IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	1 April 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **10 June 2022**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 50 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 April 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

5 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 April 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	3 June 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 July 2022**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge; and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

The record of trial consists of eight volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is currently in confinement.

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

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 3 June 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

6 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 June 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	22 June 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 August 2022**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 132 days have elapsed. On the date requested, 180 days will have elapsed.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge; and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

The record of trial consists of eight volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is currently in confinement.

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

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 22 June 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

23 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

[redacted]
THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 23 June 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	25 July 2022

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 September 2022**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 165 days have elapsed. On the date requested, 210 days will have elapsed.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge; and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

The record of trial consists of eight volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is currently in confinement.

Counsel is currently assigned 26 cases; 7 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Eleven cases have priority over the present case:

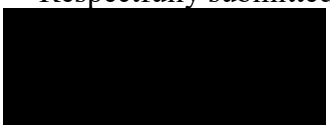
1. *United States v. Massey*, ACM 40017: This Court ordered a *Dubay* hearing on 25 March 2022. Counsel is lead for the hearing. The military judge granted the Government's second request for a continuance; the hearing date is set for 26 July 2022.
2. *United States v. Pullings*, ACM 39948: The CAAF granted review on 26 May 2022. The Reply Brief on Behalf of Appellant is due to the CAAF on 12 August 2022.
3. *United States v. Leipart*, ACM 39711: This Court ordered a *Dubay* hearing, which occurred on 5-6 April 2022. The record of trial was returned to this Court on Friday 8 July 2022. Per this Court's order, Appellant's brief is due on 12 August 2022.
4. *United States v. White*, ACM 39917: The petition for grant of review is due to the CAAF on 4 August 2022.
5. *United States v. Aumont*, ACM 39673 (rem): The second petition for grant of review is due to the CAAF on 18 August 2022.
6. *United States v. Monge*, ACM 39781 (f rev): The petition for grant of review is due to the CAAF on 1 September 2022.

7. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. Counsel is reviewing the record of trial.
8. *United States v. Rosales-Gomez*, ACM S32713: The record of trial consists of 3 volumes. The transcript is 124 pages. There are seven Prosecution Exhibits, 13 Defense Exhibits, and 5 Appellate Exhibits. Counsel is reviewing the record of trial.
9. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel is reviewing the record of trial.
10. *United States v. Raver*, ACM 40197: The record of trial consists of five volumes. The transcript is 359 pages. There are nine Prosecution Exhibits, one Defense Exhibit, two Court Exhibits, and 32 Appellate Exhibits. Counsel is reviewing the record of trial.
11. *United States v. Covey*, ACM 40238: The record of trial consists of two volumes. The transcript is 100 pages. There are five Prosecution Exhibits, six Defense Exhibits, one Court Exhibit, and four Appellate Exhibits. Counsel is reviewing the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

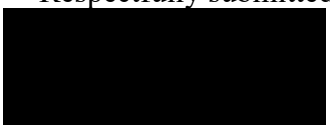


DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 25 July 2022.

Respectfully submitted,



DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

26 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 26 July 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	1 September 2022

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **8 October 2022**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge; and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

The record of trial consists of eight volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is currently in confinement.

Counsel is currently assigned 25 cases; 6 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Ten cases have priority over the present case:

1. *United States v. Pullings*, ACM 39948: The CAAF granted review on 26 May 2022. The Reply Brief on Behalf of Appellant is due to the CAAF on 8 September 2022.
2. *United States v. Aumont*, ACM 39673 (rem): The supplement to the second petition for grant of review is due to the CAAF on 8 September 2022.
3. *United States v. Dominguez-Garcia*, ACM S32694: A reply brief is due to this Court on 7 September 2022.
4. *United States v. Velasquez*, ACM 40056: The petition for grant of review is due to the CAAF on 12 September 2022.
5. *United States v. Reimers*, ACM 40141: The Brief on Behalf of Appellant was filed on 22 July 2022. Counsel expects the Government to Answer on or before 22 September 2022, with reply to follow.
6. *United States v. Geier*, ACM 32679 (f rev): The petition for grant of review is due to the CAAF on 26 September 2022.

7. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. Counsel is reviewing the record of trial.
8. *United States v. Rosales-Gomez*, ACM S32713: The record of trial consists of 3 volumes. The transcript is 124 pages. There are seven Prosecution Exhibits, 13 Defense Exhibits, and 5 Appellate Exhibits. Counsel is reviewing the record of trial.
9. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel is reviewing the record of trial.
10. *United States v. Covey*, ACM 40238: The record of trial consists of two volumes. The transcript is 100 pages. There are five Prosecution Exhibits, six Defense Exhibits, one Court Exhibit, and four Appellate Exhibits. Counsel is reviewing the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 1 September 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

7 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40250**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Charles S. NESTOR	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 1 September 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 8th day of September, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **8 October 2022**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	28 September 2022

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 November 2022**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge; and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

The record of trial consists of eight volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is currently in confinement.

Counsel is currently assigned 25 cases; 6 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Six cases have priority over the present case:

1. *United States v. Pullings*, ACM 39948: The Court of Appeals for the Armed Forces (CAAF) granted review on 26 May 2022. Oral argument is scheduled for 8 November 2022.
2. *United States v. Reimers*, ACM 40141: The Brief on Behalf of Appellant was filed on 22 July 2022. The Government Answer was filed on 19 September 2022; counsel is drafting the reply brief.
3. *United States v. Edwards*, ACM 39696 (rem): The CAAF reversed as to sentence and remanded to this Court. The Brief on Behalf of Appellant on remand is currently due on 1 November 2022.
4. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. Counsel is reviewing the record of trial and drafting the Brief on Behalf of Appellant.

5. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel is reviewing the record of trial.
6. *United States v. Covey*, ACM 40238: The record of trial consists of two volumes. The transcript is 100 pages. There are five Prosecution Exhibits, six Defense Exhibits, one Court Exhibit, and four Appellate Exhibits. Counsel is reviewing the record of trial.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

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 Appellate Government Division on 28 September 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Capt, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

28 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 28 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	31 October 2022

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **7 December 2022**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed. This motion withdraws the previous motion of the same captioning, filed on the same date, because the first version of the motion erroneously stated "3000" days will have elapsed, instead of 300.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge;

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

The record of trial consists of eight volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is not currently in confinement.

Counsel is currently assigned 24 cases; 6 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Six cases have priority over the present case:

1. *United States v. Pullings*, ACM 39948: The Court of Appeals for the Armed Forces (CAAF) granted review on 26 May 2022. Oral argument is scheduled for 8 November 2022.
2. *United States v. Edwards*, ACM 39696 (rem): The CAAF reversed as to sentence and remanded to this Court. The Brief on Behalf of Appellant on remand is currently due on 1 November 2022.
3. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. Counsel is finishing the Brief on Behalf of Appellant.
4. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel has reviewed the record of trial and working with civilian co-counsel to draft the Brief on Behalf of Appellant.

5. *United States v. Covey*, ACM 40238: The record of trial consists of two volumes. The transcript is 100 pages. There are five Prosecution Exhibits, six Defense Exhibits, one Court Exhibit, and four Appellate Exhibits. Counsel is reviewing the record of trial.
6. *United States v. Howell*, ACM 39949: The appellant's petition to the CAAF is due on 22 November 2022.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 31 October 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

1 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 November 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40250**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Charles S. NESTOR	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 November 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Eighth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 2d day of December, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than **6 January 2023**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	30 November 2022

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **6 January 2023**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 293 days have elapsed. On the date requested, 330 days will have elapsed.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge; and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

The record of trial consists of eight volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is not currently in confinement.

Counsel is currently assigned 20 cases; 7 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Four cases have priority over the present case:

1. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1,418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. Counsel is finishing the Brief on Behalf of Appellant.
2. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel has reviewed the record of trial and working with civilian co-counsel to draft the Brief on Behalf of Appellant.
3. *United States v. Covey*, ACM 40238: The record of trial consists of two volumes. The transcript is 100 pages. There are five Prosecution Exhibits, six Defense Exhibits, one Court Exhibit, and four Appellate Exhibits. Counsel is reviewing the record of trial.
4. *United States v. Howell*, ACM 39949 (f rev): The appellant's supplement to the petition for grant of review to the CAAF is due on 12 December 2022.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 30 November 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

1 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 December 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO VIEW SEALED MATERIALS**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	12 December 2022

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine the following materials sealed by the military judge: **Prosecution Exhibits 5, 14, and 15**. *See* Record of Trial (ROT) Vols. 1, 2; Record (R.) at 837.

The above-noted exhibits were provided to all trial participants and reviewed by the military judge. In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing these attachments are reasonably necessary to determine whether Appellant is entitled to relief due to errors during trial. A review of the entire record of trial is also necessary because this Court is empowered by Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d), to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, appellate defense counsel must therefore examine "the entire record." The above-noted exhibits must be reviewed to ensure undersigned counsel provides "competent appellate representation." *See United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998). Accordingly, good cause exists in this case since undersigned counsel

cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 12 December 2022.

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

13 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIAL ACM 40250 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the materials listed in Appellant's motion – which were available to all parties at trial – so long as the United States can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 December 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40250**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Charles S. NESTOR	)	
Technical Sergeant (E-6)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 12 December 2022, Appellant's counsel submitted a Motion to View Sealed Materials, requesting to examine Prosecution Exhibits 5, 14, and 15.

Appellant's motion states the exhibits were reviewed by trial and defense counsel and sealed by the Military Judge. Appellant's counsel avers that viewing the exhibits is "reasonably necessary to determine whether Appellant is entitled to relief due to errors during trial."

The Government responded to the motion on 13 December 2022. It does not object to Appellant's counsel reviewing materials that were released to both parties at trial—as long as the Government "can also review the sealed portions of the record as necessary to respond to any assignment of error that refers to the sealed materials."

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

Accordingly, it is by the court on this 19th day of December, 2022,

ORDERED:

Appellant's Motion to View Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibits 5, 14, and 15**, subject to the following conditions:

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

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	28 December 2022

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **5 February 2023**. The record of trial was docketed with this Court on 10 February 2022. From the date of docketing to the present date, 321 days have elapsed. On the date requested, 360 days will have elapsed.

On 4-8 October 2021, Appellant was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ). R. at 815. The military judge sentenced Appellant[1] to reduction to the grade of E-1; a dishonorable discharge; and, effectively, confinement for 16 months, given that terms of confinement for both specifications were ordered to be served concurrently. R. at 837.

[1] Appellant previously elected to be tried by members for findings but, in the event of a finding of guilty, be sentenced by a military judge. R. at 12, 817.

The record of trial consists of six volumes. The transcript is 838 pages. There are 25 Prosecution Exhibits, 25 Defense Exhibits, one Court Exhibit, and 38 Appellate Exhibits. Appellant is not currently in confinement.

Counsel is currently assigned 16 cases; 6 cases are pending initial AOEs before this Court. Through no fault of Appellant, undersigned counsel has been working on other assigned matters. After reviewing sealed materials (Prosecution Exhibits 5, 14, and 15) on the day of this filing, counsel has completed review of the entire record of trial. Counsel must now conduct research, write the Brief on Behalf of Appellant, and fully consult with the client. Accordingly, an enlargement of time is necessary. Four cases have priority over the present case:

1. *United States v. Lake*, ACM 40168: The record of trial consists of 17 volumes. The transcript is 1,418 pages. There are 101 Prosecution Exhibits, 14 Defense Exhibits, and 135 Appellate Exhibits. This Court remanded on 7 December 2022. Because this Court has granted 12 extensions of time prior to the remand, it will be counsel's first priority case upon re-docketing.
2. *United States v. Smith*, ACM 40202: The record of trial consists of 10 volumes. The transcript is 1,415 pages. There are 22 Prosecution Exhibits, 21 Defense Exhibits, and 76 Appellate Exhibits. Counsel filed the Brief on Behalf of Appellant on 20 December 2022. Counsel expects the Government to file its Answer in late January, with a Reply Brief to follow.
3. *United States v. Li*, ACM S32632 (f rev): The appellant's supplement to the petition for grant of review to the CAAF is due on 17 January 2023.
4. *United States v. Rosales Gomez*, ACM S32713: The appellant's petition for grant of review to the CAAF is due on 24 January 2023.

