volumes consisting of 1 prosecution exhibit, no defense exhibits, and seven appellate exhibits; the u-anscript is 62 pages. SSgt Lara is not cunently confined.

Through no fault of SSgt Lara, undersigned counsel has not yet been able to fully advise SSgt Lara on potential errors despite completing review of the record. This enlargement oftime is necessa1y to allow undersigned counsel to fully advise SSgt Lara on the potential enors and the issues to be raised. SSgt Lara has been info1med of his right to a timely appeal and this request for an enlargement of time, and SSgt Lara agrees with this request for an enlargement of time.

WHEREFORE, SSgt Lara respectfully requests that this Honorable Comi grant the requested enlargement of time.

Respectfully submitted,

USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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[2] SSgt Lara was sentenced to six months confinement for Charge I and its specification and one month confinement for Charge II and its specification, with sentences to confinement mnning concmTently. R. at 61.

CERTIFICATE OF FILING AND SERVICE

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

[redacted] SAF
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31 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) DOUGLAS G. LARA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40247 (reh) Before Special Panel

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Special Panel
Staff Sergeant (E-5) **DOUGLAS G. LARA** United States Air Force *Appellant*	)	No. ACM 40247 (reh) 9 December 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER THE PLEA TO ATTEMPT TO VIEW CHILD PORNOGRAPHY WAS IMPROVIDENT.

II.

WHETHER THE POST-TRIAL PROCESSING OF STAFF SEARGEANT LARA'S CASE WAS IMPROPERLY COMPLETED WHEN THE STAFF JUDGE ADVOCATE FOUND 18 U.S.C. § 922 APPLIED TO THE CONVICTIONS FOR NON-VIOLENT OFFENSES.

STATEMENT OF THE CASE

Staff Sergeant (SSgt) Douglas G. Lara was originally tried in 2021. *United States v. Lara*, No. ACM 40247, 2023 CCA LEXIS 267 (A.F. Ct. Crim. App. 28 Jun. 2023). This Court found SSgt Lara's pleas of guilty at his first trial were not a knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences due to improper sex-offender registration advice. *Id*. at *3. Thereafter, this case was set for a rehearing by the general court-martial convening authority. *See* App. Ex. III.

At his rehearing, SSgt Lara was convicted, consistent with his pleas, at a general court-martial composed of a military judge sitting alone. R. at 11, 49; Entry of Judgment (EOJ), 20 May 2024. He pleaded guilty to one charge and specification for attempting to view child pornography on divers occasions in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880; and one charge and specification of willful dereliction of duty on divers occasions, in violation of Article 92, UCMJ, 10 U.S.C. § 892. *Id*. The military judge sentenced SSgt Lara to a reduction to the grade of E-1, to a total of six months of confinement,[1] and to be discharged from the service with a bad-conduct discharge. R. at 61. The convening authority took no action on the findings. Convening Authority Decision on Action – *United States v. Douglas G. Lara*, 13 May 2024 (CADA). The convening authority suspended the reduction in grade until the entry of judgment, granted the deferment in the reduction in grade and automatic forfeitures, and waived automatic forfeitures for the benefit of SSgt Lara's dependents. *Id.*

STATEMENT OF FACTS

The allegations in this case revolve around SSgt Lara's addiction to pornography, with evidence of explicit material and/or use of explicit search terms on his personal and government computer. R. at 24-25, 31; Pros. Ex. 1 at 5. For specification of Charge I, SSgt Lara was only charged with using search terms, accessing websites, or images between on or about 18 March 2019 and on or about 18 December 2019 (the charged timeframe). *Charge Sheet*, DD Form 458.

[1] The military judge sentenced SSgt Lara to six months confinement for the specification of Charge I and one month confinement for the specification of Charge II, with the sentences of confinement running concurrently. *Id*. Additionally, SSgt Lara was credited with 285 days confinement for time-served at his original court-martial on these charges. EOJ; *Confinement Adjudgment* memorandum, 30 Apr. 2024.

For the specification of Charge I, SSgt Lara pled guilty to attempting to view child pornography on divers occasions by "entering known child-exploitable terms in [i]nternet search engines to view images of a minor, or what appears to be a minor, *engaging in sexually explicit conduct*." *Id.*, R. at 11 (emphasis added). In describing how he was guilty of this offense, SSgt Lara admitted to using certain, specific search terms. He admitted to typing "biker girls," "teen nude selfie," and "tiny" in internet search browsers. R. at 24. He attempted to visit websites such as "2Bteen.info," "motherless.com," and "lepardteens.org," but those websites were blocked by his browser. *Id.*

SSgt Lara believed those search terms would return legal pornography, that of eighteen- or nineteen-year-olds, but acknowledged that "some of the terms [he] entered and websites [he] attempted to visit could return images that were illegal and potentially child pornographic." *Id.* However, he knew that the images found on his devices resulting from his search terms were not child pornography. *Id.* In the colloquy with the military judge, SSgt Lara further explained he thought the words he used would show images of children sixteen-eighteen years of age. R. at 26. The military judge asked him if he "intend[ed] to view images – sexualized images of children under the age of 18" and in response, he admitted that the search terms he used would be teens that would appear to be under the age of eighteen. *Id.*. There was no discussion in the record between the military judge and SSgt Lara about how any of these terms or those websites he visited would show images of a minor, or who appeared to be a minor, engaging in sexually explicit conduct. *See* R. at 24-28.

In addition to the colloquy with the military judge, the Government relied on the evidence within the stipulation of fact and its attachments to support the providence of this

plea. Pros. Ex. 1 at 1. When the Government charged SSgt Lara with the use of child-exploitable terms to take the substantial step toward completion of the offense of viewing child pornography, "child exploitable terms" was defined to include both terms that would return child pornography and terms that would return material that did not meet the definition of child pornography, that is child exploitable material (child erotica or age-difficult material). *Id.* The definition of child exploitable terms found within the stipulation of fact did not clarify how those terms would or would not lead to either result. *Id.*

Part of the evidence appended to the stipulation of fact was portions of a recorded statement made by SSgt Lara. Pros. Ex. 1, Attach. 5. These admissions were not tied to the specific charged timeframe in terms of his desire to view child pornography. *Id.* However, SSgt Lara admitted he last had "eyes on" underage girls "sometime in 2019" but he did not explain what having "eyes on" meant (e.g., did that mean he last viewed child erotica, saw an underage female, or something else), nor what underage girls meant (e.g., under the age of eighteen or some other age). Pros. Ex. 1 at 2, Attach. 5.

The stipulation of fact also included forensic analysis of SSgt Lara's electronic devices. Pros. Ex. 1, Attach. 2 and Attach. 4. The images outlined by name only in the forensic analysis of one of his personal computers, which are detailed in paragraph 6 of the stipulation, were last accessed by a user on 7 January 2019—outside the charged timeframe. *Compare* Pros. Ex. 1, Attach. 5 at 5 (where the images on his computer were last accessed on 7 January 2019), *with* DD Form 458 (where he was charged with attempting to view child pornography between on or about 18 March 2019 and on or about 18 December 2019). The images viewed in January 2019 were titled with descriptions of

nude girls without any specific sex act and were determined to be child exploitative material and not child pornography. *Id.* Child exploitative material are those images which do not meet the statutory definition of child pornography under 18 U.S.C. § 2256 (8). *Id.* The rest of the report details search terms and results which all predate the charged timeframe by years. Pros. Ex. 1, Attach. 5.

While SSgt Lara admitted to attempting to view child pornography on his iPad, Pros. Ex. 1 at 2, that conduct was outside the charged timeframe. *See* Pros. Ex. 1, Attach. 3 (where all data from Covenant Eyes, the program used to monitor his iPad use, had dates in the year 2020). This report from Covenant Eyes shows "no incidents from Douglas" despite websites with pornographic-sounding URLs being listed. *Id.* Covenant Eyes was an application used by SSgt Lara and his wife that would restrict him from visiting pornographic websites and provide daily logs of SSgt Lara's internet activity to his spouse. Pros. Ex. 1 at 2.

ARGUMENT

I.

THE PLEA TO ATTEMPT TO VIEW CHILD PORNOGRAPHY WAS IMPROVIDENT.

Standard of Review

Acceptance of a guilty plea is reviewed for an abuse of discretion and an abuse of discretion will be found when the military judge accepts such a plea without an adequate factual basis or the law to support it. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). To prevent the acceptance of improvident pleas, the military judge must establish, on the record, the factual bases that show that "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." *United States v.*

Care, 40 C.M.R. 247 (C.M.A. 1969) (citation omitted). Applying this standard, a guilty plea must be upheld unless there is a substantial basis in law and fact for questioning the plea. *United States v. Passut*, 73 M.J. 27, 29 (C.A.A.F. 2014).

Law and Analysis

SSgt Lara's guilty plea to the specification of Charge I was improvident for three reasons. First, neither the stipulation of fact nor his plea colloquy with the military judge established a substantial step toward the completion of the offense of viewing child pornography. Despite two ways in which SSgt Lara discussed his attempt to view child pornography—use of specific search terms and specific websites he attempted to visit—both failed to establish a substantial step toward completion of the offense. SSgt Lara did not use terms that would have led him to view minors or what appeared to be minors engaged in sexually explicit conduct. The websites SSgt Lara attempted to visit were not tied to child pornography. Second, there was no independent intervening event that prevented the completion of the offense. Finally, SSgt Lara's conduct was constitutionally protected and there was no heightened inquiry into this protected conduct prior to the acceptance of his guilty plea.

There was no Substantial Step to Complete the Offense.

The Government charged SSgt Lara with attempting to view child pornography, with the substantial step toward completion of the offense as "entering of known child exploitable terms in internet search engines to view images of a minor or what appears to be a minor engaging in sexually explicit conduct." *See* DD Form 458, R. at 20. The stipulation of fact defined use of "child exploitable terms" as those search terms that would produce results that were either child abuse material (child pornography), child exploitative

material (child erotica or age-difficult material), or computer-generated imaging or animation of child erotica or age-difficult material. Pros. Ex. 1 at 1.

Based on the charge and the definition of "child exploitable terms," at least two things must be established for SSgt Lara's plea to be provident using those terms. First, the record must demonstrate that he used "child exploitable terms" as defined. Second, by typing those certain search terms into internet web browsers, the images returned would have resulted in the actual commission of the offense of viewing child pornography except for an unexpected intervening circumstance which prevented completion of that offense. R. at 20; *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1003-04 (29 Feb. 2020). That is, the search terms used would have to lead to images of a minor or what appears to be a minor engaging in sexually explicit conduct but for some other event.

The search terms used by SSgt Lara during the charged timeframe do not meet the definition of "child exploitable" terms as required. To be guilty as charged, SSgt Lara needed to use search terms that would either return child pornography, child erotica or age-difficult material, or computer-generated imaging or animation of child erotica or age-difficult material. Pros. Ex. 1 at 1. However, SSgt Lara used the terms "biker girls," "teen nude selfie," and "tiny." R. at 24. None of these search terms contain any words or descriptions that would return child pornography as none are linked to sexually explicit conduct nor to teens under the age of eighteen. "Teen nude selfie" could potentially lead to child erotica or age-difficult material, but nudity, without more, is protected expression. *New York v. Ferber*, 458 U.S. 747, 764-65 n.18 (1982). The military judge did not clarify with SSgt Lara how typing "teen nude selfie" could lead to more than nudity, R. at 24-28, nor does the record demonstrate the search term is tied to a particular website where child

pornography or child erotica is housed, for example. Therefore, based on the search term used, SSgt Lara's searches would likely yield results of constitutionally protected images, that of child erotica, legal pornography, or images which fit neither category.[2]

Additionally, SSgt Lara described websites he attempted to visit—which would occur when he used search terms and then clicked on the image result housed on a specific website. Pros. Ex. 1, Attach. 5. For those websites he attempted to visit—"2Bteen.info," "motherless.com," and "lepardteens.org", R. at 24, the record does not establish activity on those websites would even return child pornography had child exploitable terms been used. The only description of the contents of these sites is that "motherless.com" contained adult pornography, with child exploitative material[3] traded within the site in various chats. Pros. Ex. 1, Attach. 4 at 2. There is no evidence in the record that SSgt Lara was trading materials using the chat function on motherless.com. There is no other evidence to consider which supports that any of these sites actually contained child pornography, thus even if SSgt Lara admitted he searched these terms to click on images house on these websites–which he did not (*see* R. at 24-28)—this does not establish the search results with these terms would lead to child pornography. The description in these search terms is so broad as to preclude a substantial step toward child pornography. These search terms do not describe sexual acts nor do they demonstrate that the searched images would focus on genitalia or even children under the age of eighteen.