Counsel will endeavor to file the Brief on Behalf of Appellant on or before the newly established deadline of 5 February 2023; however, one final extension request beyond the one requested in this motion may be necessary.

Appellant was advised of his right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellant has provided limited consent to disclose a confidential communication with counsel wherein he consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 28 December 2022.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

29 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Technical Sergeant (E-6) CHARLES S. NESTOR, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40250 Panel No. 2

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

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

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

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 29 December 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO FILE IN EXCESS OF PAGE LIMIT**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	6 February 2023

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

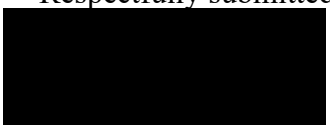
Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file his Assignments of Error (AOE) in excess of this Court's 50-page limit.

Appellant's brief is 61 pages; therefore, it exceeds the page limit by 11 pages. Good cause exists to grant the motion. Appellant vigorously contested all charges and specifications at his general court-martial. In his brief to this Court, he raises eight assignments of error, including factual and legal sufficiency attacks on every element of both specifications, Mil. R. Evid. 404(b) issues, erroneous findings instructions, incomplete record of trial, unreasonable multiplication of charges, and unanimous verdict. All eight assigned errors are raised through counsel. The length of the brief is necessary to thoroughly present the assignments of error to the Court.

Additionally, counsel intentionally formatted the document in such a way as to make the contemporaneously filed motion to file under seal and AOE with sealed portions easier for this Court to access and review. Doing so increased the page total of this brief from about 55 pages in its initial state to 61 pages in its current form.

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

Respectfully submitted,

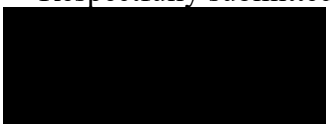


DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force


CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,



DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force


IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	6 February 2023

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

Pursuant to Rules 13.2(b), 17.2(b) and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file the following portions of his Assignments of Error (AOE) under seal:

1. Pages 13-14 (Statement of Facts);
2. Page 16 (Statement of Facts);
3. Pages 17-20 (Issue I); and,
4. Pages 31-47 (Issues IV and V).

These portions of the brief must be filed under seal because the information on these pages is derived from material under seal. Specifically, Prosecution Exhibits 5 and 14 are sealed exhibits. *See* Record (R.) at 837. Pages 13-14 and 16 are excerpts from the Statement of Facts discussing the charged content on these exhibits. Issue I alleges the record is incomplete because one file of charged content on Prosecution Exhibit 14 is unreviewable. Issues IV and V allege legal and factual insufficiency and heavily discuss sealed materials.

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

CHARLES S. NESTOR
Technical Sergeant (E-6),
United States Air Force,
Appellant.

No. ACM 40250

BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

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TABLE OF AUTHORITIES

Cases

United States Supreme Court

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant*.	)	No. ACM 40250
	)	Filed on: 6 February 2023

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

Assignments of Error

I.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE WHERE CHARGED CONTENT IS SUPPOSED TO BE CONTAINED ON "DISC 1A" OF PROSECUTION EXHIBIT 14 BUT THAT DISC HAS NO REVIEWABLE FILE?

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 404(b) WHEN HE PERMITTED THE GOVERNMENT TO INTRODUCE EVIDENCE OF CHILD EROTICA, CLIPS FROM AN ACADEMY AWARD-WINNING FILM, AND FILE NAMES FROM THE RECYCLE BIN WHICH HAD NO CONTENT, IN ORDER TO PROVE APPELLANT KNOWINGLY POSSESSED CHILD PORNOGRAPHY?

III.

WHETHER THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN HE INSTRUCTED THE MEMBERS THAT MATERIAL WHICH WAS INITIALLY ADMITTED FOR A LIMITED MIL. R. EVID. 404(b) PURPOSE CONSTITUTED EVIDENCE OF CHARGED MISCONDUCT?

IV.

WHETHER THE FINDINGS OF GUILTY FOR WRONGFUL POSSESSION OF CHILD PORNOGRAPHY IS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE: 1) THE "FILES" IN THE RECYCLE BIN HAD NO CONTENT; 2) ONE FILE DID NOT MEET THE LEGAL DEFINITION OF "MASOCHISTIC," AND THUS DOES NOT CONSTITUTE CHILD PORNOGRAPHY; OR, 3) COMPELLING CIRCUMSTANTIAL EVIDENCE INDICATED ANY POSSESSION WAS UNKNOWING?

V.

WHETHER THE FINDINGS OF GUILTY FOR WRONGFUL DISTRIBUTION OF A SINGLE FILE OF CHILD PORNOGRAPHY IS FACTUALLY AND LEGALLY INSUFFICIENT WHEN: 1) THE HASH VALUE FROM APPELLANT'S COMPUTER DID NOT MATCH THE HASH VALUE OF THE FILE ON THE INVESTIGATIVE AGENCY'S COMPUTER AND A FULL FILE TRANSFER WAS NOT COMPLETED; 2) APPELLANT DID NOT AFFIRMATIVELY DELIVER A FILE TO ANOTHER, BUT RATHER THE FILE WAS ALLEGEDLY TAKEN FROM HIS COMPUTER BY ANOTHER (I.E., PASSIVE DISTRIBUTION); OR 3) THE CONTENT IN QUESTION DID NOT MEET THE LEGAL DEFINITION OF "MASOCHISTIC," AND THUS DOES NOT CONSTITUTE CHILD PORNOGRAPHY?

VI.

WHETHER THE FINDINGS OF GUILTY ARE UNREASONABLY MULTIPLIED BECAUSE IN THIS PEER-TO-PEER NETWORK SCENARIO, THE "DISTRIBUTION" OF A SINGLE FILE OCCURRED WHEN ANOTHER USER ALLEGEDLY TOOK THE FILE FROM APPELLANT AS OPPOSED TO APPELLANT "DELIVERING POSSESSION TO ANOTHER?"

VII.

WHETHER THE FINDINGS OF GUILTY FOR BOTH SPECIFICATIONS OF THE CHARGE ARE LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT FAILED TO PRESENT ANY EVIDENCE TO PROVE APPELLANT'S CONDUCT WAS "OF A NATURE TO BRING DICREDIT UPON THE ARMED FORCES?"

VIII.

WHETHER APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT?

Statement of the Case

On 4-8 October 2021, Technical Sergeant (TSgt) Charles S. Nestor (Appellant) was convicted, contrary to his pleas, by a general court-martial composed of officer and enlisted members at Kadena Air Base, Japan, of one charge and two specifications of child pornography offenses (possession and distribution of child pornography), in violation of Article 134, Uniform Code of Military Justice (UCMJ).[1] Record (R.) at 815. Specification 1 alleged possession of more than one material constituting child pornography, though the total number of files was not detailed in the specification. *See* Record of Trial (ROT) Vol. 1, Entry of Judgment in the case of *United States v. TSgt Charles S. Nestor*, dated 2 November 2021 (EOJ). Ultimately, four files contained on prosecution exhibits were at issue. *See* Prosecution Exhibits (Pros. Ex.) 5, 14.[2] Though Specification 2 initially alleged distribution of more than one depiction of child pornography, a successful Defense R.C.M. 917 motion narrowed the scope of the specification to a single depiction (the military judge excepted the words, "visual depictions of minors, or what appear to be minors," and substituted therefore the words, "a visual depiction of a minor, or what appears to be a minor."). R. at 719-20. The military judge found Appellant not guilty of the excepted language and submitted the substituted language to the members for consideration. R. at 720. The members subsequently returned a general guilty verdict. R. at 815.

[1] Unless otherwise noted, all references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).
[2] These exhibits, along with Pros. Ex. 15, were ordered sealed by the military judge. R. at 837.

After the members returned findings, Appellant elected sentencing by military judge. R. at 817. The military judge sentenced Appellant to reduction to the grade of E-1, a dishonorable discharge, and 16 months concurrent confinement for both specifications. R. at 837. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. TSgt Charles S. Nestor*, dated 22 October 2021 (Decision on Action). He did, however, grant Appellant's request to waive automatic forfeitures for a period of six months for the benefit of Appellant's dependents. *Id*. The military judge entered judgment accordingly. *See* EOJ.

Statement of Facts

Overview

At the time of his court-martial, Appellant was a highly decorated noncommissioned officer with five combat deployments over more than 14 years in service to the United States. Pros. Ex. 23; Defense Exhibit (Def. Ex.) D. Appellant became a person of interest to law enforcement when an internet protocol ("IP") address associated with him was flagged as possibly being involved in the possession or distribution of child pornography. R. at 340. Before this event, no other person in Appellant's life suspected, or was aware, of the possibility he possessed, distributed, or was at all interested in such material.

In combination with the International Crimes Against Children (ICAC) organization, law enforcement agents use a law enforcement-specific software to proactively patrol for child exploitation material (CEM) on the internet. R.at 333-34. These agents set filters on their program, prompting the software to look for material believed to contain CEM. R. at 339-40. In June 2020, a computer belonging to Special Agent (SA) GH, an agent with the Naval Criminal Investigative Service (NCIS) trained in conducting these operations, downloaded a file suspected to contain

illicit material. R. at 339. SA GH used the law enforcement version of a computer program named "e-Mule." R. at 320, 339. Every morning, SA GH would check whether the computer automatically initiated any downloads overnight. R. at 340. On one particular June morning, he noticed a download. *Id*. He determined the IP address was "assigned to an account for [Appellant]." *Id*. After discovering Appellant was an Air Force member, SA GH contacted the Air Force Office of Special Investigations (OSI) and an investigation ensued, which culminated in the referral of the charge and specifications. *Id.*

The Expert Witnesses

Expert witnesses played a significant role in the litigation. The court-martial recognized three expert witnesses, two offered by the Government (SA GH and Mr. TB) and one offered by the Defense (Mr. KP). SA GH, the NCIS agent who initiated the investigation, was recognized as an expert in the fields of "digital forensics and peer-to-peer software." R. at 318. SA GH conducted "approximately" five investigations with the type of peer-to-peer networks involved in Appellant's case. R. at 317.

At the time of trial, Mr. TB was employed as a cyber forensics examiner for the Department of Defense Cyber Crime Center Cyber Forensics Lab (DC3 or DCFL). R. at 472. He reviewed Appellant's seized devices. R. at 479. The court-martial recognized Mr. TB as an expert in the field of digital forensics. R. at 474. Appellant's case was the first in which he testified in court regarding child pornography. R. at 551. He did not know the legal definition of child pornography. *Id*. He did not know the difference between child pornography and child erotica. *Id*. Mr. TB had very little experience with peer-to-peer networks. R. at 564. Mr. TB wrote two reports after his assessments of the devices and drives. *Id.* Prosecution Exhibit 11 was his first effort, published around the fall of 2020. *Id*. At the request of the Government, Mr. TB did another report two

weeks before trial in September 2021. R. at 565. On cross-examination, Mr. TB agreed he authored the second report because there were "still too many questions left from the first report that needed answering." *Id*. Mr. TB finished watching the videos from Appellant's devices two days before trial, more than a year after his initial report. R. at 603. Both reports were missing cover sheets, signatures of the examiner, and the organization's information. R. at 604-06.

Mr. KP is one of the owners of Peden Digital Forensics in Washington state. R. at 611. After a career as a police officer beginning in 1986, Mr. KP left the force in 2002 to earn additional degrees in network engineering, and has been working as a digital forensics examiner since 2004. R. at 612. Mr. KP has earned multiple professional certificates from Oregon State University and New Technologies Institute of Forensics. *Id*. With more than 600 to 700 hours of training, he earned certificates from EnCase, Forensic Explorers, and Cellebrite. *Id*.

Mr. KP was the forensics director for Global CompuSearch, training all of its examiners. R. at 613. He provides training at the Air Force Judge Advocate General's School at Maxwell Air Force Base, teaching digital forensics to novice and experienced trial and defense counsel. *Id*. He also teaches regional counsel, to include in Europe and the Pacific. *Id*. Mr. KP has been involved in over 400 courts-martial, and he also works on state and federal cases. R. at 615. Over 300 to 350 of these cases have involved child pornography offenses. *Id*. He has been recognized as an expert in 150 criminal trials. R. at 616. The court-martial recognized Mr. KP as an expert in the field of digital forensics and peer-to-peer networks. *Id*. The Defense offered Mr. KP's curriculum vitae (CV), admitted without objection, detailing a full compilation of certifications, training, and experience. Def. Ex. A.

The Technical Aspects of the Case

A proper analysis of this case requires an understanding of industry-specific terms of art in

digital forensics and how certain programs operate. An "IP address" functions much like a mailing address; if someone wants to send someone something, he or she needs the address to send it to. R. at 338. The address is simply a series of numbers. R. at 337. An internet service provider owns the IP address. R. at 340. With appropriate authorization, a law enforcement agent can ask an internet service provider where an IP address is registered and who owns the account in question. *Id*. An IP address can be used to determine where certain computer activity occurred, and derivatively, who conducted said activity.

"Peer-to-peer networks" began with Napster[3] in 1999 and many versions have followed thereafter. R. at 613. Many child pornography cases involve the use of peer-to-peer networks. R. at 615. Whereas normal search engines, like Google, permit a user to run a search across a server scouring the entire internet, a peer-to-peer network connects one computer directly to another. R. at 319. The term "peer-to-peer" comes from the notion that files are downloaded directly from someone else's computer on the same network and not from a server. *Id*. Peer-to-peer networks are used to exchange music, videos, images, and software. *Id*. Peer-to-peer networks can facilitate both legal and illegal activity. R. at 320. It is common to perform "mass downloads" on peer-to-peer networks, where a user downloads hundreds or thousands of files at one time. R. at 651. The user does not have to be at their computer while files are uploaded and downloaded. R. at 385. Government studies have shown that child pornography is often downloaded accidentally after a user searches for files using innocuous search terms. R. at 658.

One such peer-to-peer network, and the one involved in Appellant's case, is called "e-Mule." R. at 320. The e-Mule program can be downloaded from Google and then installed on

[3] Napster was a peer-to-peer file sharing application with an emphasis on digital audio file distribution.

anyone's computer. R. at 321. It works on the "premise of connecting one computer to another." *Id*. A search function in e-Mule permits users to search for a desired file from another user. R. at 322. A central server never possesses the files, only the users. *Id*. Users are not required to share files they possess. R. at 323. The software's settings can disallow sharing, which would allow a user to take files from others' computers but make none of their files available to others. *Id*. That is how the law enforcement version of e-Mule works; no one can download illegal content from the Government. *Id*. The default setting of e-Mule for typical users, however, is to share all content. R. at 386. Appellant's settings were set to the default setting to share content. *Id*.

In peer-to-peer network sharing, file names are not always accurate descriptions of the content of the file. R. at 556. Mr. KP testified, "I've actually had many cases where videos have had child porn terms in every single one of them and found to be no child porn in any of them by the courts." R. at 652. Without viewing the content, "it's impossible to say" whether the title of the file matches its content. *Id*. There is no "preview" function which would allow a user to view the underlying content of a file. *Id*. In Appellant's case, the digital forensics report articulated, "The files in this report exemplify the types of videos downloaded to the Lenovo (Tag7_HD_001) in that some of the file names are indicative of the content, some file names have nothing to do with the content and some file names indicate the content is a commercially produced film." Pros. Ex. 11 at 7.

The "recycle bin" of a computer is its trashcan. R. at 640. When a file is deleted, the computer removes all of the information of that file and assigns a new file name for it. R. at 641. Nothing about the presence of a file name in the recycle bin can tell a forensic examiner if the file was played, viewed, or visited, because there is no data remaining. R. at 642. Appellant's recycle bin contained file names indicative of CEM, but all of the files were empty. R. at 531.

A "hash" is an algorithm typically considered to be a "digital fingerprint," in that "no two data sets will have the same hash value." R. at 478. It is the "DNA" of the file. R. at 618. Mr. KP testified, "It's actually found more reliable than actual human DNA. If you have two files with the same exact hash value, it's believed to be the same file." *Id*. Hash values are the "staple" of digital forensics. R. at 619. Files are hashed before and after analysis to demonstrate nothing has been altered or changed. *Id*. If a file has two different hashes, a digital forensics examiner cannot necessarily determine *what* was changed, but with certainty, can conclude *that it was* changed. R. at 620. It has "been altered in some way." *Id*. There are different kinds of hash values, such as MD4, MD6, SHA1, SHA256, and ED2K. R. at 620-21. ED2K, however, is not used in the practice of digital forensics. R. at 621. In Appellant's case, Mr. KP ran hash values on the file supposedly coming from Appellant's computer and that which was obtained by SA GH, forming the basis of the distribution specification. R. at 630. The hash values did not match, leading Mr. KP to conclude, "[i]t's absolutely not the same" file. R. at 635.

The Seizure and Search

NCIS and OSI agents searched Appellant's residence.[4] One agent took a body-cam video of the premises. *See* Pros. Ex. 6. Agents did an initial triage to determine whether a digital device should be seized or left behind. R. at 431. In total, agents seized 16 items for review. *Id*. Once those items reached DCFL, Mr. TB conducted reviews of each of them. Pros. Ex. 11 at 13. This involved a review of 29 devices and/or drives, because some of the 16 seized items contained additional hard drives or other systems capable of containing files. *Id*. No prospective CEM or CP was found on 14 of 16 seized devices. Pros. Ex. 11 at 1. The other two devices returned results

[4] The search authorization itself was not challenged at trial; therefore, Appellant does not challenge the validity of the authorization on appeal.

for possible CEM or CP: a Lenovo laptop (Tag7_HD_001) and a ThinkPad laptop (Tag15_HD_001). *Id*. At trial, Mr. TB conceded, "for a majority of the items, no CEM or CP was found." R. at 482. And, upon further analysis, the ThinkPad contained no files of child pornography. R. at 553. Mr. TB could not forensically determine whether any files were opened, accessed, or viewed. R. at 571-72.

The Mil. R. Evid 404(b) Motion and Ruling

The Defense moved in limine to exclude certain Mil. R. Evid 404(b) material from being offered as evidence against Appellant. *See* Appellate Exhibit (App. Ex.) X. The Defense attached documentary and digital evidence to the motion with separate exhibits. *See* App. Ex. XI, XII. The Government opposed the motion. *See* App. Ex. XIII. The Defense objected to the introduction of three items described in the Government's Mil. R. Evid. 404(b) notice: 1) evidence of possession of child erotica; 2) evidence Appellant "used video editing software to make short clips of scenes involving nude minors from movies"; and, 3) "in an abundance of caution," the Government noticed an intent to introduce a list of all files in the recycle bin and recent folders.[5]

During argument on the motion, the Government had difficulty articulating what the charged conduct was as compared to the uncharged conduct, confusing the military judge and the Defense. R. at 86-88. The Defense openly asked, "[I]s this 404(b) other acts? Or is this charged misconduct? So that's why in the defense's motion we specifically ask for relief to compel the government to determine whether this is going to be charged conduct or not, so we can respond accordingly." R. at 96. The confusion endured. R. at 96-98. The military judge recognized as much:

> MJ: . . .the Defense is confused about what it is that the government is offering as part of the charged offenses, is that correct?

[5] The full notice can be found on App. Ex. XI at 1.

DC: Correct. Yes, Your Honor.

R. at 98. The military judge eventually distilled the Government position; it was his understanding that the Government intended to argue three video files constituted child pornography possession and 28 files were uncharged. R. at 88, 100-01. The military judge asked, "how is it going to be cleared [sic.] to the factfinder what it is that the government is alleging is child pornography, as opposed to the dozens of other video files that are going to be put in front of them?" R. at 89. The Defense relayed the same concern. R. at 104.

Ultimately, by written ruling, the military judge denied the Defense motion to exclude. *See* App. Ex. XVIII. However, he demonstrated at least some concern with all three noticed items. First, as to the child erotica, the military judge expressed unease that the Government intended to offer only three files as evidence of the charged crime, but 28 uncharged files as evidence of absence of mistake. *Id*. at 4, para. 27(a)(iii). This impacted the third prong of the *Reynolds*[6] analysis, with the aggregate probative value diminishing with each successive file while the aggregate prejudice grew. *Id*. Second, as to the video clips on the "VLC" software, the military judge recognized it was uncertain whether Appellant created the video clips or whether the clips were downloaded already in that form.[7] *Id*. at 5, para. 27(b)(i). This impacted the first *Reynolds* prong, whether the "other act" actually happened, because if Appellant did not clip the video, it is less likely his user interaction shows "knowing" possession. *Id*. Finally, with regard to the recycle bin, the military judge recognized the inflammatory nature of the members reviewing illicit file names, but those file names are not actually associated with any related content. *Id*. at 6, para.

[6] *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989).
[7] By "clipped," the military judge was referring to the process of extracting a portion of a video with film-editing software.

27(c)(iii). This impacted the third prong of the *Reynolds* analysis. The military judge, however concluded that a limiting instruction on the proper use of the recycle bin material would be sufficient. *Id*. Despite these concerns, he determined all the evidence was admissible. *Id*. at 6.

Pages 13-14 filed separately under seal.

Findings Instructions

The military judge discussed potential findings instructions with the parties on the record. R. at 705-28. The Government requested the military judge instruct the members on the Merriam-Webster's dictionary definition of "masochism,"[10] which the military judge granted in absence of an objection. R. at 709-10; App. Ex. XXIX. During this Article 39(a), UCMJ, session, the military judge required trial counsel to provide him a list of the charged content and that would be incorporated into the findings instructions. R. at 711. In complying, trial counsel referred to the recycle bin content as evidence of charged misconduct despite the Government's original notice that it was Mil. R. Evid. 404(b) evidence; the military judge so instructed. *See* App. Ex. XXXVII at 6-9. The military judge instructed on 42 file names, despite earlier motions practice in which he identified three files constituting evidence of the charged misconduct and 28 files constituting evidence of uncharged misconduct. *Compare* App. Ex. XXXVII at 6-9 *with* R. at 88-89.

The Defense waived "instructions on any affirmative defenses." R. at 707. The military judge asked, "are there any other evidentiary instructions that the parties request that I give that are commonly found in the Benchbook?" R. at 708. Both parties declined. *Id*. The military judge never asked defense counsel if they objected to the prosecution's list of files constituting evidence of the charged misconduct. There is no discussion on the record about why these 42 file names so vastly depart in number from that which was forecasted in the motions practice. The military judge never asked whether the Defense agreed the final findings instructions were a complete and accurate statement of the law, or whether the Defense waived challenges to the final instructions.

[10] "Derivation of sexual gratification from being subjected to physical pain or humiliation by oneself or another person."

Page 16 filed separately under seal.

Pages 17-20 filed separately under seal.

II.

THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 404(b) WHEN HE PERMITTED THE GOVERNMENT TO INTRODUCE EVIDENCE OF CHILD EROTICA, CLIPS FROM AN ACADEMY AWARD-WINNING FILM, AND FILE NAMES FROM THE RECYCLE BIN WHICH HAD NO CONTENT, IN ORDER TO PROVE APPELLANT KNOWINGLY POSSESSED CHILD PORNOGRAPHY.