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[2] "Biker girls" could return images of females riding bicycles, riding motorcycles, or in cycling or motorcycle gear, and searching "tiny" could result in images which are not of people at all—given the search term is only a description of a noun's relative size and there is no noun associated with his use of "tiny" as a search term.

[3] Child exploitive material, as defined within the stipulation of fact and its attachments, is material that does not meet the statutory definition of child pornography, otherwise described as child erotica or age-difficult material. Pros. Ex. 1, Attach. 2 at 2.

The evidence within the stipulation of fact cannot be used to support the factual basis for the plea because the evidence is squarely outside the charged timeframe. *See* Pros. Ex. 1 at 2 (where SSgt Lara's admissions to law enforcement were not tied to the charged timeframe). While SSgt Lara stipulated he made admissions to law enforcement that he used terms such as "little Lolita naked," "underage girls nude," "teen," "teenie," or "young angels," neither the Government nor SSgt Lara tied those search terms to the charged timeframe. *Id.*, Pros. Ex. 1, Attach. 5. Moreover, as outlined above, none of those terms would return child pornography, because the terms do not contain words which would lead to images of minors or what appear to be minors engaged in sexually explicit conduct.

The deficiency in proof to support the factual basis for SSgt Lara's plea is not cured by the other evidence within the stipulation of fact, given that evidence was also outside the charged timeframe. Attachment 2 to the stipulation of fact contained images in unallocated space that were all accessed outside of the charged timeframe. Pros. Ex. 1, Attach. 2. Similarly, evidence on his iPad and the application Covenant Eyes was all from 2020, outside the charged timeframe and showed no incidents to report during that timeframe. Pros. Ex. 1, Attach. 3. As outlined, not only were these searches and websites visited outside the charged timeframe, none of these search terms included terms that were likely to produce child pornography nor were the websites listed in the stipulation of fact that were visited during the charged timeframe linked to child pornography by the Government or SSgt Lara.

The remaining colloquy with the military judge only extrapolated legal conclusions without resolving the lack of proof established within the charged timeframe. *See, e.g.*, R.

at 24 (were SSgt Lara admitted the search terms he entered and websites he attempted to visit could return images that were illegal, but did not explain how); R. at 26 (where SSgt Lara typed search terms into search engines that he knew could possibly return images of children between the ages of sixteen and teens to eighteen, but did not explain or provide objective support for the conclusion that his terms would lead to child pornography as defined). *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980), requires that "the factual circumstances as revealed by the accused himself objectively support that plea [of guilty]." It is not enough to elicit legal conclusions. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004).

Without the search terms in the charged timeframe meeting the definition of "child exploitable terms," and by only attempting to visit websites not linked to child pornography, SSgt Lara's plea is improvident. He did not "admit every element of the offense to which [he] plead[] guilty." *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006). As a result, there was not an adequate factual basis for the plea, thus his plea was improvident. *See United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

There was no Intervening Event to Constitute an Attempt.

SSgt Lara's plea is also improvident because the substantial step does not "unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *United States v. Goetzke*, 494 F.3d 1231, 1237 (9th Cir. 2007). In evaluating the connection between the attempt and the greater crime, the completed crime must be more than a probability. *Id.* To support a guilty plea, the facts pled to have to have objective support. *See Davenport*, 9 M.J. at 367. In other words, the plea must clearly establish the substantial step would lead to prohibited visual depictions

of child pornography but for some independent intervening event. *See Goetzke*, 494 F.3d at 1237.

SSgt Lara described he was unable to complete the offense of viewing child pornography because certain websites that populated when he used search terms were blocked by his browser. R. at 24. However, he did not state anything about whether those websites contained child pornography. *Id.* In response to questioning by the military judge, SSgt Lara again admitted that his internet browser blocked the return of websites, but did not discuss whether the sites he attempt to visit actually contained child pornography, adult pornography, or child erotica. R. at 27-28. Additionally, for those websites he attempted to visit—"2Bteen.info," "motherless.com," and "lepardteens.org," R. at 24—, the only other description of the contents of these sites to support the plea is that "motherless.com" contained adult pornography. Pros. Ex. 1, Attach. 4 at 2. There is no other evidence for this Court to consider which supports that the websites SSgt Lara attempted to visit but were blocked by his web browser contained child pornography. The evidence failed to establish that the sites that he attempted to visit but were blocked would even contain child pornography. There is no intervening event as it relates to the websites SSgt Lara attempted to visit because there is no evidence that but for the website being blocked, those websites even contained child pornography.

With the websites themselves proving unhelpful to support the intervening event to support his pleas of guilty, the remaining foothold is the search terms used by SSgt Lara. However, the search terms also fail to support there was an independent intervening event. SSgt Lara did not explain how or why he was unable to view child pornography by typing "biker girls," "teen nude selfie," nor "tiny" into his internet browser. R. at 24. SSgt Lara's

conduct—the search terms he used—prevented the completion of the offense, not some intervening event. When SSgt Lara used search terms, SSgt Lara described for the military judge that he could not view the pictures because the pictures or thumbnails would be either blurred or just blank, and that is how they would be blocked. R. at 27-28. However, SSgt Lara never linked "biker girls," "teen nude selfie," nor "tiny" to instances where images were blurred or blank, nor did he tie the blurred images to child pornography. *Id.* Without tying the search terms—which would not necessarily return child pornography as discussed above—to the blurred images, the search terms failed to show the inevitably of viewing child pornography absent an intervening event. Based on SSgt Lara's description of this offense, the crime of viewing child pornography could not be completed because SSgt Lara's conduct in visiting those websites or using those search terms were not a substantial step toward completion of the crime and there was no intervening event that prevented completion of the crime.

The plea colloquy did not address the constitutionally protected conduct.

There is a distinction between prohibited child pornography and images that are sometimes referred to as "child erotica," defined as "material that depicts 'young girls [or boys] as sexual objects or in a sexually suggestive way,' but is not 'sufficiently lascivious to meet the legal definition of sexually explicit conduct' under 18 U.S.C. Section 2256." *United States v. Vosburgh*, 602 F.3d 512, 520 (3d Cir. 2010) (citing *United States v. Gourde*, 440 F. 3d 1065, 1068 (9th Cir. 2006)).

Here, the Government charged SSgt Lara with an attempt to view child pornography based on search terms which could return child erotica, which is not sufficiently lascivious to meet the legal definition of sexually explicit conduct. *Id.*; DD

Form 458; Pros. Ex. 1. Speech outside the categories of defamation, incitement, obscenity, and pornography produced with real children retain First Amendment protection. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245-46 (2002).

In charging SSgt Lara for conduct which is otherwise protected speech—child erotica--the military judge was required to conduct a heightened colloquy to ensure he understood the criminality of his conduct. "When a charge against a servicemember may implicate both criminal and constitutionally protected conduct, the distinction between what is permitted and what is prohibited constitutes a matter of 'critical significance.'" *United States v. Hartman*, 69 M.J. 467, 468 (C.A.A.F. 2011) (quoting *United States v. O'Connor*, 58 M.J. 450, 453 (C.A.A.F. 2003)). The colloquy between the military judge and an accused must contain an appropriate discussion and acknowledgement on the part of the accused of the critical distinction between permissible and prohibited behavior. *Id.*

Based on SSgt Lara's colloquy, it is clear he did not understand the line between prohibited and permissive behavior. SSgt Lara believed those search terms would return legal pornography, that of eighteen- or nineteen-year-olds, but acknowledged "some terms [he] entered and websites [he] attempted to visit could return images that were illegal and potentially child pornographic." R. at 24. The military judge did not explain to SSgt Lara the critical distinction between his constitutionally protected conduct—that of viewing child erotica—as it related to the charge of attempt to view child pornography. *See* R. at 24-28; *see also O'Connor*, 58 M.J. at 453. Thus, when SSgt Lara explained the searches he conducted, the websites he attempted to visit, and that he was aware his conduct was likely to return something other than child pornography, R. at 24, these raised an inconsistency of critical distinction which needed to be addressed on the record before his

guilty plea was accepted. *Hartman*, 69 M.J. at 468. This was not done. As a result, SSgt Lara admitted to attempting to view child erotica and used search terms which would lead either to legal pornography or child erotica and was convicted based on that constitutionally-protected conduct alone.

This is not the first time appellate courts have encountered an appellant articulating constitutionally protected conduct under the inapt label of child pornography, and the same outcome in that case—a set aside of the conviction—should result here. In *United States v. Moon*, the military judge failed to adequately elicit from the appellant that he clearly understood the critical distinction between criminal and constitutionally protected conduct when he offered inconsistent definitions and explanations of possession of nude minors or what appear to be nude minors and the criminality of that conduct. 73 M.J. 382 (C.A.A.F. 2014); *see also United States v. Warner*, 73 M.J. 1 (C.A.A.F. 2013) (where possession of nude images of minors or possession of non-nude images of children, even if sexualized, may not give rise to an offense). SSgt Lara used the search terms "biker girls," "teen nude selfie," and "tiny," R. at 24; however, none of these terms describe sexual acts, demonstrate a focus on the genitalia, nor do they even direct the search toward children under the age of 18. Like the findings in *Moon*, here, the military judge found SSgt Lara guilty of conduct that was not criminal (using search terms that would return child erotica, legal pornography, or non-pornographic material). Thus, as a result, the conviction for the specification and of Charge I should be set aside just as it was under similar circumstances in *Moon*.

Given the substantial step would not have resulted in completion of the offense, there was no intervening event that prevented completion of the offense, and the searches

conducted would have or did result in viewing of constitutionally protected images and the military judge did not engage in a heightened inquiry with SSgt Lara, the plea is improvident. SSgt Lara respectfully requests that this Honorable Court set aside the conviction and the sentence for the specification of Charge I.

II.

THE POST-TRIAL PROCESSING OF STAFF SERGEANT LARA'S CASE WAS IMPROPERLY COMPLETED WHEN THE STAFF JUDGE ADVOCATE FOUND 18 U.S.C. § 922 APPLIED TO HIS CONVICTION FOR NON-VIOLENT OFFENSES.

Additional Facts

SSgt Lara was first notified he would be prohibited from owning a firearm as a result of his conviction pursuant to 18 U.S.C. § 922 when served the Statement of Trial Results (STR) and first indorsement. STR, 30 Apr. 2024. The first indorsement to the EOJ was signed by the Staff Judge Advocate (SJA) after the EOJ was signed by the military judge and contained the same notation. EOJ. Neither of these documents state which provision of 18 U.S.C. § 922 applies to SSgt Lara.

SSgt Lara was disarmed and remains disarmed as a result of this conviction. Appellant's Motion to Attach, Appendix A, Dec'l of SSgt Lara,1 Dec. 24. SSgt Lara owned both rifles and sidearms prior to the investigation and has not been able to possess these weapons as a result of these charges. *Id*. SSgt Lara wants to possess firearms for personal protection but cannot. *Id.*

Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citations omitted). To prevail in a post-trial processing claim, an appellant must establish that there was an error

and that the error resulted in prejudice. *United States v. Blodgett*, 20 M.J. 756, 758 (A.F.C.M.R. 1985); *see also* Article 66(d)(2), 10 U.S.C. § 866(d)(2) (authorizing relief for error or excessive delay in processing after the EOJ). "There must be a colorable showing of possible prejudice in terms of how the omission potentially affected an appellant's opportunity for clemency." *United States v. Scalo*, 60 M.J. 435, 437 (C.A.A.F. 2005).