Standard of Review

A military judge's decision to admit evidence pursuant to Mil. R. Evid. 404(b) is reviewed for an abuse of discretion. *United States v. Staton*, 69 M.J. 228, 230 (C.A.A.F. 2010) (citation omitted).

Law

The general rule for character evidence, set forth in Mil. R. Evid. 404(a), states: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." The Court of Appeals for the Armed Forces (CAAF) has "consistently stated that evidence of uncharged bad acts may not be introduced solely to show that an accused has a propensity to commit crimes of the type charged." *Staton*, 69 M.J. at 230 (citations omitted). Under Mil. R. Evid. 404(b)(1), evidence of a crime, wrong, or other act is inadmissible to "prove a person's character in order to show that on a particular occasion the person acted in accordance with that character." A court may admit such evidence for another purpose, such as "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mil. R. Evid. 404(b)(2).

Courts apply the three-part *Reynolds* test to review admissibility under Mil. R. Evid. 404(b): (1) "Does the evidence reasonably support a finding by the court members that appellant committed other crimes, wrongs or acts?"; (2) "What fact of consequence is made more or less probable by the existence of this evidence?"; and (3) "Is the probative value substantially

outweighed by the danger of unfair prejudice?" 29 M.J. at 109 (citations omitted). "If the evidence fails to meet any one of these three standards, it is inadmissible." *Id.*

This Court must also test for material prejudice of the evidentiary error, evaluating and weighing "(1) the strength of the Government's case, (2) the strength of the defense case, (3) the materiality of the evidence in question, and (4) the quality of the evidence in question." *United States v. Barnett*, 63 M.J. 388, 397 (C.A.A.F. 2006) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)).

Analysis

The military judge abused his discretion by allowing the Government to admit the following as Mil. R. Evid. 404(b): 1) evidence of possession of child erotica; 2) the VLC recordings; and 3) the recycle bin content. There are two reasons why Mil. R. Evid. 404(b) evidence was particularly critical in this case. First, the Government had trouble identifying what was charged and uncharged, leaving the Defense and the military judge trying to figure it out *during motions practice*. R. at 86-88, 96, 98. This presents notice problems in a case in which the specifications are generic with no precise identifiers. *See also* Issue III (arguing the erroneous instructions were prejudicial for this reason). Second, child pornography offenses are typically private in nature, requiring the Government to prove knowledge with circumstantial evidence in the form of uncharged misconduct or other acts. *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). This elevates the importance for the Government to get the evidence introduced as well as the possible prejudice to the accused for erroneous admission, who may very well secure an acquittal in the absence of the evidence.

1. Evidence of child erotica.

The military judge abused his discretion by permitting the Government to introduce

evidence of possession of child erotica in order to prove knowing possession of child pornography. After finally distilling what the Government intended to prove, the military judge noted the prejudice to Appellant when the Government only alleged possession of three videos but intended to offer 28 uncharged videos. App. Ex. XVIII at 4, para. 27(a)(iii). He correctly noted, "[s]uch danger is that the factfinder may become inflamed by the large number of videos that are not charged misconduct. Further, with each successive video, the probative value diminishes." *Id*. The ruling actually seemed to indicate such evidence would not be allowed as such, when the military judge ruled:

> Put more finely, the evidence contained in each video file will become somewhat more cumulative at a certain point, such that the danger of unfair prejudice may reach the point of substantially outweighing the collective probative value of the evidence, especially as the prosecution intends to admit evidence of the file names both of the alleged child pornography and the alleged child erotica. Should the prosecution desire to admit a lesser number of video files, the court will reassess the evidence under M.R.E. 403 and determine the admissibility of those files actually offered by the prosecution.

Id. The military judge's articulated concerns are wholly incongruent with his ruling to admit the evidence in total. The commentary "should the prosecution desire to admit a lesser number of video files, the court will reassess the evidence under M.R.E. 403 and determine the admissibility of those files actually offered by the prosecution" seemingly indicates the uncharged child erotica files *would not* be admitted in such large volume, but some lesser amount might pass scrutiny. His 180-degree reversal to admit the evidence is not supported by this analysis. That is an abuse of discretion. This ruling permitted the Government, in opening statement, to set the stage of the possession as something much larger than it was. A case with three or four files became a case about "50." R. at 311 (Trial counsel telling the panel "The accused possessed over 50 video files with child content on this laptop."). Of course, a case about 50 files versus three or four makes a big difference, if a major focus of the litigation is whether Appellant *knowingly* possessed. It is

much harder to unknowingly possess 50 files. By contrast, there is a real possibility—reasonable doubt—of unknowing possession of a handful of videos.

2. The VLC recordings.

The military judge abused his discretion by permitting the Government to introduce the two VLC recordings from "Nirgendwo in Afrika." The Government notice indicated the evidence would demonstrate Appellant "used video editing software to make short clips of scenes involving nude minors from movies." App. Ex. XI at 1. The notice was not that he possessed these clips, but rather that he *made* these clips. As the military judge noted, the evidence from the motions hearing did not establish this, yet he admitted the evidence anyway; this is an abuse of discretion.

These VLC snippets can be found at Pros. Ex. 15 as stand-alone files. In his ruling, the military judge acknowledged the deficit in the Government's proof: the evidence did not establish Appellant was the one who clipped the videos from the feature length film or whether the clips came to him in that form. App. Ex. XVIII at 5, para. 27(b)(i). That matters as to the first *Reynolds* prong: whether the "other act" occurred. If there was evidence he clipped the files, it would then be relevant to prove lack of mistake of the "knowing" possession. But the existence of the clip without such determination leaves the factfinder in the exact same position, trying to ascertain whether he knew he possessed certain images. By letting this evidence in, the military judge allowed the members to conclude that because Appellant possessed a legal item, without any indication he knew he possessed the legal item, the members could conclude Appellant knowingly possessed the illegal items. That turns the burden of proof on its head.

Moreover, "Nirgendwo in Afrika" is an award winning, critically acclaimed film. It won the 2003 Academy Award for Best Foreign Language Film, as part of 19 wins and 6 additional

nominations at the world's most prestigious film festivals.[13] Whether a "material" alleged to be child pornography has serious literary or artistic value is a legal consideration of constitutional proportions. *See New York v. Ferber*, 458 U.S. 747, 755 (1982). Given the constitutionally protected nature of serious literary and artistic material, admitting it as uncharged misconduct to prove charged misconduct presents a problem of constitutional proportions. Objectively, there is no better indicator of serious literary or artistic value than the Academy Award for Best Film in a category. "Nirgendwo in Afrika" certainly qualifies as serious art, and its introduction into evidence to prove Appellant's knowing possession of child pornography was error.

3. The recycle bin content.

Admittedly, the recycle bin content enigma is hard to decipher. It was a stated Mil. R. Evid. 404(b) item for admission and was litigated as such. App. Ex. X. It was also admitted as such. App. Ex. XVIII. It somehow morphed into evidence of the charged misconduct by the time the military judge instructed the members. *Compare* R. at 88 *with* App. Ex. XXXVII at 6-9; *see* Issue III *infra* (arguing instructional error).

Analyzing the material through the lens of Mil. R. Evid. 404(b), the military judge recognized the inflammatory nature of the file names with no content, but still found some probative value in the names of the files themselves. App. Ex. XVIII at 6, para. 27(c)(iii). This constituted an abuse of discretion on the third *Reynolds* prong. There was evidence at the motions practice that file names do not always match the content of the video. R. at 62. Given the uncertainty of what the files used to be, coupled with the inflammatory suggestion of what the file names depict, the danger of unfair prejudice substantially outweighed any probative value. The

[13] *See* https://www.imdb.com/title/tt0161860/awards/?ref_=tt_awd, last accessed on 6 February 2023.

military judge elective to provide a curative instruction, but the instructions ended up permitting the members to use this evidence to prove the charged misconduct anyway—the opposite of its intended purpose. The misidentification of charged versus uncharged misconduct plagued this court-martial from the beginning and only got worse as the court-martial progressed, to the point where it was no longer just the "four files" previously indicated. Prejudicial and inflammatory content-less file names in the recycle bin, with no proof of what the files ever used to contain, should never have been admitted as Mil. R. Evid. 404(b) evidence or as evidence of the charged offenses.

4. Prejudice.

As discussed in Issues IV, V, and VII *infra*, the Government's case was weak in the absence of the admitted Mil. R. Evid. 404(b) material. It comprised of seizures of dozens of devices and drives, most of which had no illegal content on them, and four actual files at issue. Evidence of mass downloads, peer-to-peer networking, and the testimony of Mr. KP dismantled the Government's case and strengthened the Defense's. There was no actual evidence to prove the terminal element beyond a reasonable doubt.

The evidence was of significant quality and materiality, in that the Government relied on it to make it seem as if Appellant possessed myriad more files than he did, and that possession of legal content indicated knowing possession of illegal content. The Government brilliantly blurred the lines between what was charged and not charged, bringing the military judge's prior concern into reality. R. at 89 (military judge's concern); R. at 311 (trial counsel opening statement suggesting possession of 50 files); R. at 490 (Mr. TB discussing child erotica, not child pornography); Pros. Ex. 14 (disc of charged child pornography); Pros. Ex. 15 (disc of child erotica, not child pornography); Pros. Ex. 16 (121 row Excel spreadsheet of file names from the Lenovo

laptop); Pros. Ex. 17 (310 row Excel spreadsheet of file names from the ThinkPad, on which there was no child pornography); Pros. Ex. 18 (904 row Excel spreadsheet of the content-less files names from the ThinkPad recycle bin, on which there was no child pornography); Pros. Ex. 19 (227 aggregate rows across 5 tabs of an Excel spreadsheet from "e-Mule" traffic on the ThinkPad, on which there was no child pornography). Without such evidence, there are a few video files with no context for how they got to Appellant's computer, some of which do not meet the definition for child pornography, and one hash value that did not match for the distribution. A court-martial without such evidence is remarkably different in scope and content. This content, objected to and improperly admitted, serves as a basis to set aside and dismiss the findings.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt, and the sentence.

III.

THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN HE INSTRUCTED THE MEMBERS THAT MATERIAL WHICH WAS INITIALLY ADMITTED FOR A LIMITED MIL. R. EVID. 404(b) PURPOSE CONSTITUTED EVIDENCE OF CHARGED MISCONDUCT.

Standard of Review

Whether a panel was properly instructed is a question of law reviewed *de novo*. *United States v. Quezada*, 82 M.J. 54, 57 (C.A.A.F. 2021) (citing *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008)).

Law

Military judges are required to "determine and deliver appropriate instructions." *United States v. Barnett*, 71 M.J. 248, 249 (C.A.A.F. 2012) (quoting *Ober*, 66 M.J. at 405). Required instructions include a "description of the elements of each offense charged," any applicable special defenses, and "[s]uch other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given." R.C.M. 920(e).

Analysis

The military judge's request to have the Government insert its own list of charged file names into the findings instructions, and then adopting that list without modification, was legal error under the circumstances. The recycle bin content was noticed as Mil. R. Evid. 404(b) material. App. Ex. XI at 1. It was admitted as such. App. Ex. XVIII at 6, para. 27(c). It was not evidence of charged misconduct. R. at 101-02 (military judge confirming recycle bin content was uncharged). It is not what the Defense was on notice it was defending against. After much circular and non-committal assertions from the Government, the military judge just identified "three" files,

not 42. R. at 88, 100-01. He was already concerned the line was going to be blurred between what was charged and uncharged. R. at 89.

To the extent the Government altered its theory (R. at 102) and wanted the recycle bin files admitted as evidence of charged misconduct despite initially noticing it as Mil. R. Evid. 404(b) evidence, such an about-face did not carry the day. What matters most is this: the military judge admitted it as evidence of uncharged misconduct. *See* App. Ex. XVIII. That was his understanding, and it became the Defense's understanding, too. If the Government tried to broaden its scope, the military judge foreclosed that attempt. Had the military judge sanctioned the Government's intent to convert uncharged misconduct into charged misconduct this late in the game, he would not have ruled on the recycle bin content as Mil. R. Evid. 404(b) material. He would have noted the Defense motion on that ground had been mooted by subsequent events. But that is not what the ruling says. The Defense was entitled to rely on that ruling which scoped the recycle bin content as "uncharged."