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

Law and Analysis

1. Courts of Criminal Appeals (CCAs) have authority to review whether the post-trial processing of a case was completed correctly.

Both the STR and the EOJ must contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 24 January 2024, ¶¶ 20.6, 20.41, and 29.32, the SJA must determine whether the offenses trigger a prohibition under § 922 and include the information in the first indorsement to both the STR and EOJ. Completion of both the STR and EOJ are under the heading "Post-Trial Procedure" in the MCM. *Manual for Courts-Martial, United States* (2024 ed.) pt. II. Using the plain meaning of the language of R.C.M. 1101(a)(6) and 1111(b)(3)(F), alongside the requirements to include whether an offense triggers a prohibition under § 922 within the Department of the Air Force's regulation, the first endorsement to the STR and EOJ are part of the post-trial processing of a case, one prior to the EOJ and one after the EOJ is signed by the military judge.

Given the STR and EOJ are post-trial issues, a CCA's authority to review the accuracy of the indorsements to those documents is not limited by the fact that the STR

and EOJ are not part of the findings and sentence under Article 66(d)(1)(A). *United States v. Williams*, __M.J.__ , No. 24-0015/AR, 2024 CAAF LEXIS 501, at *12-13 (C.A.A.F. 5 Sep. 2024). Rather, as this Court and other courts have done previously, whether the STR and EOJ are accurate is reviewable as a part of the service CCA's authority to review the record for proper completion of post-trial processing. *See* R.C.M. 1112(b)(7) and (9) (where the STR and EOJ are part of the certified record of trial); R.C.M. 1112(d)(2) (where correction can be ordered to make the certified record accurate); Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3) (where the CCA determines additional proceedings are warranted, the Court may order a hearing as may be necessary to address a substantial issue); 10 U.S.C. § 866(d)(2).

Viewing the STR and EOJ as part of the post-trial process is consistent with this Court's actions to correct the CADA, the STR, and EOJ. Under the realm of assuring post-trial processing was properly completed, this Court remanded a case to ensure the EOJ accurately reflected an appellant's pleas and findings. *United States v. Graves*, No. ACM 40340, 2023 CCA LEXIS 356, at *8-9 (A.F. Ct. Crim. App. 23 Aug. 2023). In doing so, this Court had authority to correct errors in the EOJ pursuant to R.C.M. 1112(c)(2) and (d)(2) (which allows a CCA to modify a judgment—to correct an incomplete or defective record of trial—in the performance of their duties and responsibilities). *Id.* at *6. This Court also noted it could remand the case to the Chief Trial Judge of the Air Force Trial Judiciary, who has been delegated authority to modify EOJs in accordance with R.C.M. 1111(c)(2)-(3). *Id.* at *6-7. Additionally, this Court has returned the record to the convening authority for new post-trial processing when the CADA did not clearly show the convening authority's intent on the requested action on a reduction in grade and the

action by the convening authority on the adjudged reduction was not reflected in the EOJ. *United States v. Jones*, No. ACM S32717, 2022 CCA LEXIS 652, at *4. (A.F. Ct. Crim. App. 7 Nov. 2022). The military judge was empowered to take several steps, including correcting or modifying the EOJ. *Id.* Not only does *Jones* show that this Court can return the record to a military judge to modify an EOJ, this Court can review whether the decision by a convening authority is accurately reflected in the record of trial. Using *Jones* as a parallel to the facts of this case, SSgt Lara is asking this Court to return the record to a military judge to correct the error in the STR and EOJ to ensure both documents accurately reflect the determination of the SJA as it relates to whether § 922 is triggered. As outlined *infra*, there is question of whether § 922 can lawfully be applied to SSgt Lara's conviction.

Not only has this Court remanded to fix errors in the CADA and in the EOJ, this Court has also returned a case to a military judge when it was unclear if the convening authority was given proper advice from the SJA, in that the convening authority did not take action on the sentence as required due to changes to the law. *United States v. Finco*, No. ACM S32603, 2020 CCA LEXIS 246, at *14-17 (A.F. Ct. Crim. App. 27 Jul. 2020). In SSgt Lara's case, whether § 922 is applicable to SSgt Lara's conviction for a non-violent offense falls within this review of post-trial processing errors. R.C.M. 1101(a)(6); R.C.M. 1111(b)(3)(F); *see* DAFI 51-201 ¶ 29.32 (requiring § 922 denotation attached to the STR and EOJ). Just when the advice an SJA gives errant advice before a convening authority before action, *Finco*, 2020 CCA LEXIS 246 at *14-17, when an SJA makes an error in the endorsement to the STR and EOJ, the post-trial processing of a case is rendered inaccurate.

Because the Department of the Air Force has chosen to make the applicability of § 922 a mandatory part of both the STR and EOJ under the applicable R.C.M., this decision

is reviewable because the correctness of the STR and EOJ as a part of the certified record of trial is reviewable. SSgt Lara is asking this Court to order correction of the errors in the record of trial—the indorsements to the STR and EOJ—which contain a firearms prohibition in error.

Even if this Court does not agree that these are avenues through which to correct the deficient indorsements to the STR and EOJ, Article 66(d)(2) provides a solid jurisdictional foundation. By the plain language of that statute, the error in the first indorsement to the EOJ concerning 18 U.S.C. § 922 is an "error . . . in the processing of the court-martial after the [EOJ]," 10 U.S.C. § 66(d)(2), because the first indorsement and its application of the firearms ban from 18 U.S.C. § 922 arises after the EOJ from R.C.M. 1111(b)(3)(F)'s incorporation of DAFI 51-201 ¶ 20.41. This was not foreclosed by the Court of Appeals for the Armed Forces in *Williams*, 2024 CAAF LEXIS 501, at *13-15. Likewise, this accords with this Court's published opinion in *United States v. Vanzant*, 84 M.J. 671, 2024 CCA LEXIS 215 (A.F. Ct. Crim. App. 2024), *rev. granted*, USCA Dkt. No. 24-0182, ___M.J. ___, 2024 CAAF LEXIS 640 (C.A.A.F. Oct. 17, 2024). In *Vanzant*, this Court determined it did not have authority to act on collateral consequences because they are not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id*. at *23. ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"). The Court of Appeals for the Armed Forces (CAAF) agreed with this interpretation. *Williams*, 2024 CAAF LEXIS 501, at *11-13. However, SSgt Lara is asking this Court to review an error in post-trial processing under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See Vanzant*, 84 M.J. 671, 2024 CCA LEXIS 215, at *23 (quoting the

language of Article 66(d)(1), UCMJ, not (d)(2)). At minimum, in light of the CAAF's analysis in *Williams*, this Court should reexamine its jurisdiction and the unconstitutional, post-trial processing error concerning firearms tied to the facts of SSgt Lara's court-martial.

2. The Staff Judge Advocate erroneously found 18 U.S.C. § 922 applied to SSgt Lara.

The facts of SSgt Lara's crime support the conclusion that his conviction does not qualify as one of the nine categories listed in 18 U.S.C. § 922(g)(1)-(9).

The test for applying the Second Amendment is as follows:

> 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). The Second Amendment plainly covers SSgt Lara's right to keep and bear arms post-conviction. Thus, the Government must justify its regulation as applied to SSgt Lara. However, the Government does not specify which category it applied to SSgt Lara's conviction. EOJ. Even if a category does apply to SSgt Lara, he was not convicted of a violent offense. Its application in the STR and EOJ was therefore error and warrants correction pursuant to this Court's authority discussed above.

Of the nine categories within § 922(g), the only one that could possibly apply to SSgt Lara is § 922(g)(1). However, SSgt Lara was convicted of a non-violent offense. *See* EOJ. To prevail in light of *Bruen* and *Rahimi*, the Government has to show a historical tradition of applying an undifferentiated ban on firearm possession for those convicted of a non-violent offense. *United States v. Rahimi*, 602 U.S. ___, 144 S. Ct. 1889, 1901

(2024)). The Supreme Court's decision in *Rahimi* solidified the place for firearms bans within the realm of violent offenders and crimes of violence. *Id.* The historical analysis of whether breaking a domestic violence restraining order was a crime of violence to initiate the restriction was supported by the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.*

The historical analogue breaks down when applied to SSgt Lara's computer habits and sexual proclivities. In *Rahimi*, the Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at 1902. By contrast, SSgt Lara's conviction never involved a threat, with a weapon or otherwise. Pros. Ex. 1, R. at 23-34. Additionally, the Supreme Court itself noted the limited nature of its holding in *Rahimi*. As the Supreme Court stated, "[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 1903. Such a narrow holding cannot support the restriction encompassed here when SSgt Lara faces a lifetime restriction in his right to bear arms for his non-violent offense.

Looking at the provisions of § 922(g) in light of *Rahimi*, the Government would have to show a historical tradition of applying a ban on firearm possession for non-violent offense. The Government fails to meet that burden. The Government cannot establish the constitutionality of the § 922 limitations an attempt to view child pornography nor for a dereliction of duty. Therefore, applying any provision under § 922 to SSgt Lara is unconstitutional given the lack of correlation between SSgt Lara's conduct and the

Nation's historical tradition of firearm regulation tethered to regulating violent offenders.

3. SSgt Lara established a colorable showing of prejudice when the Government unlawfully restricted his right to bear arms.

There must be a colorable showing of possible prejudice to garner relief for post-trial processing errors. *United States v. Taylor*, 60 M.J. 190, 195 (C.A.A.F. 2004). This requires the appellant to articulate the possible prejudice—what, if anything, would have been different if the post-trial processing error had not occurred. *See United States v. Robinson*, No. ACM, 2020 CCA LEXIS 121, at * 8-9 (N-M. Ct. Crim. App. 16 Apr. 2020). Similarly, this Court has found there was no colorable showing of possible prejudice when the appellant did not demonstrate what she would have done differently or how the error could have impacted the convening authority's decision. *United States v. Harrington*, No. ACM 39112, 2017 CCA LEXIS 748, *14-15 (A.F. Ct. Crim. App. 6 Dec. 2017).

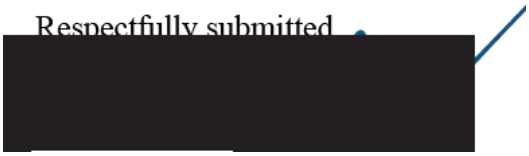
Using these cases as a guide, when the error in the STR and EOJ restricts a constitutionally protected right, there is more than enough to meet the low threshold of possible prejudice. This is unlike errors which have no correlated impact as analyzed above. The nature of 18 U.S.C. § 922 itself demonstrates prejudice—as applied to SSgt Lara. SSgt Lara had firearms prior to this investigation and had to dispense of his weapons. Dec'l of SSgt Lara. He wants to continue to keep and bear arms but as a result of this conviction, he cannot. *Id.*

The SJA's application of § 922 to SSgt Lara's non-violent conviction was plain and obvious error that rendered his post-trial processing incorrect. The lifetime restriction on SSgt Lara's right to keep and bear arms establishes more than a colorable showing of possible prejudice. As such, this Court can and should remand this case to the military

judge to correct the post-trial processing enors in the STR and EOJ to reflect no provision of§ 922 is applicable to his conviction.

SSgt Lara respectfully requests this Honorable Comi remand this case to the Air Force Trial Judiciruy to order correction of the post-trial processing of SSgt Lara's case by ensuring the STR and EOJ, to include the indorsements thereto, accmately reflect that § 922 does not apply to his conviction.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I ce1iify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 9 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO ATTACH**
	)	Before Special Panel
v.	)	
	)	No. ACM 40247 (reh)
Staff Sergeant (E-5) **DOUGLAS G. LARA** United States Air Force *Appellant*	)	9 December 2024

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

Pursuant to Rules 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to attach the following document to the Record of Trial:

Declaration of Staff Sergeant Douglas G. Lara, 1 page, 1 December 2024 (Appendix A).

Appendix A is a sworn declaration from SSgt Lara, which provides details regarding the lifetime ban on possession of firearms SSgt Lara faces due to his conviction. Because the record does not document the prejudice that resulted from the Staff Judge Advocate's errant decision in determining a lifetime ban on firearms possession applies to SSgt Lara's non-violent offense, this declaration is needed to resolve the issue of prejudice as it relates to the error in his post-trial processing.

These matters may be attached for this Court's consideration pursuant to Article 66, UCMJ, as these declarations supplement matters raised in the record – that is, whether the Government's post-trial processing error resulted in prejudice. The facts SSgt Lara attests to—that he used to possess guns, was disarmed, and would like to again possess firearms—are of central importance in this Court's duty to determine if prejudice is established as a result of this post-trial processing error. Because these facts are not otherwise documented, there is no other way for this Court to

consider all the factors necessruy to resolve the assignment of error. *See United States* v. *Jessie*, 79 M.J. 437,445 (C.A.A.F. 2020).

Appellant respectfully requests that this Honorable Comt grant the motion to attach.

Respectfully Submitted,

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I ce1tify that the original and copies of the foregoing were sent via electronic mail to the Court and se1ved on the Government Trial and Appellate Operations Division on 9 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' OPPOSITION TO APPELLANT'S MOTION TO ATTACH**
v.	)	
	)	Before Special Panel
Staff Sergeant (E-5) **DOUGLAS G. LARA,** United States Air Force *Appellant.*	)	No. ACM 40247 (reh)
	)	16 December 2024

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

Under Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, the United States opposes Appellant's motion to attach Appendix A – his declaration signed 1 December 2024. Appellant states that he used to possess rifles that are now in the possession of his brother and handguns that were placed in the Hurlburt Field Armory. He further states that, after his guilty plea, he signed a form acknowledging that his conviction would trigger a "lifetime ban" on his ability to possess firearms under 18 U.S.C. § 922. (App. Mot. App. A). Appellant claims that the facts that "he used to possess guns, was disarmed, and would like to again possess firearms" are of central importance in this Court's determination as to whether prejudice existed as a result of the post-trial processing error alleged in his second assignment of error. (App. Mot. at 1.)

Our superior Court has held that Appellants may supplement the record with affidavits when claims and issues raised by the record are not fully resolvable by the materials in the record. United States v. Jessie, 79 M.J. 437, 442 (C.A.A.F. 2020) (internal citations omitted). This Court requires the movant to explain the relevance and necessity of the supplement to the case. (A.F. Ct. Crim. App. R. 23.3(b)). This case is fully resolvable by the materials in the

record. This Court should deny Appellant's motion to attach for two reasons: 1) documentation of Appellant's firearm prohibition under 18 U.S.C. § 922 is found in the record (*Entry of Judgment, 1st Indorsement,* ROT, Vol. at 4); and 2) neither the current location of his firearms nor his desire to possess firearms again are necessary to address Appellant's assignments of error.

1. The record contains information regarding Appellant's firearm prohibition.

The fact that Appellant's convictions resulted in firearm prohibition is undisputed and evidenced throughout the rehearing record. (*See, e.g., Entry of Judgment, 1st Indorsement,* ROT, Vol. at 4; *SJA Confinement Adjudgment Memo,* ROT, Vol. 1, dated 30 Apr 24.) Because this information is found within the record and is available for this court to weigh in evaluating Appellant's assignments of error, the portion of Appellant's declaration referring to the fact that he received a firearm ban under 18 U.S.C. § 922 because of his convictions is unnecessary. Therefore, this Court should deny his motion to attach.

2. Appellant's claim that he used to have firearms and would like to have them back is not necessary to address Appellant's assignments of error.

Appellant's assertion that he used to have guns and wants them back is not relevant to whether Appellant's conviction should have triggered firearm prohibition. And, assuming a post-trial processing error exists, this information is also unnecessary to evaluate whether Appellant was sufficiently prejudiced.

Appellant's second assignment of error asserts that his convictions for "non-violent offense[s]" did not trigger firearm prohibition under 18 U.S.C. § 922 and the Staff Judge Advocate's decision to require the same was erroneous. (App. Br. at 20.) A firearms prohibition would be triggered automatically by the finding of guilt for a crime punishable by imprisonment for a term exceeding one year. 18 U.S.C. § 922(g). The maximum sentence for a violation of

Articles 80 (for an attempt to view child pornography under Article 134) and 92, UCMJ, include a te1m of confinement for 10 years and 2 years, respectively. Manual for Comis-Martial, United States, paii IV, paras. 18.d(l), 93.d(l) (2019 ed.). Appellant's plea to the chai·ges of violating Articles 80 and 92, UCMJ triggered fireaims prohibition. Appellant's claim that he wants his fireaims back from his family and the Hurlbmi Field Almo1y is not relevant for dete1mining whether his convictions triggered a firea1m ban. Similai·ly, assuming this Court were to find post-trial processing error, those details ai·e not relevant to assessing prejudice to Appellant. Appellant can claim prejudice without reso1i to extra-record materials.

Appellant's assignments of error are fully resolvable by the facts in the record. Appellant's claims that he used to possess fireaims and wants to possess them once again is not necessa1y for resolving his assignments of error.

WHEREFORE, the United States respectfully requests this Court deny Appellant's motion to attach Appendix A.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I ce1iify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 16 December 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Special Panel
Staff Sergeant (E-5) **DOUGLAS G. LARA**, United States Air Force *Appellant.*	)	No. ACM 40247 (reh) 8 January 2025

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

ISSUES PRESENTED

I.

WHETHER THE PLEA TO ATTEMPT TO VIEW CHILD PORNOGRAPHY WAS IMPROVIDENT.

II.

WHETHER THE POST TRIAL PROCESSING OF [APPELLANT'S] CASE WAS IMPROPERLY COMPLETED WHEN THE STAFF JUDGE ADVOCATE FOUND 18 U.S.C. § 922 APPLIED TO THE CONVICTIONS FOR NON-VIOLENT OFFENSES.

STATEMENT OF CASE

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

STATEMENT OF FACTS

Consistent with his pleas, the military judge found Appellant guilty of one charge and one specification of attempting to view child pornography on divers occasions in violation of Article 80, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 880; and one charge and specification of willful dereliction of duty on divers occasions, in violation of Article 92, UCMJ,

10 U.S.C. § 892. Appellant now challenges the providence of his plea of guilty concerning his attempt to view child pornography. The government charged the offense as follows:

> Between on or about 18 March 2019 and on or about 18 December 2019, at or near Navarre, Florida, on divers occasions, [Appellant] did attempt to view child pornography; to wit, entering known child exploitable terms in internet search engines to view images of a minor or what appears to be a minor engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

(*Charge Sheet*, ROT, Vol. 1.)

In describing how he was guilty of this offense, Appellant, in his own words, stated that he would use search terms "such as 'biker girls,' 'teen nude selfie,' and 'tiny'" in internet search browsers in an effort to obtain and view child pornographic material. (R. at 24.) Specifically, Appellant admitted that he sought to view sexual material which depicted minor children who appeared to be under the age of eighteen and understood that the search terms he used would have possibly produced both legal pornography as well as material which met the definition of illegal "child pornography." (R. at 24, 26.) While he did not specify how or why the terms he specifically mentioned ("biker girls," "teen nude selfie," "tiny") would likely produce illegal child pornography, he clarified that "s*ome of the terms* [he] entered and websites [he] attempted to visit could return images that were illegal and potentially child pornographic." (R. at 24.) (emphasis added.) Further, he knew the same to be true at the time he ran the searches, but he "did it anyway." (Id.) Along these same lines, Appellant, still using his own words, elaborated about his understanding of the distinction between legal pornography and that which was prohibited under Article 134, UCMJ, and referenced a conversation he had with his attorneys on the subject. (R. at 24.)

Following Appellant's explanation, the military judge asked several follow-up questions, as follows:

> MJ: You indicated that you attempted to view the child pornography on electronic devices; is that accurate?
>
> ACC: Yes, Your Honor.
>
> MJ: All right. How did you attempt to do it?
>
> ACC: Your Honor, I was typing terms into search engines that I knew could possibly return images of children between the ages of 16 and teens to 18, so 16 to 18.
>
> MJ: Okay. Based on the definitions that I told you, you understand that child pornography includes visual depictions of any child under the age of 18; is that accurate?
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. When you were typing in the search terms that you realized could have returned images of children under the age of 18, did you have any legal justification or excuse for doing so?
>
> ACC: No, Your Honor.
>
> MJ: Did you intend to view child pornography? That is, did you intend to view sexualized images of children under the age of 18?
>
> ACC: Your Honor, could you ask your question again, one more time?
>
> MJ: Sure. When you typed the words into your search engine that you typed, did you intend to view images – sexualized images of children under the age of 18?
>
> ACC: Your Honor, when I typed in those terms I – I knew that what would be produced or returned is – would be teens that would appear to be under the age of 18. So, yes, Your Honor, it was my intention to look for teens that appeared under the age of 18.

(R. at 25-26).

Due to his browser's settings, many of the images resulting from his searches were blurred or blank, which prevented him from viewing them. (R. at 26-27). Still, he was able to successfully view some images that may not have met the legal definition of child pornography. (R. at 24-26.) In addition to using search terms to find child pornographic content, he also stated that he attempted to visit websites such as "2Bteen.info," "motherless.com," and "lepardteens.org," but those websites were blocked by his browser entirely. (Id.)

The military judge also sought clarification on this information, asking Appellant the following questions:

> MJ: []Do you believe and admit that your actions were more than merely preparatory steps and that is where you clearly – that they were clearly substantial steps made directly toward the commission of attempting to view child pornography?
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. Do you believe and admit that your attempt would have been successful but for the fact that your internet browser blocked the return of the results that you were seeking?
>
> ACC: I'm sorry, Your Honor. Could you repeat that question?
>
> MJ: Sure. I believe you indicated that your internet browser blocked the return of the websites?
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. Do you believe and admit that your attempt would have been successful but for that fact?
>
> ACC: Yes, Your Honor.
>
> MJ: All right. Describe to me what happened when your internet browser blocked the return of those sites?
>
> ACC: Sometimes the page entirely would be blocked. It would show that – that the website contained pornographic material and that was the end of that action. Sometime[s] if I was using digital images, the

> pictures, the thumbnails they would be either blurred out or just blank, and that's how they would be blocked.
>
> MJ: Okay. Did anyone or anything force you to attempt to commit the offense of viewing child pornography?
>
> ACC: No, Your Honor.
>
> MJ: Could you have avoided the attempt to commit the offense if you wanted to?
>
> ACC: Yes, Your Honor.
>
> MJ: Was the attempt to commit the offense a freely made decision made on your part?
>
> ACC: Yes, Your Honor.
>
> MJ: Okay. Sergeant Lara, do you believe and do you admit that between on or about 18 March 2019 and on or about 18 December 2019, at or near Navarre, Florida, on divers occasions, you did attempt to view child pornography; to wit, entering know child exploitable terms in internet search engines to view images of a minor or what appears to be a minor engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces?
>
> ACC: Yes, Your Honor.

(R. at 27-28.)

In addition to the colloquy with the military judge, the Government offered a stipulation of fact with several attachments in support of the plea, which was admitted without objection. (Pros. Ex. 1; R. at 14-17.) One of the attachments appended to the stipulation of fact consists of video clips of a recorded statement made by Appellant during a prior interview with law enforcement. (Pros. Ex. 1, Attach. 5.) During that statement, Appellant stated that he last had "eyes on" underage girls "sometime in 2019." (Pros. Ex. 1 at 2, Attach. 5.)

In the stipulation of fact, Appellant also admitted to attempting to view child pornography on his iPad, in 2020. (Pros. Ex. 1 at 2.) A report from an application on

Appellant's iPad called Covenant Eyes[1] was also attached to the stipulation of fact. (Pros. Ex. 1, Attach. 3.) This report documented several pages of pornographic-sounding URLs visited by Appellant such as "ameteursteen.net," "fallenteenangels.com," "amateurfetishist.com."[2] (Id.)