This background of the motions practice and ruling demonstrates why the instructions the members received were erroneous. It was error to change course from the motions ruling at the pinnacle of the trial. The military judge allowed the trial counsel's offering of that list of 42 items to overrule and supplant his prior rulings. It allowed the members to believe—as witnesses and trial counsel had talked about all along—that Appellant possessed many illegal files when there were few. It gave credence to trial counsel's erroneous opening statement which alleged Appellant possessed "50" files. R. at 311. It permitted the members to potentially convict Appellant based solely on content-less file names, which the military judge had already recognized were inflammatory, and in the face of evidence that content names are not always accurate. *See* App. Ex. XVIII at 5, para. 27(c)(iii); R. at 62. It changes this Court's calculus on legal and factual

sufficiency review of Issue IV, *infra*, because it is possible—but unknown—which files or file names are the basis for the conviction. It mattered pretrial. It mattered at trial. It matters on appeal.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilty, and the sentence.

Pages 31-47 filed separately under seal.

VI.

THE FINDINGS OF GUILTY ARE UNREASONABLY MULTIPLED BECAUSE IN THIS PEER-TO-PEER NETWORK SCENARIO, THE "DISTRIBUTION" OF A SINGLE FILE OCCURRED WHEN ANOTHER USER TOOK THE FILE FROM APPELLANT AS OPPOSED TO APPELLANT "DELIVERING POSSESSION TO ANOTHER." [21]

Standard of Review

This Court may only affirm such findings of guilty as the Court finds correct in law and fact and determines, based on the entire record, should be approved. Article 66(d)(1), UCMJ. Forfeited errors are reviewed for plain error. *United States v. Day*, __ M.J. __, 2022 CAAF LEXIS 892 at *11 (C.A.A.F. 13 Dec. 2022).

Law

"[T]he prohibition against unreasonable multiplication of charges allows courts-martial and reviewing authorities to address prosecutorial overreaching by imposing a standard of reasonableness." *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). Unreasonable multiplication of charges (UMC) is an equitable doctrine based on R.C.M. 307(c)(4). It provides, in part, that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4), Discussion.

The factors for a court to consider when evaluating UMC are as follows:

> a. whether each charge and specification is aimed at distinctly separate criminal acts,
>
> b. whether the number of charges and specifications misrepresent or exaggerate the accused's criminality,
>
> c. whether the number of charges and specifications unreasonably increase the accused's punitive exposure, and/or

[21] If this Court resolves any of the three articulated bases for relief under Issue V in Appellant's favor, this issue is moot.

> d. whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges.

United States v. Campbell, 71 M.J. 19, 24 (C.A.A.F. 2012). These factors are not all-inclusive, nor is any one or more factors a prerequisite. *Id*. at 23-24. Likewise, one or more factors may be sufficiently compelling, without more, to warrant relief for UMC. *Id*. at 23. Moreover, the concern of multiple convictions existed long before *Campbell* and *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). The Court of Military Appeals explained:

> [Q]uite apart from any sentence that is imposed, each separate criminal conviction typically has collateral consequences, in both the jurisdiction in which the conviction is obtained and in other jurisdictions. . . . The number of convictions is often critical to the collateral consequences that an individual faces. . . . Furthermore, each criminal conviction itself represents a pronouncement by the State that the defendant has engaged in conduct warranting the moral condemnation of the community. Because a criminal conviction constitutes a formal judgment of condemnation by the community, each additional conviction imposes an additional stigma and causes additional damage to the defendant's reputation.

United States v. Doss, 15 M.J. 409, 411-12 (C.M.A. 1983).[22]

"In applying this rule, it first should be determined whether the charged offenses are based on '[o]ne transaction or what is substantially one transaction.'" *United States v. Baker*, 14 M.J. 361, 366 (C.M.A. 1983). "A 'transaction' generally means 'a series of occurrences or an aggregate of acts which are logically related to a single course of criminal conduct.'" *United States v. Grubb*, 34 M.J. 532, 535 (A.F.C.M.R. 1991), citing *Baker*, *supra*, and *United States v. Crowe*, 30 M.J. 1144, 1145 (A.F.C.M.R. 1990).

[22] *See also Ball v. United States*, 470 U.S. 856 (1985); *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999) (holding an unauthorized multiplicious conviction alone constitutes punishment and carries potential adverse collateral consequences); *United States v. Neblock*, 45 M.J. 191, 200 (C.A.A.F. 1996) (stating the danger of multiplicious charging is "the defendant may be given multiple sentences for what Congress considered a single offense, and that prolix recitation may falsely suggest to a jury that a defendant has committed not one but several crimes").

The week before filing this brief, when evaluating UMC, this Court set aside and dismissed two specifications with prejudice when an appellant suffered three separate convictions for sending one text message arguably soliciting three different offenses. *See United States v. Massey*, No. ACM 40017, 2023 CCA LEXIS 46, at *42 (A.F. Ct. Crim. App. 30 Jan. 2023) (unpub. op.) (We are not persuaded, however, that allowing Appellant to stand convicted of three separate offenses is a just outcome.").

Analysis

It is unreasonable to charge and convict Appellant for both possessing and distributing the same file in this specific scenario of a peer-to-peer network sharing environment. When a file is possessed on e-Mule, it can also be shared without any user interaction.[23] Whereas this Court can envision many situations in which drug or child pornography possessions and distributions are *not* unreasonably multiplied (i.e., the accused possessed an item and then affirmatively transferred the possession of the item into the hands of another), that is not the case here.

The Defense did not file a motion to dismiss for UMC, thus forfeiting the issue. Nevertheless, this Court may review for plain error, and pursuant to its statutory duty, must still only affirm findings of guilt that are correct in law and fact, and on the basis of the entire record, should be approved. Article 66(d)(1), UCMJ. This Court must determine under these circumstances whether the distribution conviction should remain. As in *Massey*, where this Court determined that maintaining three federal convictions for sending one message was not "just," so too should Appellant's findings of guilty for passive distribution be set aside and dismissed with prejudice. *See Massey*, unpub. op. at *42.

[23] This argument incorporates, by reference, the argument in Issue V(2), *supra*, that the passive distribution without additional indicators of knowledge renders the conviction factually and legally insufficient.

The *Campbell* factors weigh in Appellant's favor. First, the specifications aim at the exact same criminal act: possessing a file on a peer-to-peer network. No further action need be taken by Appellant, nor was any additional action actually taken, to effectuate a distribution. Second, adding an additional specification misrepresents and exaggerates his criminality; the number of specifications doubled the number of criminal acts it appeared Appellant committed. *See Massey*, unpub. op. at *42. Third, the additional specification unreasonably increased Appellant's punitive exposure, adding 20 years additional confinement to the maximum punishment, *tripling* that maximum from 10 to 30 years. *See MCM*, Pt. IV, para. 95.d.(1), (3). In the final factor, although there is no evidence of prosecutorial overreaching, it is fair and reasonable to infer the purpose of adding the distribution specification was to double the number of allegations and triple the punitive exposure. The totality of the factors weigh in Appellant's favor.

Transposing this *Campbell* analysis into plain error review, it is plain and obvious the distribution specification is unreasonably multiplied as to findings. The Government sought, and obtained, convictions in different ways for the exact same conduct. It should have only charged the possession and then argued the "distribution" as a matter in aggravation in presentencing as directly related to or resulting from the charged offense. The prejudice flowing from the additional specification is rather simple as well: Appellant has one more federal conviction than he ought to for doing the exact same thing, one which signals to the public that he was more than just a passive participant in the illicit market for CEM but was rather an active purveyor of the same. *See supra* at n. 22 (cataloging cases standing for this proposition). The appropriate thing to do in this circumstance is to set aside and dismiss the distribution specification because Appellant ought not carry additional, cumulative convictions on his record. Article 66(d)(1), UCMJ, provides this Court ample authority to remedy the concern.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilty for Specification 2 of the Charge and set aside the sentence adjudged for that specification. This Court would then need to decide under *United States v. Winckelmann*, 73 M.J. 11 (C.A.A.F. 2013) whether the punitive discharge may be affirmed under the auspices of a sentence reassessment or whether a sentencing rehearing would be necessary to adjudicate the merit of a punitive discharge under the circumstances.

VII.

THE FINDINGS OF GUILTY FOR BOTH SPECIFICATIONS OF THE CHARGE ARE LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT FAILED TO PRESENT ANY EVIDENCE TO PROVE APPELLANT'S CONDUCT WAS "OF A NATURE TO BRING DICREDIT UPON THE ARMED FORCES."

Additional Facts

The military judge instructed the members on the terminal element and that "service discrediting conduct is conduct which tends to harm the reputation of the service or lower it in public esteem." R. at 734. The trial counsel only mentioned this element once in his closing argument, despite it being relevant to both specifications. R. at 762. In two sentences, the trial counsel discussed the terminal element, then moved on. *Id*. ("The possession of child pornography falls demonstratively below the standards that our society expects for Airmen. When you engage in that type of conduct, it brings shame to the armed services and that is overwhelming evidence for the second element.").

The element is not mentioned elsewhere in closing argument. No witness testified about the terminal element. No documentary evidence demonstrates the conduct is "of a nature to bring discredit upon the armed forces."

Standard of Review

This issue incorporates the standard of review from Issues IV and V, *supra.*

Law

This issue incorporates the law cited in Issues IV and V, *supra.*

As charged, the second element of both specifications required the Government to prove beyond a reasonable doubt that knowing possession/distribution of child pornography was "of a nature to bring discredit upon the armed forces." *MCM*, Pt. IV, para. 95.b.(1)(b)(ii); para.

95.b.(3)(b)(ii). "'Discredit' means to injure the reputation of. This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem." *See MCM*, pt. IV, para. 91.c.(3).

In *United States v. Phillips*, the CAAF held by a 3-2 margin "proof of the conduct itself may be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that, under all the circumstances, it was of a nature to bring discredit upon the armed forces." 70 M.J. 161, 163 (C.A.A.F. 2011) (emphasis in original). In that case, the appellant was charged under Clause 2 of Article 134, UCMJ, for the wrongful possession of child pornography. *Id*. at 164. No witnesses testified they believed the conduct to be service discrediting. *Id*. No witness testified they had become aware or that they would have become aware of the conduct. *Id*.

The CAAF noted as a threshold matter of law, the terminal element could not be established by conclusive presumption because conclusive presumptions are unconstitutional, invading the province of the trier of fact. *Id*. at 164-65 (citing *Sandstrom v. Montana*, 442 U.S. 510, 523, (1979) (additional citations omitted)). The terminal element must be proven beyond a reasonable doubt like any other element. *Id*. at 165.

On the issue of whether the public's knowledge of the conduct impacted legal sufficiency, the CAAF noted, "the degree to which others became aware of the accused's conduct may bear upon whether the conduct is service discrediting, but the statute does not establish a requirement that the accused's conduct must in every case be in some respect public knowledge." *Id*. at 166. It ultimately concluded, despite the fact no one testified their opinion of the service had been lowered or that anyone knew or would know about the conduct, that a rational trier of fact could have found the activity would have "tended to bring discredit upon the service had the public known of it." *Id*.

Two judges, typically of differing judicial philosophies, jointly dissented. *Id*. at 167 (Ryan, J.; Erdmann, J., dissenting). The dissent reasoned it is entirely inconsistent for the majority to have recognized the unconstitutionality of conclusive presumptions, yet at the same time, find the conviction legally sufficient when nothing in the record articulated as a matter of affirmative proof that, in fact, the conduct was of a nature to bring discredit upon the armed forces. *Id*. ("There is nothing in the record -- other than the fact of the activity itself -- upon which the military judge could have based this finding. . . . [T]he record of trial contains no discussion whatsoever of whether and how Appellant's conduct was service discrediting." (emphasis in original)). The dissent recognized the Due Process Clause requires the terminal element to be independently proven beyond a reasonable doubt. *Id*.