The stipulation of fact also included forensic analysis of Appellant's electronic devices. (Pros. Ex. 1, Attach. 2 and Attach. 4.) The analysis indicated that the images outlined were last accessed by a user on 7 January 2019. (Pros. Ex. 1, Attach. 5 at 5, para. 6.) During his statements in the plea colloquy concerning Appellant's use of a government computer to view pornography, he explained that his personal devices were monitored by his spouse, and he did not want her to know about his internet search activity. (R. at 31.)

After completing inquiries concerning the factual bases of both charges and specifications, the military judge communicated her understanding that Appellant and the government had entered into a plea agreement, which the parties confirmed was accurate. (R. at 35.) The military judge then inquired as to the circumstances surrounding the plea agreement, the terms of the agreement, and Appellant's understanding of the same. (R. at 35-46.) Notably, the military judge highlighted and discussed the Defense's agreement to waive litigation of any potential motions. (R. at 39.) Defense counsel clarified that it was the Defense who originated the provision concerning the waiver of motions and stated that the Defense was specifically waiving the ability to litigate a motion *in limine* under Mil. R. Evid. 404(b) as a part of this agreement. (R. at 40.)

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[1] Covenant Eyes was an application used by Appellant and his wife to monitor Appellant's internet activity and restrict him from visiting pornographic sites. The application was also supposed to create a log of Appellant's internet activity which would be accessible by Appellant's spouse.

[2] This is not an exhaustive list.

Finally, before accepting Appellant's plea, the military judge asked the following questions:

> MJ: Are you pleading guilty not only because you hope to receive – excuse me -- the relief set forth in the plea agreement, but because you are convinced that you are, in fact, guilty?
>
> ACC: Yes, Your Honor.

(R. at 45.) Further, the military judge asked:

> MJ: Are you pleading guilty voluntarily and of your own free will?
>
> ACC: Yes, Your Honor.
>
> MJ: Has anyone made any threat or tried in any way to force you to plead guilty?
>
> ACC: No, Your Honor.
>
> MJ: Do you have any questions as to the meaning and effect of a plea of guilty?
>
> ACC: No, Your Honor.
>
> MJ: Do you fully understand the meaning and effect of your plea of guilty?
>
> ACC: Yes, Your Honor.
>
> MJ: Do you understand that even though you believe you are guilty, you have the legal right to plead not guilty and to place upon the government the burden of proving your guilt beyond a reasonable doubt?
>
> ACC: Yes, Your Honor.

(R. at 47.)

ARGUMENT

I.

APPELLANT'S PLEA TO ATTEMPT TO VIEW CHILD PORNOGRAPHY WAS PROVIDENT.

Standard of Review

This Court reviews a military judge's decision to accept a plea of guilty for abuse of discretion. *See* United States v. Forbes, 78 M.J. 279, 281 (C.A.A.F. 2019) (citation omitted). In reviewing the providence of a plea, a military judge abuses his discretion only when there is "a substantial basis in law and fact for questioning the guilty plea." United States v. Inabinette, 66 M.J. 320, 322 (C.A.A.F. 2008) (internal quotation marks and citation omitted). "[T]he military judge's determinations of questions of law arising during or after the plea inquiry are reviewed de novo." Id. at 321. "[A]ppellant bears the burden of establishing that the military judge abused that discretion, i.e., that the record shows a substantial basis in law or fact to question the plea." United States v. Phillips, 74 M.J. 20, 21-22 (C.A.A.F. 2015) (citation omitted).

In a guilty plea, the military judge must establish on the record the factual bases that show that "the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty." United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (citation omitted). While the military judge must find an adequate factual basis to support the plea, that is "an area in which [this Court] afford[s] significant deference." United States v. Jordan, 57 M.J. 236, 238 (C.A.A.F. 2002). In reviewing the providence of Appellant's guilty plea, this Court considers Appellant's colloquy with the military judge, as well as any inferences that may be reasonably drawn from it. United States v. Carr, 65 M.J. 39, 41 (C.A.A.F. 2007).

Law

The underlying offense of viewing child pornography requires the following elements: (1) the accused knowingly and wrongfully viewed child pornography; and (2) under the circumstances, the conduct of the accused was of a nature to bring discredit upon the armed forces. MCM, Part IV 95b.(1).

As charged in this case, an attempt to view child pornography in violation of Article 80, UCMJ requires four elements: (1) that Appellant did a certain overt act; (2) that the act was done with the specific intent to view child pornography in violation of Article 134, UCMJ; (3) that the act amounted to more than mere preparation; and (4) that the act apparently tended to effect the commission of the intended offense. Manual Courts-Martial pt. IV, para. 4.b.

As for the third element of attempt, which requires an act amounting to "more than mere preparation," CAAF has interpreted it as requiring that an accused take a "substantial step" toward commission of the crime. United States v. Payne, 73 M.J. 19 (C.A.A.F. 2014) (citing United States v. Schoof, 37 M.J. 96, 102 (C.M.A. 1993)). To constitute a substantial step, the **overt act** must amount to "more than mere preparation" and "unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." United States v. Winckelmann, 70 M.J. 403, 407 (C.A.A.F. 2011) (alteration in original) (quotations and citations omitted.) "[A] substantial step must be conduct strongly corroborative of the firmness of the defendant's criminal intent." United States v. Byrd, 24 M.J. 286, 290 (C.M.A. 1987) (citations omitted). However, the explanation section of Article 80, UCMJ, states that "[t]he overt act need not be the last act essential to the consummation of the offense." MCM, pt. IV, ¶ 4.c.(2); *see also* United States v. Thomas, 13 C.M.A. 278, 32 C.M.R. 278, 288 (C.M.A. 1962).

Child pornography is "material that contains either an obscene visual depiction of a minor engaging in sexually explicit conduct or a visual depiction of an actual minor engaging in sexually explicit conduct." MCM, Part IV 95c.(4). A minor is any "person under the age of 18 years." MCM, Part IV 95c.(7).

Visual depiction includes any developed or undeveloped photograph, picture, film, or video; any digital or computer image, picture, film, or video made by any means, including those transmitted by any means including streaming media, even if not stored in a permanent format; or any digital or electronic data capable of conversion into a visual image. MCM, Part IV 95c.(11).

"Sexually explicit conduct" means actual or simulated: (a) sexual intercourse or sodomy, including genital to genital, oral to genital, anal to genital, or oral to anal, whether between persons of the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; or (e) lascivious exhibition of the genitals or pubic area of any person. MCM, Part IV 95c.(10). An accused must be aware the images "were of minors, or what appeared to be minors, engaged in sexually explicit conduct." MCM, Part IV 95c.(5). Circumstantial evidence such as search term used by the appellant may be used to infer the appellant was aware of the child pornography. Id.

At the trial level, "the ability to rely on circumstantial evidence is especially important" in child pornography cases "where the offense is normally committed in private." King, 78 M.J. at 221. Direct evidence of a child pornography offense is "rare because the offense is usually committed in private," and the government depends on circumstantial evidence to prove the offense occurred. Id.

Analysis

The evidence was sufficient to support his plea of guilty and resulting conviction because Appellant purposefully conducted internet searches and attempted to visit websites he believed could produce illegal child pornographic material. (R. at 24-27.) In conducting his internet searches, he had the specific intent to view pornographic material depicting children under the age of eighteen and was unsuccessful in obtaining illegal material only because his device blocked his access to certain images and websites. (R. at 26-28.)

Appellant makes three arguments under this Assignment of Error, namely that: (1) the evidence did not support the finding of a substantial step toward the completion of the offense of viewing child pornography; (2) there was no independent intervening event that prevented the completion of the offense; and (3) his conduct was constitutionally protected which required the military judge to conduct a heightened inquiry prior to the acceptance of Appellant's guilty plea. (App. Br. at 6.) All three points are without merit, in that they seem to rest on a theory of factual and legal insufficiency rather than whether his plea was provident.

Appellant took a substantial step to complete the offense.

The military judge did not abuse her discretion in accepting Appellant's plea of guilty. Further, nothing in the record supports a substantial basis to question the guilty plea concerning whether Appellant's actions were a "substantial step" toward the completion of the offense of viewing child pornography. In Appellant's own words, he agreed that his actions of entering certain search terms and attempting to visit the websites at issue were "substantial steps made toward the commission of viewing child pornography." (R. at 24.) He specifically stated, "I [] knew that some of the terms I entered and websites I attempted to visit could return images that were illegal and potentially child pornographic, but I entered them anyway." (Id.) He also told

the military judge, "Your Honor, when I typed in those terms I – I knew that what would be produced or returned is – would be teens that would appear to be under the age of 18. So, yes, Your Honor, it was my intention to look for teens that appeared under the age of 18." When the military judge asked him later for a second time whether he believed his actions were "substantial steps" to complete the offense, rather than mere preparation, he answered affirmatively. (R. at 27.)

In evaluating the military judge's decision to accept Appellant's plea, this Court should keep in mind the nature and character of a guilty plea. *See* United States v. Faircloth, 45 M.J. 172, 174 (C.A.A.F. 1996). Whether the return of child pornography was a natural and probable consequence of Appellant's actions based on the search terms he used and websites he visited was "a matter of proof" that Appellant could have contested at a litigated trial. *See* id. Instead, Appellant pleaded guilty and thereby waived a trial on the facts for that issue. Id. When Appellant admitted that his search could have returned child pornographic material, and that his intent was to view material which depicted teens appearing to be under 18, it showed that resulting child pornographic material was a natural and probable consequence of his actions, those factual circumstances established the factual predicate for Appellant's specific intent under prevailing law. Id. Nothing more was required to support the plea. And this Court should not now question Appellant's admissions about his intent or what he believed was the natural and probable consequences of his actions. *See* id. (citing United States v. Johnson, 42 M.J. 443, 445 (C.A.A.F. 1995)).

But even if Appellant's admissions concerning his intent were not clear enough, military courts have long used the permissive inference that an individual intends the natural and probable consequences of his actions. *See* Pettibone v. United States, 148 U.S. 197, 207 (1893);

See also United States v. Stoker, 706 F.3d 643, 646 (5th Cir. 2013) ("Generally, the natural probable consequences of an act may satisfactorily evidence the state of mind accompanying the act, even when a particular mental attitude is a crucial element of the offense.") (quoting United States v. Maggitt, 784 F.2d 590, 593 (5th Cir. 1986)).

In other words, even without Appellant's statements, the military judge could have properly inferred that the search conducted was a substantial step toward completion of the offense. It was reasonable to determined that the return of child pornographic videos or images was a natural and probable consequence of the search conducted by Appellant and based on the totality of the circumstances, including the direct and circumstantial evidence presented and Appellant's history of similar conduct.

Appellant references and acknowledges multiple similar instances of misconduct he committed outside the charged timeframe but argues that the military judge could not have properly relied on the same or considered those circumstances in accepting the guilty plea. (App. Br. at 9.) That is inaccurate though. As just previously stated, aside from Appellant's own words and admissions, the military judge was permitted to consider other evidence – that is the facts contained within the stipulation of fact and its attachments (Pros. Ex. 1) – to determine whether Appellant's intended outcome was a natural and probable result of his actions.

Appellant essentially argues that his actions do not form a sufficient basis to support his conviction for attempting to view child pornography because the searches he ran, even if successful, could not have possibly resulted in prohibited material and that the websites he attempted to visit did not actually contain any prohibited content involving minor children. (App. Br. at 7-8.) Any assertion of impossibility would be heavily contradicted both by the facts, established largely through Appellant himself, and by the applicable case law, discussed below.

To the extent that Appellant intended to assert that the defense of impossibility applied to the charged offenses, his argument should easily fail. And the fact that Appellant only advances this argument now, for the first time on appeal, only further weakens any such position. In United States v. Lozicki, for example, CAAF considered whether the defense of impossibility applied to an attempt to solicit child pornographic material from a minor where the minor was an online persona and not an actual child. United States v. Lozicki, No. ACM 39643, 2020 CCA LEXIS 469 (A.F. Ct. Crim. App. Dec. 28, 2020) (unpub. op.). The Lozicki Court confirmed "the general rule is that an accused should be treated in accordance with the facts as he or she supposed them to be." Id. (citing United States v. Riddle, 44 M.J. 282, 286 (C.A.A.F. 1996)). "It is unequivocally the rule that impossibility is no defense to the crime of attempt in violation of Article 80, UCMJ." United States v. Knarr, 80 M.J. 522, 531 (A.F. Ct. Crim. App. 2020) (holding that, provided the elements of the offense are otherwise satisfied, the impossibility of the crime solicited is not a defense to attempted solicitation in violation of Article 134, UCMJ); *also see* United States v. Williams, 553 U.S. 285, 300, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). Even if Appellant could not complete the offense, what matters is that he intended to complete the offense and took a substantial step to try to do so. Appellant admitted to both of these elements.