Just last term, the CAAF unanimously decided the case of *United States v. Richard*, __ M.J. __, 2022 CAAF LEXIS 637 (C.A.A.F. 7 Sep. 2022).[24] Although the case mostly concerned the sufficiency of proof as to a different terminal element—whether the conduct was prejudicial to good order and discipline—the CAAF reaffirmed the two major aspects of *Phillips* that all five judges from that case agreed upon. First, every element of a criminal offense, even the terminal element, must be proven beyond a reasonable doubt and may not be conclusively presumed. 2022 CAAF LEXIS 637 at *2. Second, such requirement is a constitutional mandate rooted in the Due Process Clause. *Id*. at *17. Thus, a finding of guilty "beyond a reasonable doubt" in the absence of evidence offends the Constitution and may not endure.

In *Richard*, the CAAF set aside and dismissed the findings of guilty at issue because the Government solely focused on the misconduct and ignored its duty to prove the terminal element

[24] This case will be reported at 82 M.J. 473; however, the page numbers associated with the military justice reporter for pin citations are not yet available as of the date of filing.

as charged. *Id*. at *18. Specifically, the CAAF concluded, "Because *no evidence* established the terminal element of the three specifications for violating Article 134, UCMJ, we conclude that no reasonable factfinder could have found the essential elements of those offenses beyond a reasonable doubt." *Id*. (emphasis added).

Analysis

1. The distinction between factual and legal sufficiency in this context.

In accordance with Article 67, UCMJ, the CAAF in *Phillips* reviewed the case through the lens of *legal insufficiency*, i.e., whether any rational factfinder could have concluded, beyond a reasonable doubt, the Government presented sufficient evidence the conduct at issue was of a nature of to bring discredit upon the armed forces. The case announces no rule as to whether the absence of *any evidence* of an element renders a finding *factually insufficient*. In fact, the CAAF remanded so the CCA below could perform a factual sufficiency review under the correct legal standard. 70 M.J. at 167.

2. Factual insufficiency.

Notwithstanding the concerns raised below with the CAAF's decision in *Phillips* as to legal sufficiency, the findings of guilty must be set aside and dismissed because they are *factually insufficient*. The Government presented *no evidence* the conduct at issue was of a nature to bring discredit upon the armed forces. If this Court's charge with factual sufficiency is to "take a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt to make [an] independent determination as to whether the *evidence constitutes proof of each required element* beyond a reasonable doubt,"[25] this Court can *never* be convinced the *evidence* constitutes proof of the terminal element beyond a reasonable doubt when there was *no*

[25] *Rodela*, 82 M.J. at 525 (emphasis added).

evidence presented of the terminal element. This Court would have to use an inference, which by definition, means no actual evidence satisfied the burden of proof.

3. Legal sufficiency with *Phillips*.

Appellant fully recognizes *Phillips* has never been overruled, modified, or abridged by subsequent decision of the CAAF or the Supreme Court, nor has the governing statutory language been substantively amended. Therefore, traditional principles of vertical *stare decisis* apply. *See United States v. Andrews*, 77 M.J. 393, 399 (C.A.A.F. 2018) (discussing the concept). Nevertheless, Appellant raises legal insufficiency with regards to the terminal element as a good faith attempt to overrule or modify existing law. *See* American Bar Association, Rules of Professional Conduct, R. 3.1.

In short, the *Phillips* dissent was correct. Clause 2 offenses relying on the statutory language "of a nature" and the presidentially codified definition of "service discrediting conduct" (…tendency to lower) in the absence of *any evidence* are unconstitutional. The *Phillips* majority grounded its opinion on this text, essentially reasoning the plain language of the statute and definition allow this lesser form of proof. This "lesser form" is readily apparent when comparing Clause 1 and Clause 2 offenses. Whereas Clause 1 offenses require acts directly and palpably prejudicial to good order and discipline, Clause 2 offenses textually require the conduct to be such that it has a tendency to bring the service into disrepute or which tends to lower it in public esteem. *Compare MCM*, pt. IV, para. 91.c.(3) *with id.* at para. 91.c.(2)(a).

But that is the essence of the problem. The statute, and by extension the definition of service discrediting provided by the President, *allows* a factfinder—and ostensibly an appellate authority—to find an accused guilty and sustain that conviction in the *absence of any evidence*. This, by its very nature, offends the Constitution. The problem with *Phillips* is not that the majority

incorrectly interpreted the words as drafted, it is that the words are the source of the legal issue. If neither party raised the issue constitutionally, the CAAF would have followed the party presentation principle and not decided the issue on a constitutional basis. *See Greenlaw v. United States*, 554 U.S. 237, 244 (2008) (describing party presentation).

Here, Appellant is doing just that. It is constitutionally infirm for the panel at trial to have concluded—and for this Court to conclude now—that *if* a member of the public *had learned* about Appellant's alleged child pornography offenses, *he or she would* lose respect for the military. Those conditional words demonstrate, as a matter of law, the convictions are insufficient because relying on words like *if* and *would* necessarily means no one from the public did so learn about the conduct and it further imparts a speculation that learning so would indeed have an unproven effect. That cannot be the standard. Nor can it be so that the "nature" of conduct itself satisfies constitutional demands. In such a scenario, the factfinder or appellate authority introduces its own sense of these theoretical possibilities. In doing so, the decisional entity is—again—rendering judgment as to guilt based on personal notions of justice and contemporary standards, *not evidence.* All other elements in any other criminal code must be affirmatively proven with evidence. If the text of Clause 2, or the definition expounding upon it, say differently, those sources of law are unconstitutional and may not endure.

Applied to the case at hand, the Government offered no evidence of the terminal element. It could have, but did not, call a witness to elicit testimony that the reputation of the service had been discredited. It could have, but did not, call a witness to elicit testimony that—in the witness's opinion—the conduct at issue was "of a nature to bring discredit upon the armed forces." Had the Government done so, the Defense could have cross-examined the witness about the foundation of the opinion, as is commonplace in other opinion contexts. The Defense could have called a witness

to rebut the Government's offer. The point of the matter is there was no evidence offered for this element and the trial counsel "satisfied" a terminal element that must be proven beyond a reasonable doubt with evidence like any other element[26] by merely arguing the conduct was *per se* service discrediting. R. at 762. It was, in theory and as applied, a prohibited unconstitutional conclusive presumption.

The entire composition of the CAAF has changed since *Phillips* was decided and it is appropriate to reevaluate whether that decision was correctly decided. Appellant recognizes this Court's obligation to follow precedent, but if in its independent judgment and wisdom this Court concludes *Phillips* was wrongly decided, it should acknowledge as much in the opinion and provide the rationale for why the issue presented here is tantamount to an unconstitutional conclusive presumption. That, indeed, may be the best way for the CAAF to grant review of the issue and confront its incorrect precedent.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilty, and set aside the sentence.

[26] *Richard*, 2022 CAAF LEXIS 637 at *2.

VIII.

APPELLANT WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

Additional Facts

In providing Appellant forum advice, the military advised Appellant that he could be convicted if three-fourths of the members concurred as to guilt. R. at 11. Later, the members received the same instruction. R. at 798.

Standard of Review

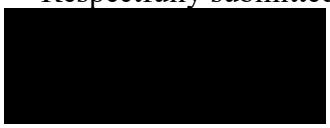
"The constitutionality of a statute is a question of law; therefore, the standard of review is *de novo*." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

The CAAF granted review in *United States v. Anderson* to determine whether a military accused has a constitutional right to a unanimous verdict, and hence, whether Article 52, UCMJ, is unconstitutional. No. 22-1093/AF, 2022 CAAF LEXIS 529, at *1 (C.A.A.F. 25 July 2022). The CAAF has granted trailer review of several cases. *See United States v. Veerathanongdech*, USCA Dkt. No. 22-0205/AF; *United States v. Martinez*, USCA Dkt. No. 22-0165/AF; *United States v. Apgar*, USCA Dkt. No. 22-0226/AR; *United States v. Miramontes*, USCA Dkt. No. 22-0233/AR; *United States v. Aikanoff, Jr.*, USCA Dkt. No. 22-0258/AR; *United States v. Warda*, USCA Dkt. No. 22-0282/AR; *United States v. Docilet*, USCA Dkt. No. 22-0284/AR; *United States v. Cunningham*, USCA Dkt. No. 23-0027/AF; *United States v. Bentley*, USCA Dkt. No. 23-0037/AR; *United States v. Garret*, USCA Dkt No. 23-0050/AR; *United States v. Vance*, USCA Dkt. No. 22-0294/MC. This Court should—and must—decide this assignment of error in accordance with the CAAF's forthcoming decision in *Anderson*.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilty and set aside the sentence.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 6 February 2023. The sealed portions of this brief were hand-delivered on the same date.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION TO EXCEED**
v.	)	Before Panel No. 2
Technical Sergeant (E-6) **CHARLES S. NESTOR** United States Air Force *Appellant*	)	No. ACM 40250 16 March 2023

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

Pursuant to Rules 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully moves to file its answer brief in excess of the page limit prescribed by this Court. The United States' answer is 64 pages not including the table of contents or index.

There is good cause to grant this motion. Appellant raised eight assignments of error, with many distinct subparts, spanning 71 pages. The transcript in this case is 841 pages long and the record consists of 6 volumes. In order to properly address Appellant's arguments, and identify the relevant facts and law necessary for resolution of the issues raised, the United States is required to exceed this Court's page limit in its brief.

WHEREFORE, the United States respectfully requests this Honorable Court grant its Motion to File Answer Brief in Excess of Page Limit.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 16 March 2023.

[redacted]
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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee, v. Technical Sergeant (E-6) **CHARLES S. NESTOR**, USAF Appellant.	))))))))))	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR** Before Panel No. 2 No. ACM 40250 16 March 2023

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

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UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERRORS
v.	)	Before Panel No. 2
Technical Sergeant (E-6) **CHARLES S. NESTOR** United States Air Force *Appellant.*	)	No. ACM 40250 16 March 2023

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

ISSUES PRESENTED

I.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE WHERE CHARGED CONTENT IS SUPPOSED TO BE CONTAINED ON "DISC 1A" OF PROSECUTION EXHIBIT 14 BUT THAT DISC HAS NO REVIEWABLE FILE?

II.

WHETHER THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION UNDER MIL. R. EVID. 404(b) WHEN HE ALLOWED THE INTRODUCTION OF EVIDENCE OF CHILD EROTICA, FILM CLIPS ONLY FEATURING CHILDREN IN VARIOUS STATES OF UNDRESS, AND FILE NAMES FROM THE RECYCLE BIN USING PHRASES LIKE "PRETEEN HARDCORE", IN ORDER TO PROVE APPELLANT KNOWINGLY POSSESSED CHILD PORNOGRAPHY?

III.

WHETHER THE MILITARY JUDGE ERRED WHEN HE INSTRUCTED THE MEMBERS THAT MATERIAL WHICH WAS INITIALLY ADMITTED FOR A LIMITED MIL. R. EVID. 404(b) PURPOSE CONSTITUTED EVIDENCE OF CHARGED MISCONDUCT?

IV.

WHETHER THE FINDINGS OF GUILTY FOR WRONGFUL POSSESSION OF CHILD PORNOGRAPHY IS FACTUALLY AND LEGALLY INSUFFICIENT BECAUSE: 1) THE "FILES" IN THE RECYCLE BIN HAD NO CONTENT; 2) ONE FILE DID NOT MEET THE LEGAL DEFINITION OF "MASOCHISTIC," AND THUS DOES NOT CONSTITUTE CHILD PORNOGRAPHY; OR, 3) COMPELLING CIRCUMSTANTIAL EVIDENCE INDICATED ANY POSSESSION WAS UNKNOWING?

V.

WHETHER THE FINDINGS OF GUILTY FOR WRONGFUL DISTRIBUTION OF A SINGLE FILE OF CHILD PORNOGRAPHY IS FACTUALLY AND LEGALLY INSUFFICIENT WHEN: 1) THE HASH VALUE FROM APPELLANT'S COMPUTER DID NOT MATCH THE HASH VALUE OF THE FILE ON THE INVESTIGATIVE AGENCY'S COMPUTER AND A FULL FILE TRANSFER WAS NOT COMPLETED; 2) APPELLANT DID NOT AFFIRMATIVELY DELIVER A FILE TO ANOTHER, BUT RATHER THE FILE WAS ALLEGEDLY TAKEN FROM HIS COMPUTER BY ANOTHER (I.E., PASSIVE DISTRIBUTION); OR 3) THE CONTENT IN QUESTION DID NOT MEET THE LEGAL DEFINITION OF "MASOCHISTIC," AND THUS DOES NOT CONSTITUTE CHILD PORNOGRAPHY?

VI.

WHETHER THE FINDINGS OF GUILTY ARE UNREASONABLY MULTIPLIED BECAUSE IN THIS PEER-TO-PEER NETWORK SCENARIO, THE "DISTRIBUTION" OF A SINGLE FILE OCCURRED WHEN ANOTHER USER ALLEGEDLY TOOK THE FILE FROM APPELLANT AS OPPOSED TO APPELLANT "DELIVERING POSSESSION TO ANOTHER?"

VII.

WHETHER THE FINDINGS OF GUILTY FOR BOTH SPECIFICATIONS OF THE CHARGE ARE LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT FAILED TO PRESENT ANY EVIDENCE

TO PROVE APPELLANT'S CONDUCT WAS "OF NATURE TO BRING DISCREDIT UPON THE ARMED FORCES?"

IV.

WHETHER APPELLANT WAS DEPRIVED OF A CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT?

STATEMENT OF CASE

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

Pages 4-5 filed separately under seal.

ARGUMENT

I.

APPELLANT'S RECORD IS COMPLETE.

Additional Facts

At the time he filed Appellant's brief, Appellate Defense Counsel was unable to play Prosecution Exhibit 14, contained on Disc 1A in the Court's record of trial. (App. Br. at 19.) Since that time, with the assistance of the Court's clerks, counsel has been able to play, and view, Prosecution Exhibit 14, and verify that Disc 1A in the Court's record of trial contains the "missing" exhibit.

Standard of Review

Whether a record of trial is complete is a question of law that is reviewed de novo. United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014).

Law and Analysis

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ. Since the Court's record of trial does, in fact, contain a viewable version of Prosecution Exhibit 14, the record is complete, and Appellant is not entitled to relief.

Pages 7-14 filed separately under seal.

III.

APPELLANT WAIVED ANY OBJECTION TO THE MILITARY JUDGE'S INSTRUCTIONS.

Additional Facts

On 29 July 2021, the defense submitted a request for a Bill of Particulars to the Government. (App. Ex. XI, page 17.) Specifically, the defense requested "a list of the media file names that the Government is alleging is in fact child pornography and in TSgt Nestor's possession." (Id.) On 9 August 2021, the Government responded with a chart containing 41 total file names. (App. Ex. IV, page 23-27.) On 1 October 2021, the Government amended its response to the defense's request for a Bill of Particulars by adding one more file to the chart for a total of 42 files. (App. Ex. XI, page 25.)

On 11 August 2021, the Government provided notice under Mil. R. Evid. 404(b) of certain child erotica files found in the "Recycle Bin" on Appellant's laptop computer. (App. Ex. XI, page 1.) On 2 October 2021, the defense filed a motion *in limine* to preclude the uncharged evidence. (App. Ex. X.) On 3 October 2021, the Government responded to that motion in writing. (App. Ex. XIII.) On 5 October 2021, the military judge issued a written ruling denying the defense's motion. (App. Ex. XVIII.) The military judge reasoned that evidence that Appellant possessed child erotica was relevant to show Appellant's sexual interest in minors, which would make his knowing possession and distribution of child pornography more likely. (App. Ex. XVIII, pages 5-6.)

During oral argument on the Mil. R. Evid. 404(b) motion, the Government clarified that the evidence found in the Recycle Bin on Appellant's laptop included both charged and uncharged files. (R. at 99.) In order to avoid confusion on behalf of the factfinder concerning which exact files were charged the Government proposed that they would "highlight those"

uncharged files on a spreadsheet and provide that list to the members. (Id.) The defense did not object to the Government's proposal. (Id.) The military judge did not respond to the Government's proposal at that juncture. (Id.)

Later, during an Article 39(a), UCMJ, session concerning instructions, the military judge asked trial counsel if there "were any additional requests for special instructions" other than an unopposed request for an instruction on the definition of "masochism." (R. at 710.) To alleviate the defense's earlier concern regarding the files meeting the definition of child pornography, trial counsel stated:

> So, Your Honor, I guess as it relates to which files have been alleged to contain or have previously been child pornography, I think earlier the defense expressed a concern with allowing the full file listing. That could cause confusions about which ones are being alleged to have been child pornography. So I guess, we would request that the court say that the members need to look at the highlighted cells [in the spreadsheet] to decide whether those particular files were in fact child pornography.

(Id.)

The military judge responded: "All right. Well, that's an inefficient way of doing things. Trial counsel, if that is the proposed way forward, I need you to provide in word format those particular filenames and I will incorporate those into the written instructions." (R. at 711.) The defense did not object to this "proposed way forward," nor did they offer an alternative. (Id.) When the military judge called on the trial defense counsel for any requests for "other instructions," defense counsel again did not request any special instructions or propose an alternative to trial counsel's suggested methodology. (R. at 712.) Trial defense counsel only requested a *different* special instruction on the definition of "child erotica," which was not related to the Government's proposal or the judge's request for the specific file names. (Id.)

During a recess after discussing instructions, the military judge conducted an R.C.M. 802 conference with counsel. (R. at 715.) During that conference, which was summarized by the judge on the record as follows, "Counsel requested some clarification as far as the court's expectations as it related to the prosecution's request to how best to identify what they are alleging as child pornography." (Id.) Trial defense counsel did not voice a desire to supplement the military judge's summary of the R.C.M. 802 conference, nor did they raise any issues or lodge objections with respect to the identification of the charged child pornography. (Id.) The military judge then indicated his intent to take a "long recess" to finalize instructions and provide them to the parties for review. (R. at 716.) The military judge again referenced trial counsel's request to include specific file names in the written instructions: "As we had discussed, I believe trial counsel indicated they were going to provide files, filenames that are at issue in this case to the court, to include the written instructions. I'll be sure to include those once I receive them." (Id.) Trial defense counsel again did not object, raise any issue, or lodge an objection to the military judge's proposed plan to insert the file names into his written instructions to the members. (Id.) The military judge once more called upon trial defense counsel, "Are there any other matters that we need to take up regarding instructions?" (Id.) Trial defense counsel responded unequivocally, "No, Your Honor." (Id.)

Before calling the members back into the courtroom to provide the instructions, the military judge again queried trial defense counsel if there was "anything else to take up at this time?" (R. at 726.) And once again, trial defense counsel responded with, "No, Your Honor." (Id.)

The military judge instructed and highlighted to the members orally the file names that the Government alleged met the definition of child pornography:

> The depictions in this case which the prosecution has alleged meet the definition of child pornography are those depictions contained in files with the following filenames found on pages 6-9 in these written instructions. Now there is about, as I have indicated, four pages of filenames. I am not going to read those out loud to you now, but they are all there in writing for your reference during deliberations.

(R. at 738.)

The corresponding written instructions included four pages of file names, totaling 42 files, which were those files the Government was alleging met the definition of child pornography. (App. Ex. XXVII, pages 6-9.) In addition, the 42 files in the military judge's instructions corresponded with the 42 files the Government previously provided in response to the defense's Bill of Particulars request.

The military judge separately instructed the members on the Mil. R. Evid. 404(b) evidence as follows:

> You may consider evidence that the accused may have viewed and possessed child erotica and foreign movie productions featuring scenes with unclothed children and that he may have used video editing software to make short video clips of scenes involving nude minors from movies for the limited purpose of its tendency, if any, to prove knowledge on the part of the accused that he possessed child pornography and to determine whether the accused had a motive to commit he offenses.

(R. at 742-43.)

After reading instructions, and before the members retired to deliberate, the military judge asked, "Do counsel object to the instructions given or request additional instructions?" (R. at 801.) Defense counsel responded, "No, Your Honor." (Id.)

Standard of Review

"Whether a panel was properly instructed is a question of law reviewed *de novo*." United States v. Medina, 69 M.J. 462, 465 (C.A.A.F. 2011) (internal citation and quotation

omitted). If an accused fails to make an adequate request for an instruction or object to a proposed instruction, this Court reviews for plain error. *See* United States v. Payne, 73 M.J. 19, 22 (C.A.A.F. 2014) (citations omitted). To establish plain error, the appellant must demonstrate: (1) that there was "error" (2) that such error was "plain, clear, or obvious"; and (3) that the effort "affected" appellant's "substantial rights." United States v. Czekala, 42 M.J. 168, 170 (C.A.A.F. 1995) (citing United States v. Olano, 507 U.S. 725, 737 (1993)).

Law

A. Waiver

R.C.M. 920(f) states: "Failure to object to an instruction or to omission of an instruction before the members close to deliberate forfeits the objection." "Whether an appellant has waived an issue is a legal question that this Court reviews *de novo*. Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020) (citation and internal quotation marks omitted).

"Waiver must be established by *affirmative* action of the accused's counsel, and not by a mere failure to object to erroneous instructions or to request proper instructions." United States v. Smith, 50 M.J. 451, 455-56 (C.A.A.F. 1999) (emphasis in original) (citations and internal quotation marks omitted). An affirmative statement than an accused at trial has "no objection" generally "constitutes an affirmative waiver of the right or admission at issue." United States v. Swift, 76 M.J. 210, 217 (C.A.A.F. 2017) (citation omitted). "While there are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, of critical importance is the specificity with which counsel makes the basis for his position known to the

military judge." United States v. Killion, 75 M.J. 209, 214 (C.A.A.F. 2016) (citation omitted) (quoting United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999)).

"Required" findings instructions can be waived. *See* Davis, 79 M.J. at 331 (holding that Appellant waived the issue of whether the *mens rea* of "knowingly" applies to the consent element of Article 120c(a)(2)); United States v. Gutierrez, 64 M.J. 374, 376 (C.A.A.F. 2007) ("[E]ven if an affirmative defense is reasonably raised by the evidence, it can be affirmatively waived by the defense.").

In Davis, the military judge had a preliminary discussion with the parties regarding the findings instructions he intended to give. Id. at 330. He asked whether there were any objections or requests for additional instructions, to which the trial defense counsel responded, "No changes, sir." Id. Subsequently, after granting a finding of not guilty to one of the specifications and marking the instructions as an appellate exhibit, the military judge again asked if there were any objections to the findings instructions, to which the trial defense counsel responded, "No, Your Honor." Id.

On appeal, the appellant in Davis argued "that it was plan error for the military judge to instruct the members that a required element of Article 120c(a)(2) is lack of consent, without also specifying that the accused must have subjectively known that the alleged victim did not consent." Id. However, the Court found that the appellant "waived this claim." Id. The Court reasoned that the appellant "affirmatively declined to object to the military judge's instructions and offered no additional instructions." Id. at 331. By "expressly and unequivocally acquiescing" to the military judge's instructions, the appellant waived all objections to the instructions. Id. (quoting United States v. Smith, 2 C.M.A. 440, 442 (1953)). "Having directly bypassed an offered opportunity to challenge and perhaps modify the instructions, appellant

waived any right to object to them on appeal." Id. (quoting United States v. Wall, 349 F.3d 18, 24 (1st Cir. 2003).