Here, Appellant's history demonstrated his experience with accessing pornographic content through the internet and electronic means and his ability to obtain responsive material. Those facts coupled with his own statements concerning his intent in conducting the searches and confidence in his ability to successfully obtain the material he desired material reasonably support a conclusion that Appellant knew which search terms and websites would successfully

lead him to prohibited child pornography in this case and his action of conducting the relevant searches constitute a substantial step toward his completion of the offense.

In sum, the military judge properly determined that Appellant, possessing the requisite specific intent to view child pornography, took a substantial step in furtherance of the same. This conclusion was not undermined by anything in the record. While he could have challenged this element of the offense at a litigated trial, he chose to instead plead guilty, which he did not have to do. Appellant has established no basis in law to question the plea on the stated grounds.

The government computer's firewalls and security settings which blocked access to his desired content was an intervening event which prevented Appellant from completing the intended offense.

Appellant next argues that his plea was improvident because his actions did not "unequivocally demonstrat[e] that the crime [would have] take[n] place [if not] interrupted by independent circumstances." (App. Br. at 10.) First, despite his prior statements to the military judge, he now claims that he did not explain how or why he was unable to view child pornography by typing "biker girls," "teen nude selfie," nor "tiny" into his internet browser. (App. Br. at 11; R. at 24.) He also points out that he never clarified whether the websites he attempted to visit "actually contained child pornography, adult pornography, or child erotica." (App. Br. at 11.) Based on this, he argues that "there was no intervening event as it relates to the websites [he] attempted to visit because there is no evidence that but for the website being blocked, those websites even contained child pornography." (App. Br. at 10-11; R. at 24, 27-28.)

This point is entirely contradicted by Appellant's statements during the plea colloquy. It was established that Appellant believed he was unable to complete the offense of viewing child pornography, although he was trying to do so, because certain websites and images that populated when he used search terms were blocked by his browser. (R. at 24.) Further,

Appellant assured the court that he believed his actions would have successfully produced prohibited child pornographic material but for the government computer's firewalls. (R. at 27.) If Appellant had wanted to advance the arguments he is now making on appeal, then he could have pled not guilty and demanded a trial on the facts. But he did not. Instead, he pled guilty because he stated he believed he was guilty of the offense. (R. at 45.) And then he admitted that he would have obtained child pornography, but for his computer blocking his access. Again, nothing in the record undermines his statements and, therefore, no legal basis exists to question the providence of the plea on the stated grounds.

The elements of the charged offense did not require inquiry as to whether any specific material was "constitutionally protected."

As an initial matter, the charged offense of attempting to view illegal child pornography under Article 80, UCMJ, did not require a determination as to First Amendment protection. That is, the military judge was not required to speculate as to the other non-child pornography material Appellant might have viewed if his attempts had been successful. Likewise, she was not required to rule out any possible constitutional protections with regard to that purely theoretical material. What matters is that Appellant admitted that his conduct was both intended to obtain unlawful child pornography and likely to do so.

As discussed above, the elements of an attempt as opposed to the underlying offense, do not even require an accused to actually obtain or view any material at all. Appellant was not convicted of viewing or possessing any specific contraband pursuant to the underlying offense, and instead was charged and convicted with an overt act in an attempt to complete the underlying offense. A person enjoys no constitutional right to *attempt* to view illegal child pornography.

It would be illogical for this Court to require a factfinder to assess whether First Amendment protection applies to evidence that has not been put before it. Similarly, the

factfinder should not be required to speculate as to every other possibility which may tend to contradict an accused's own statements during an inquiry before a guilty plea can be accepted. *See generally*. Faircloth, 45 M.J. 172 at 174); *See also* United States v. Johnson, 42 M.J. 443, 445 (C.A.A.F. 1995)).

Appellant argues that based on the colloquy, "it is clear he did not understand the line between prohibited and permissive behavior" and now asserts on appeal that he "believed those search terms would return legal pornography, that of eighteen- or nineteen-year-olds."[3] (App. Br. at 13-14.) Appellant further asserts that, "[t]he military judge did not explain [] the critical distinction between his constitutionally protected conduct—that of viewing child erotica—as it related to the charge of attempt to view child pornography." (Id.) Appellant also claims, incorrectly, that his statement during the inquiry that his search terms could have also produced results that were not child pornography created "an inconsistency of critical distinction which needed to be addressed on the record before his plea could be accepted." (App. Br. at 13-14; R. at 24.) Appellant further asserts that, because this heightened inquiry was not conducted, he admitted to attempting to view child erotica and used search terms which would lead either to legal pornography or child erotica and was convicted based on that constitutionally-protected conduct alone." (App. Br. at 14.)

Again, Appellant could have had a trial on the facts to litigate these matters, but he chose to plead guilty instead. He admitted to attempting to commit an offense that was not constitutionally protect conduct. No heightened inquiry was required, and the fact that his

[3] Appellant takes this position but at the same time acknowledges that he also stated during the inquiry that "some terms [he] entered and websites [he] attempted to visit could return images that were illegal and potentially child pornographic." (App. Br. at 13; R. at 24.)

searches might have *also* turned up legal, constitutionally protected material does not create a substantial basis to question his guilty plea.

In support of this position concerning an inconsistency of "critical distinction," Appellant relies on United States v. Hartman, 69 M.J. 467 (C.A.A.F. 2011) and United States v. O'Connor, 58 M.J. 450, 453 (C.A.A.F. 2003). Those cases, though, discuss the requirement of a heightened inquiry for a military-specific crime (consensual sodomy in the presence of a third person) and for possession of virtual child pornography where the individuals in the images were not actually minors. (Id.) Each of the charged offenses would have been constitutionally protected in the civilian sphere. Neither of these cases is similar to this case where Appellant was charged and convicted of attempting to view prohibited child pornography. The charged offense in this case is criminal in both the civilian and military systems. Thus no heightened plea inquiry was required.

Furthermore, the act of entering the search terms as laid out in the specification was intended to be the overt act towards the commission of the completed offense. In an attempt offense, there is no requirement that the overt act alleged be criminal for the actor's intent to be criminal. *See, e.g.*, United States v. Harjung, No. ACM 39661, 2020 CCA LEXIS 311 (A.F. Ct. Crim. App. Sep. 11, 2020); United States v. Braddock, No. ACM 39465, 2019 CCA LEXIS 441 (A.F. Ct. Crim. App. Oct. 29, 2019) (unpub. op.). Since the overt act did not need to be criminal and could have constituted constitutionally protected behavior, the same heightened constitutional inquiry as in Hartman and O'Connor was unnecessary here.

Even if some heightened inquiry requirement were triggered by the facts of this case, the same would have been satisfied by the discussion which occurred on the record. (R. at 22-27.) Contrary to Appellant's implication, Hartman states that, "with respect to the requisite inquiry

into the providence of a guilty plea…the colloquy between the military judge and an accused must contain an *appropriate* discussion and acknowledgment on the part of the accused of the critical distinction between permissible and prohibited behavior." 69 M.J. at 468 (emphasis added.) Appellant also notably fails to discuss United States v. Mason, wherein CAAF found that a plea colloquy which demonstrated that the accused understood and acknowledged the circumstances establishing the criminal nature of the conduct at issue was sufficient to support his conviction. 60 M.J. 15, 19 (C.A.A.F. 2004).

Here, the record establishes that Appellant specifically explained to the military judge that he understood the distinction between illegal "child pornography" and other types of material such as "child erotica, children posed in suggestive fashion or modeling, or legal obtained pornography." (R. at 24-25.) He also said that he realized that the images which resulted from his search, that he actually viewed, did not constitute "child pornography" by its legal definition, "despite [his] efforts." (R. at 24.) Appellant mentioned that he became aware of this after discussing it with his attorneys at some point prior to the plea colloquy. (Id.) He never stated, expressly nor impliedly, that he did not intend to obtain illegal material when he conducted his search. (Id.) Throughout the inquiry, after acknowledging the distinction between illegal child pornography and other kinds of material, Appellant maintained that his intent was to obtain and view child pornography. Specifically, Appellant stated, "Your Honor, when I typed in those terms I – I knew that what would be produced 5 or returned is – would be teens that would appear to be under the age of 18. So, yes, Your Honor, it was my intention to look for teens that appeared under the age of 18." (R. at 27.)

Further, the military judge did explain to Appellant each and every element of the offense of attempting to view child pornography, including definitions and description of what is and is

not prohibited by the statute. (R. at 22-23.) Appellant stated that he did not have any questions about the information explained to him and agreed that the elements of the offense with the relevant definitions accurately described what he did. (R. at 23.) The inquiry conducted in this case was sufficient to satisfy the standards set forth in Hartman and Mason, even assuming, arguendo, their applicability.

Finally, under this point, Appellant also cites to United States v. Warner and United States v. Moon. 73 M.J. 1 (C.A.A.F. 2013) (clarifying that images of nude minors or possession of non-nude images of children, even if sexualized, may not constitute "child pornography" as defined by statute); 73 M.J. 382 (C.A.A.F. 2014) (finding the First Amendment inquiry insufficient where the military judge provided inconsistent definitions and explanations of possession images depicting nude minors and the criminality of that conduct).

But neither Moon nor Warner have any real applicability here nor do they tend to further Appellant's claim that "the military judge found [him] guilty of conduct that was not criminal (using search terms that would return child erotica, legal pornography, or non-pornographic material)." (Id.; App. Br. at 14.) This factually unsupported conclusion ignores Appellant's repeated statements during the inquiry that he was specifically looking for pornographic material depicting children who appeared to be under the age of 18, that he knew when he conducted the searches that the terms used could return results of illegal child pornography, and despite having this knowledge, he conducted the searches anyway. (R. at 24-26.) Yet again, Appellant could have pled not guilty and argued that the government could not prove that he intended to view child pornography rather than constitutionally protected child erotica. But not only did Appellant acknowledge during the plea inquiry that he understood the difference, he still continued with his guilty plea.

The plea colloquy sufficiently addressed Appellant's specific intent, actions, and understanding of the offense's elements. The military judge provided accurate explanations and definitions, and Appellant shared with court the details of his actions, including his knowledge and specific intent. Nothing more was required for the military judge to accept his plea of guilty. As pointed out throughout this answer, Appellant pleaded guilty of his own volition and had no obligation to do so. He stated during his plea inquiry with the military judge that he was pleading guilty *because he was actually guilty*, that he understood he did not have to, and that he believed his plea of guilty was in his best interest. (*See* R. at 45-47.)

This Court should, therefore, deny this assignment of error and affirm the findings of the trial court.

II.

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

Additional Facts

The Staff Judge Advocate's first indorsement to the Statement of Trial Results (STR) and EOJ in Appellant's case contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*STR* and *EOJ*, ROT, Vol. 1.)

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Appellant asserts that his convictions did not trigger the firearm prohibition under 18 U.S.C. § 922 and the Staff Judge Advocate's determination was erroneous. (App. Br. at 20-21). He also argues that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, citing to the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). (Id.)This Court recently held in its published opinion in United States v. Vanzant, No. ACM 22004, 2024 CCA LEXIS 215, ___M.J. ___(A.F. Ct. Crim. App. 28 May 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at *24. Appellant suggests that Vanzant is not dispositive of his request because he has framed the issue merely as an error in post-trial processing under Article 66(d)(2), UCMJ, which he claims this Court did not analyze in Vanzant. 84 M.J. 671, 2024 CCA LEXIS 215, at *23. (App. Br. at 19.)

First, the Vanzant opinion was clear as to the scope of its jurisdiction under Article 66, UCMJ, and none of the cases cited by Appellant support his position that this Court has the authority to amend post-trial documents beyond correcting clerical errors related to the findings or sentence. *See*, e.g., United States v. Jones, No. ACM S32717, 2022 CCA LEXIS 652, at *4 (A.F. Ct. Crim. App. 7 Nov. 2022); United States v. Graves, No. ACM 40340, 2023 CCA LEXIS 356, at *8-9 (A.F. Ct. Crim. App. 23 Aug. 2023). (App. Br. at 17-18.)

Next, Appellant is not entitled to relief under Article 66(d)(2), UCMJ. A CCA "***may*** provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial ***after*** the judgment was entered into the record under section 860c of this title[.]" (emphasis added).

The 18 U.S.C. § 922 annotation was entered into the record before the EOJ was entered into the record. The 18 U.S.C. § 922 annotation on the First Indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other information and the STR are entered into the record. 10 U.S.C. § 8Article 60(1)(C). Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" cited in Article 66(d)(2). *Compare* Article 66 *with* Article 60c. Because the STR and the First Indorsement are entered into the record before the EOJ is entered into the record under Article 60c, the § 922 annotation on the STR's First Indorsement is not an error occurring "*after* the judgment was entered into the record." Article 66(d)(2) (emphasis added).

Then the STR and its First Indorsement are entered into the record again as attachments to the EOJ. Article 60c (a)(1)(A). Because they are entered again as attachments to the EOJ they are simultaneous with the judgment of the court. The STR and the STR's First Indorsement are not errors occurring after the judgment was entered into the record.

Appellant suggests that this Court could correct the First Indorsement to the EOJ because it is attached to the EOJ after the military judge signs it. (App. Br. at 19); DAFI 51-201, para. 20.41. ("After the EoJ is signed by the military judge and returned to the servicing legal office, the SJA signs and attaches to the EoJ a first indorsement.") But a correction to the EOJ's First Indorsement would be a pyrrhic victory. Even if this Court had authority to remove the firearms prohibition annotation from the First Indorsement to EOJ (*Entry of Judgment*, ROT Vol. 1 at 3),

it could not remove the firea1ms annotation from the STR that was incorporated into the EOJ *(Enhy of Judgment,* ROT, Vol. 1, Attach. at 3) because that annotation on the STR occmTed before the EOJ was entered into the record. Thus, Appellant would remain in the same situation he is in now - having a firea1ms prohibition annotated on the EOJ. Since this Comt's intervention under Alticle 66(d)(2) would not provide meaningful relief, this Comt should deny Appellant's claim.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I ce1iify that a copy of the foregoing was delivered to the Comi and the Air Force Appellate Defense Division on 8 Januaiy 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* v. Staff Sergeant (E-5) **DOUGLAS G. LARA** United States Air Force *Appellant*	))))))))))	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Special Panel No. ACM 40247 (reh) 15 January 2025

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

Appellant, Staff Sergeant (SSgt) Douglas G. Lara, by and through his undersigned counsel and pursuant to Rule 18.3 of this Honorable Court's Rules of Practice and Procedure, files this reply to the United States' Answer to the Assignments of Error (Answer), filed 8 January 2025. SSgt Lara stands on the arguments in his initial brief, filed on 9 December 2024 (Appellant's Br.) and offers additional argument for the issue listed below.

THE PLEA TO ATTEMPT TO VIEW CHILD PORNOGRAPHY WAS IMPROVIDENT.

1. Staff Sergeant Lara's plea lacked an adequate factual basis.

To establish an accused's guilt in the course of a guilty plea, the military judge must establish on the record the factual bases that show the accused's acts constituted each of the elements of the charged offense. *See United States v. Care*, 18 U.S.C.MA. 535, 541 (C.M.A. 1969). A military judge abuses her discretion when a plea is accepted without an adequate factual basis or the law to support it. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008). SSgt Lara's plea should not have been accepted because the military judge could not determine his guilt at to each element based on the description of his own

conduct within the *Care* inquiry and the Stipulation of Fact. Therefore, SSgt Lara's plea did not have an adequate factual basis to support it, rendering his plea improvident, and the military judge abused her discretion in accepting it. *See id.*, *see also United States v. Weeks*, 71 M.J. 44, 46 (C.A.A.F. 2012).

The central issue with SSgt's Lara's guilty plea to attempt to view child pornography is that the plea does not contain more than broad admissions and generalizations. Despite being the gravamen of the offense, child pornography was discussed in name only. As a result, child pornography became the proverbial elephant in the room, with SSgt Lara, the Government, and the miliary judge talking around it versus about it.

The facts elicited for each element of the offense of attempt to view child pornography illustrate this deficiency. SSgt Lara's admissions to the military judge, along with the Stipulation of Fact, did not meet the elements of attempt to view child pornography.

To plead guilty to attempt to view child pornography, SSgt Lara had to admit to conduct that was an overt act. *Manual for Courts-Martial* (*MCM*) (2019 ed.), pt. IV ¶ 4.b(1). Next, SSgt Lara had to admit he had the specific intent to view child pornography. *MCM* pt. IV ¶ 4.b(2). Then, SSgt Lara was required to admit his conduct amounted to more than mere preparation, that it was a substantial step toward completion of the crime. *MCM* pt. IV ¶ 4.b(3). Finally, SSgt Lara had to admit he would have completed the offense but for some independent intervening event. *MCM* pt. IV-5 ¶ 4.b(4). The requirement to develop an adequate factual basis to support the plea will not be satisfied by questions such as whether the accused realizes that a guilty plea admits every element charged and every

act or omission alleged and authorizes conviction of the offense without further proof. *See Care*, 18 U.S.C.M.A. at 541.

SSgt Lara made the standard admissions at the outset of the guilty plea, in that he admitted he committed each of the elements as described by the military judge. R. at 24-25. What was missing in SSgt Lara's admissions or as described within the Stipulation of Fact is how his conduct was linked to child pornography. SSgt Lara's factual description of his crime, as supplemented with the Stipulation of Fact and its attachments, leaves all four elements of an attempt to view child pornography deficient because he did not tie his conduct to child pornography with more than broad generalizations.

When SSgt Lara discussed the specifics of his conduct to explain how his conduct met each element, he talked around the issue of child pornography. Neither the questioning by the military judge nor the Stipulation of Fact ameliorated the issue. As to the inadequate factual basis to support the plea related to the overt act, substantial step, and the intervening event, those deficiencies are not re-articulated here as they were outlined in the original brief. *See* Appellants' Br. at 5-12.

However, the Government made a pivotal concession as to the overt act and substantial step taken by SSgt Lara that is worth noting. SSgt Lara's plea was required to have a factual bases demonstrating that the overt act that constituted the substantial step toward completion of the offense was the use of "child exploitable [search] terms." *Compare* DD Form 458 (where SSgt Lara was charged with use of "child exploitable terms" as the substantial step), *with MCM* pt. IV ¶ 4.b(1), (3) (setting forth the elements of an overt act and substantial step toward completion of the crime). The Government conceded SSgt Lara did not specify how or why the search terms he used would lead to

child pornography. Answer at 2. This is pivotal because it illustrates the point—SSgt Lara merely talked around the issue of child pornography but did not describe either directly with the language he used or in response to clarifying questions how the search terms he used were linked to anything, not even child pornography more generally or "child exploitable terms" as specifically charged. *Compare*, *Charge Sheet*, DD Form 458 (where SSgt Lara was charged with using child exploitable search terms as the substantial step), *with* R. at 24-28 (where SSgt Lara described using the search terms "tiny," "biker girls," and "teen nude selfie," but did not describe how or why those terms met the definition of child exploitable terms).

Additionally, the search term "teen nude selfie" that was described by SSgt Lara as one search term that he admitted in name only met the definition of a "child exploitable term," R. at 24, sets up an inconsistency that was unresolved on the record. SSgt Lara believed using the word "teen" would lead to depictions of eighteen-year-olds. Pros. Ex. 1 at 2. SSgt Lara's use of the term, as he described it, also prevents this search term from meeting the definition of a child exploitable term. *See* Pros. Ex. 1 at 1 (where child exploitable term is defined to include search terms that will return images of minors or those who appear to be minors). The Supreme Court has stated "the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is accompanied by significant conduct." *United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007). Here, SSgt Lara's conduct in using the search terms he describes, R. at 24, does not meet the threshold for significant conduct given it was not tied to the use of child exploitable terms or even more generally, child pornography.

In addition to demonstrating a lack of an adequate factual basis to support the element of the offense as it relates to the overt act taken by SSgt Lara, the Government's concession has a cascading effect through the other elements. In discussing the evidence required to prove a substantial step, the Court of Appeals for the Armed Forces has recognized that "the substantial step must *unequivocally* demonstrate[e] that the crime will take place unless interrupted by independent circumstances." *United States v.Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (emphasis added) (citation omitted). The overt act was the substantial step toward completion of the crime, and with the lack of an adequate factual basis to support that what SSgt Lara did was at all related to child pornography, there could be no substantial step. Appellant's Br. at 6-10. Given the paucity of facts documenting SSgt Lara's conduct was at all tied to child pornography, the record unequivocally demonstrated the crime as charged would not have taken place as there was no substantial step. *Id.* at 10-11. If there was no substantial step toward completion of the crime, that itself prevented completion of the crime. *Id.* Therefore, there was no independent intervening event.

As to the adequate factual basis to support the element of an independent intervening event, the Government also makes a serious mischaracterization of the facts. To support the existence of an intervening event, the Government steers this Court to government firewalls which prevented completion of the offense. *See* Answer at 15. However, at no time did SSgt Lara tie his attempt to view child pornography to the use of a government computer. *See generally* R. at 24-28.[1] Moreover, SSgt Lara's conduct on

[1] The record citations provided by the Government are to SSgt Lara's description of websites being blocked or images being blurred but this is not tied to the use of his government computer. *See* R. at 27-28. Rather, SSgt Lara's personal devices had

his government computer is encompassed within the specification of Charge II, not Charge I, which is the focus of this assignment of error. This is a critical distinction given Charge I deals with child pornography and Charge II does not. *See* DD Form 458. Therefore, nothing with the use of SSgt Lara's government computer can be used to demonstrate a sufficient factual basis for this plea to attempt to view child pornography under Charge I.

SSgt Lara's plea continued to be fraught with error. The record does not establish SSgt Lara intended to view child pornography, and his specific intent to view child pornography was required. *MCM* pt. IV ¶ 4.b(3); *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 1003-04 (29 Feb. 2020); *see also* R. at 20. SSgt Lara's words describing his intent are the search terms he used, and generic admissions about his intent. R. at 24, 25-26. As discussed above, and within Appellant's Br. at 6-10, the words he used did not demonstrate his intent because he did not describe search terms which would lead to child pornography. When discussing what he was looking for with these searches, SSgt Lara provided generalizations. *See* R. at 24-25. He also believed "what the terms would likely return would be legal pornography." R. at 24. He knew that some of the terms he entered "could return images that were illegal and potentially child pornographic" but never described why he believed that to be true. *Id.* When asked about his intent, the military judge framed the requisite intent as one only to "view sexualized images of children under

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monitoring software which would block all pornographic content. *See* Pros. Ex. 1 at 2. The record at pages 31-34 is the only portion where SSgt Lara describes use of a government computer to look at explicit content. *See* R. at 31-34. SSgt Lara's description of the offense of attempt to view child pornography was not tied to the use of his government computer. R. at 24-28. This is confirmed with review of the Stipulation of Fact under the header Facts and Circumstances of Charge I. *See* Pros. Ex. 1 at 1-3 (where there is no reference to a government computer or government firewalls preventing completion of the offense).

the age of 18." R. at 26-27. In response, SSgt Lara stated he had the intent to "look for teens that appeared under the age of 18." *Id.* An intent to look for teens under the age of 18 does not amount to the specific intent to view child pornography.

Not only does SSgt Lara's spoken intent not provide an adequate factual basis, the evidence within the Stipulation of Fact did not provide any further clarification on SSgt Lara's specific intent. *See* Pros. Ex. 1, Attach. 5. Within these recordings, SSgt Lara merely stated he last "had eyes on underage girls" sometime in 2019. *Id.* A generic statement about having eyes on underage girls, or intending to look for teens under the age of 18, does not show the specific intent to view child pornography, which the military judge instructed, and was required. R. at 20. The specific intent to view child pornography, versus sexualized images of children under the age of 18, matters because child pornography has a specific definition and that is the actus reus of the charge. *See* R. at 21-23, *see also*, DD Form 458. SSgt Lara could not plead guilty to attempt to view child pornography solely with an intent or desire to see teens under the age of 18; his intent had to be tied to child pornography, that is, visual depictions of minors engaged in sexually explicit conduct. *See generally Winckelmann*, 70 M.J. 403, 407 (C.A.A.F. 2011) (where to be guilty of an attempt an accused must have had the intent to commit the substantive offense).

The lack of an adequate factual basis here can be illustrated by comparison with what is missing from the record. The military judge could have asked SSgt Lara whether he intended to see minors or what appear to be minors engaged in sexually explicit conduct when he used the search terms he described. Instead, the military judge framed a different intent—one to view sexualized images of children under the age of 18. R. at 26-27. This

also could have been proven through the search terms he used and how those terms met the definition of child exploitable terms. But neither of those things happened here. *See generally* R. at 24-28 (where there is no such description of his conduct nor his intent). The factual basis to support the plea is entirely eroded.

In sum, SSgt Lara's plea and the evidence within the record talks about child pornography in a general sense and ends up talking around it. However, that is not the standard for a provident plea. The military judge must be able to discern whether there was a factual basis to support that SSgt Lara was actually guilty. No such basis exists because SSgt Lara did not "admit every element of the offense to which [he] plead[] guilty." *United States v. Aleman*, 62 M.J. 281, 283 (C.A.A.F. 2006). Without an adequate factual basis to support the generalized admissions by SSgt Lara, his plea was improvident.

2. Staff Sergeant Lara's plea left unresolved inconsistencies within the record.

Two unresolved inconsistencies emerged from the *Care* inquiry and the Stipulation of Fact. Each of these inconsistencies gave rise to the need for a heightened inquiry because they implicated constitutionally protected conduct. As the Government acknowledges, SSgt Lara did not tie the terms he used specifically to child pornography. Answer at 2. This set up the first inconsistency that gave rise to the need for the heightened inquiry, when SSgt Lara used the term "teen nude selfie," R. at 24, and did not tie it to child pornography and believed use of the word teen would lead to eighteen-year-olds. Pros. Ex. 1 at 2. Second, in responding to the need for a heightened inquiry, the Government dismisses the inconsistencies raised by SSgt Lara's description of his conduct merely because the charge was not the impetus for the constitutional concern. Answer at 18-19. This is incorrect because whether the inconsistency arises from the charge or at any

time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea. *United States v. Moon*, 73 M.J. 382, 386 (C.A.A.F. 2014).

In a guilty plea, inconsistencies must be resolved by the military judge, or the plea must be rejected. *United States v. Outhier*, 45 M.J. 326, 331 (1996). The lack of an adequate factual basis to support the plea also set forth inconsistencies within the record which must have been resolved before the plea was accepted. *See id.* To resolve a matter inconsistent with a guilty plea, a military judge must identify a particular inconsistency at issue and explain its legal significance to an accused, who must then either retract, disclaim, or explain an inconsistent matter. Article 45(a), UCMJ, 10 U.S.C. §845(a); R.C.M. 910(e).

Looking at the first inconsistency that gives rise to the need for the heightened inquiry, SSgt Lara described using the term "teen nude selfie" as the substantial step toward completion of the offense. R. at 24. However, SSgt Lara also believed that when he used the term "teen" in searches, it would lead to eighteen-year-olds. Pros. Ex. 1 at 2. Moreover, the Government conceded that the terms used by SSgt Lara were not tied to child pornography. Answer at 2. The military judge did not ask SSgt Lara to explain how the use of the word "teen nude selfie" then would demonstrate that he intended to view child pornography given his conflicting position that the word "teen" would lead only to adult pornography. *See* R. at 24-28. This view of the search terms is even described by SSgt Lara during the plea:

> At the time I was attempting these terms I did know that most of what the terms would likely return would be legal pornography, meaning that of the ages of 18 or 19 years old.

R. at 24.

The second inconsistency that gave rise to the need for the heightened inquiry came from the military judge's instructions on intent. The military judge initially instructed SSgt Lara he had to have the specific intent to view child pornography to be guilty of attempt to view child pornography. R. at 20. However, when the military judge questioned SSgt Lara about his specific intent, she asked him only if he intended to view sexualized images of children. R. at 27-28. The military judge never reconciled this disparity between the specific intent to view child pornography and the specific intent to view sexualized images of children. *Id.* Ultimately, SSgt Lara needed to be correctly advised on all the elements of the offense, which included his specific intent. *United States v. Barton*, 60 M.J. 62, 64 (C.A.A.F. 2004).

At a minimum, SSgt Lara needed to understand the difference between conduct that was illegal—attempting to view child pornography—and conduct that is not—looking for or intending to look for visual depictions of eighteen- or nineteen-year-olds or images which are not child pornography. That is because the providence of the inquiry must reflect the accused understood the nature of the prohibited conduct. *United States v. Sapp*, 53 M.J. 90, 92 (C.A.A.F. 2000). However, these inconsistencies were left unresolved in this record and therefore, his plea should have been rejected. *Outhier*, 45 M.J. at 331.

These two inconsistencies, both separately and together, erode the foundation for SSgt Lara's plea by calling into question whether he plead guilty to attempt to view child pornography, or attempt to view a "sexualized" image equating adult or child erotica. Only child pornography was charged. *See generally* DD Form 458. Additionally, child erotica is not child pornography. *See generally United States v. Vosburgh*, 602 F.3d 512, 520 (3d Cir. 2010) (distinguishing child erotica from child pornography). These inconsistencies

are apparent and show a substantial basis for questioning the plea. *United States v. Harris*, 61 M.J. 391, 398 (C.A.A.F. 2005).

Moreover, these inconsistencies triggered a two-fold requirement on the military judge that she failed to meet. First, military judges must either resolve an inconsistency or reject the guilty plea. Yet despite the inconsistencies described above between what SSgt Lara was trying to view and the conduct to which he was pleading guilty, the military judge did neither. Second, when SSgt Lara described his conduct and intent in ways that amounted to an attempt to view child erotica, the need for the heightened inquiry contemplated in *United States v. Moon*, 73 M.J. 382, 388 (C.A.A.F. 2014) arose. Again, the military judge failed to correspondingly rise to the occasion.

The heightened inquiry was required in *Moon* because the charged conduct was not otherwise criminalized outside of Article 134, UCMJ. *Moon*, 73 M.J. at 388-89. *Moon* dealt with images of minors that were not obscene, nor were they child pornography, but were still charged as service discrediting under Article 134, UCMJ. *Id.* The Court of Appeals for the Armed Forces reasoned that the military judge had incorrectly advised the accused on the law and should have established why the otherwise protected material could still be, and was, prejudicial to good order and discipline instead of attempt to take the accused's conduct outside of the First Amendment's protection. *Id.* at 389. The accused needed to understand the constitutional implications of his charge—why his conduct still violated Article 134, UCMJ when he was not viewing child pornography or obscene material. *Id.*

The same logic follows here. When SSgt Lara's plea described viewing child erotica and legal pornography, R. at 24, when the Stipulation of Fact asserted the use of

"teen" would return images of eighteen-year-olds, Pros. Ex. 1 at 2, when he described using the search tenn "teen nude selfie," R. at 24, and when he described only an intent to view sexualized images of children, R. at 28, the resulting inconsistencies with the guilty plea needed to be addressed. *See Moon*, 73 M.J. at 389. Simply put, SSgt Lara, in attempting to plead guilty, explained non-criminal conduct and intent. Like the milita1y judge in *Moon*, the milita1y judge here should have clarified whether the conduct and intent SSgt Lara described was criminal, and in doing so, would have given SSgt Lara the oppo1tunity to explain exactly how his conduct and intent met the elements of attempt to view child pornography. The heightened inquiiy would simply serve to resolve the inconsistencies, which is requii·ed. *See Outhier*, 45 M.J. at 331, *see also Moon*, 73 M.J. at 386. The militaiy judge failed to resolve these inconsistencies before she accepted his plea. In doing so, she also failed to conduct the heightened inqui1y required under *Moon.* Because SSgt Lara's plea should have been rejected due to these inconsistencies, his plea is improvident. This Comi should set aside the conviction and the sentence.

SSgt Lara respectfully requests that this Honorable Comi set aside the conviction and the sentence for the specification of Charge I.

Respectfully submitted,

[redacted]

r / \J AF

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I ce1tify that the original and copies of the foregoing were sent via email to the Comt and served on the Government Trial and Appellate Operations Division on 15 Januaiy 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Special Panel
Staff Sergeant (E-5) **DOUGLAS G. LARA** United States Air Force *Appellant*	)	Case No. ACM 40247 (reh) 28 February 2025

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

Pursuant to Rule 23(b) of the Joint Rules of Appellate Procedure, effective 17 May 2024, and Rules 18.5 and 23.3(b) of this Court's Rules of Practice and Procedure, effective 23 December 2020, Staff Sergeant (SSgt) Douglas G. Lara hereby moves to attach the Declaration at the Appendix to the Record of Trial.

The Rule 23(b) and 23.3(b) set out above describe different standards, but the end-result under both should be to grant this motion. The Joint Rules require "good cause shown." JT. CT. CRIM. APP. R. 23(b). This Court's rules must be consistent with the Joint Rules. JT. CT. CRIM. APP. R. 3; *United States v. Gilley*, 59 M.J. 245, 247 (C.A.A.F. 2004). This Court's rules require a statement concerning the relevance and necessity of the proposed item. A.F. CT. CRIM. APP. R. 23.3(b).

There is good cause to grant SSgt Lara's Motion to Attach because SSgt Lara's Assignments of Error were previously filed with this Court on time, on 9 December 2024, and this document is responsive to concerns arising from the Court's consideration of SSgt Lara's Assignments of Error that were brought to the parties' attention in a status conference held on 5

February 2025. Further, there is good cause to attach the proposed declaration because it is relevant and necessary to resolving the Court's concern regarding (a) whether there is the appearance of a conflict of interest related the due to Colonel Pilar Wennrich's role as the Chief of the Appellate Defense Division and Rater of Major Nicole Herbers, the appellate counsel responsible for SSgt Lara's Assignments of Errors, in light of Colonel Wennrich's prior role as the military judge in SSgt Lara's court-martial; (b) whether SSgt Lara has been advised of the potential apparent conflict of interest; and (c) whether SSgt Lara waives the potential conflict of interest.

The Appendix contains a declaration from SSgt Lara, which describes SSgt Lara's knowledge and waiver of any potential conflict of interest related to Colonel Wennrich's status as the current Rater for his assigned appellate counsel and role as the Chief of the Appellate Defense Division.

Undersigned counsel is submitting SSgt Lara's declaration because Major Herbers cannot.[1] As a member of the United States Air Force Reserve, Major Herbers's role in SSgt Lara's representation has been materially affected by the termination of remote work directed by the President's Return to In-Person Work memorandum. 90 Fed. Reg. 8,251 (Jan. 28, 2025).

For the reasons stated above, the proposed document provides the information needed to resolve the issues identified by this Court in its 5 February 2025 status conference. As such, the proposed document is relevant and necessary, and there is good cause to grant this motion to attach a document.

[1] The Appendix only mentions SSgt Lara's knowledge as it relates to Maj Herbers's role. However, SSgt Lara was verbally informed of, and consented to, undersigned counsel's status as Colonel Wennrich's ratee in submitting this motion on his behalf.

SSgt Lara requests that this Honorable Court grant the motion to attach.

Respectfully Submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing and the Appendix were delivered by e-mail to the Court and served on the Government Trial and Appellate Operations Division on 28 February 2025.

Respectfully Submitted,

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