B. Instructions

R.C.M. 920(e) lists "Required instructions" which the military judge "shall" give, including "a description of the elements of each offense charged." In this regard, "the military judge must bear the primary responsibility for assuring that the jury properly is instructed on the elements of the offense raised by the evidence as well as potential defenses and other questions of law." United States v. Prather, 69 M.J. 338, 344, n.8 (C.A.A.F. 2011) (quoting United States v. Graves, 1 M.J. 50, 53) (C.M.A. 1975)).

R.C.M. 920(c) states:

> At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

While the military judge must instruct the court members on findings, he "has substantial discretion in selecting which instructions to give." United States v. Sanchez, 50 M.J. 506, 509 (A.F. Ct. Crim. App. 1999) (citing United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993)). On appeal, this Court reviews the instructions "in their entirety rather than piecemeal." Id. (quoting United States v. Buchana, 41 C.M.R. 394, 397 (C.M.A. 1970)).

The Discussion section to R.C.M. 920(a) states: "Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings. Instructions should be tailored to fit the circumstances of the case, and should fairly and adequately cover the issues presented."

"Appropriate instructions" under R.C.M. 920(a) are "those instructions necessary for the members to arrive at an intelligent decision concerning appellant's guilt." United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002) (citations omitted). To arrive at such an intelligent decision, the members must consider the charged offense's elements, evidence pertaining to those elements, and pertinent legal principles necessary to decide the case." Id. (citations omitted).

Analysis

A. Appellant waived his objection to the military judge's instructions.

At the outset, Appellant's assertions of instructional error are waived. Through repeated affirmative declinations to object to the military judge's findings instructions or to provide a proposed instruction for the list of filenames that Appellant now alleges was error, Appellant "expressly and unequivocally acquiesce[d] to the military judge's instructions." Davis, 79 M.J. at 331. Moreover, Appellant was directly asked if he objected to the Court's instructions, and he affirmatively stated that he did not. Thus, he "waived all objections to the instructions" with respect to Mil. R. Evid. 404(b) evidence on appeal. Id. at 332; *see also* United States v. Rich, 79 M.J. 572, 586 (A.F. Ct. Crim. App. 2019) (finding waiver when trial defense counsel's advocacy for the instruction "was distinguished by its equivocal, nonspecific, and half-hearted nature.")

Appellant claims waiver does not apply because the military judge never asked defense counsel whether they "agreed the final findings instructions were a complete and accurate statement of the law, or whether the Defense waived challenges to the final instructions." (App. Br. at 15.) But, the military judge is not required to use that precise verbiage when asking if the defense has objection to instructions. CAAF found waiver in Davis when trial defense counsel responded: "No changes, sir." 79 M.J. at 330. And this Court has never demanded a military

judge affirmatively ask the defense if they are "waiving" instructions to find waiver. In fact, this Court in United States v. Solomon found the appellant waived his claim of instructional error by not specifically requesting its desired instruction, not objecting to the military judge's instructions, and then not raising the issue with the military judge before the members began their deliberation. No. ACM 39972, 2022 CCA LEXIS 492, at *46-47 (A.F. Ct. Crim. App. 19 August 2022) (unpub. op.)

Trial defense counsel had ample opportunity to challenge the military judge's instructions. "Given his ability to confront these issues head-on at the trial level, his affirmative declination to do so despite repeated inquires by the military judge is precisely why the principle of waiver exists." United States v. Schmidt, 80 M.J. 586, 602 (N-M. Ct. Crim. App. 2020), *overruled on other grounds by* United States v. Tabor, 82 M.J. 637 (N-M Ct. Crim. App. 2022). *See also* Wall, 349 F.3d at 24 ("Counsel twice confirmed upon inquiry from the judge that he had 'no objection and no additional requests' [regarding the instructions].' Having directly bypassed an offered opportunity to challenge and perhaps modify the instructions, appellant waived any right to object to them on appeal."). Thus, while the military judge ultimately remains responsible for providing correct instructions, the principle of waiver necessitates that counsel "must be especially careful to raise any objections that they might have to proposed instructions when the military judge asks them." Id. (quoting Davis, 79 M.J. at 332) (Maggs, J., concurring).

If required findings instructions can be waived (*see* Davis, 79 M.J. at 331) and affirmative defenses can be waived (*See* Gutierrez, 64 M.J. at 376), then certainly an instruction

on Mil. R. Evid. 404(b) evidence can likewise be waived.[1] Since Appellant waived this issue, there is no error for this Court to correct on appeal.

B. The military judge gave the members "appropriate instructions in findings" in accordance with R.C.M. 920(a).

The military judge provided the members with all the "required instructions" listed in R.C.M. 920(e). He provided "a description of the elements of each offense charged." R.C.M. 920(e)(1). He instructed on applicable potential defenses. *See* R.C.M. 920(e)(3); (R. at 1771-72). The military judge gave the members the "instructions necessary for the members to arrive at an intelligent decision concerning appellant's guilt." Baker, 57 M.J. at 333.

Appellant claims it was error for the military judge to instruct the members on the Government's list of charged file names. (App. Br. at 28.) But trial counsel's proposal to provide a list of filenames for the members was an effort to alleviate any defense "concern" that the members would be confused, given the number of charged *and* uncharged files. (R. at 710.) Trial defense counsel had ample opportunity to raise those concerns to the military judge during multiple Article 39(a) sessions and R.C.M. 802 conferences. They did not.

Appellant argues it was error for the military judge to list the Recycle Bin contents in the written instructions (i.e., the 42 files alleged as child pornography) since he asserts those files were previously only admitted as Mil. R. Evid. 404(b) evidence. (App. Br. at 28.) But, the Government made clear in its Bill of Particulars that there were both charged *and* uncharged items in Appellant's recycle bin: "There is a mixture of child erotica, and then…filenames that we believe establish beyond a reasonable doubt that he had a one-time possess those videos files,

[1] The Government recognizes this Court has the authority under Article 66, UCMJ, to pierce waiver to correct a legal error. *See generally* United States v. Hardy, 77 M.J. 438, 442-43 (C.A.A.F. 2018) (citation omitted). However, Appellant has pointed to nothing in the record to even suggest that the military judge might have plainly erred in his instructions.

that are indicative of…child pornography." (R. at 99.) Therefore, it was not error for the military judge to include the *charged* file names from the Recycle Bin in his written instructions to the members (since not all of the recycle bin content was uncharged misconduct).

For the first time on appeal, Appellant claims surprise over the Government's charging theory.[2] (App. Br. at 29.) But the 42 files included in the instructions were the same 42 files the Government noticed in its response to the defense's Bill of Particulars before trial. Therefore, the defense was on notice regarding the Government's charging scheme and cannot claim surprise now on appeal.

Appellant likewise cannot now claim prejudice when trial defense counsel used the fact that the military judge instructed the members on 42 files to his advantage in closing argument when he attacked the burden of proof:

> Trial counsel has kind of handed you hundreds of pages and hundreds of filenames and some videos that are charged and some videos that are not.

(R. at 771.)

> This is the government's burden in this case. Questions prosecution has just left open for you to fill in the gaps in their case.

(R. at 772.)

> Then you have filenames that you are expected to somehow imagine, close your eyes members, and imagine and look at these filenames and although you heard a lot of evidence that filenames cannot be trusted, trial counsel is asking you to just close your eyes and imagine what this video could be and find [Appellant] in federal criminal court: Guilty. Absolutely not. You are not going to do that.

[2] While styled as a claim of instructional error, the core of Appellant's complaint is the military judge's initial ruling on the Mil. R. Evid. 404(b) Recycle Bin content, which would be evaluated under an abuse of discretion standard. United States v. Harrow, 65 M.J. 190, 199 (C.A.A.F. 2006). In any case, both issues are now waived.

(Id.)

Given the way trial defense counsel used the military judge's instructions to Appellant's advantage to argue reasonable doubt, Appellant cannot show any error, no less plain error, which affected his substantial rights. Czekala, 42 M.J. at 170.

The military judge provided instructions to the members which were legally correct. His instructions were based upon the statutory language of the offenses. To alleviate any charging scheme confusion, the Government provided the members with a list, consistent with the Government's response to the defense's Bill of Particulars. This instruction was within the "substantial discretion" afforded to a military judge in "selecting which instructions to give." Sanchez, 50 M.J. at 509. And since trial defense counsel never objected, the military judge did not commit plain instructional error. The military judge's instructions fairly and adequately covered the issues presented. And Appellant has failed to demonstrate any way the military judge's instructions were not consistent with the law. Nor does Appellant identify any prejudice under a plain error standard of review.

At bottom, Appellant waived any objection to the military judge's instructions. Even if this Court pierces waiver, the military judge did not plainly err in issuing the instructions in this case, the United States respectfully requests this Court deny Appellant's requested relief.

Pages 27-45 filed separately under seal.

VI.

THE FINDINGS OF GUILTY ARE NOT UNREASONABLY MULTIPLIED.

Standard of Review

This Court reviews forfeited issues regarding failures to state an offense for plain error. United States v. Humphries, 71 M.J. 209, 213 (C.A.A.F. 2012). Appellant has the burden of persuading the Court: (1) there was error, (2) the error was plain and obvious, and (3) the error materially prejudiced a substantial right of the appellant. United States v. Sweeney, 70 M.J. 296, 304 (C.A.A.F. 2011). "As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006). Courts of Criminal Appeals are empowered to consider claims even when those claims have been waived. Article 66(d), UCMJ.

Law

"A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting United States v. Cook, 406 F.3d 485, 487 (7th Cir. 2005)). In determining whether a particular circumstance constitutes a waiver or a forfeiture, the Court considers whether the failure to raise the objection at the trial level constituted an intentional relinquishment of a known right. Campos, 67 M.J. at 332. This Court may review the issue of unreasonable multiplication of charges, even if it was waived or forfeited at trial. "However, the CAAF has made clear that the courts of criminal appeals have discretion, in the exercise of their authority under Article 66, UCMJ, 10 U.S.C. § 866, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error." Hardy, 77 M.J. at 442-43.

Unreasonable multiplication of charges concerns "those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." United States v. Quiroz, 55 M.J. 334, 337 (C.A.A.F. 2001). A five-part test determines whether the prosecution has unreasonably multiplied charges:

> (1) Did the Accused object at trial to an unreasonable multiplication of charges or specifications?
>
> (2) Does each charge and specification address distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the Appellant's criminality?
>
> (4) Does the number of charges and specifications unfairly increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Id. at 338.

In assessing unreasonable multiplication of charges, the Court looks to whether prosecutors are, essentially, overreaching. It is a principle of "reasonableness." Id.

Analysis

Appellant concedes that the issue of unreasonable multiplication of charges was forfeited at trial, and he fails to establish a plain error occurred. Appellant makes the circular argument that it is "plain and obvious the distribution specification is unreasonably multiplied" and that the Government should have only charged possession. (App. Br. at 51.) Appellant's only claimed prejudice is a "signal to the public" that Appellant was an active participant in the distribution of child pornography. (Id.) But Appellant *did* actively participate in the distribution of child pornography; law enforcement officers downloaded a video of child sexual abuse from

Appellant. The fact that the public will now recognize this is not a cause for relief. Failing one prong of the plain error analysis is fatal, Appellant fails all three.

Appellant's claim of unreasonable multiplication of charges also fails every part of a Quiroz analysis. First, Appellant did not object on the grounds of unreasonable multiplication of charges at trial, so that weighs against his claim for relief.

Second, the specifications address distinctly separate criminal acts. Possession and distribution continue the vicious cycle of child pornography in two different ways. Appellant was an active consumer of the material when he possessed it. Child pornography exists because people like Appellant seek it out and consume it. By distributing the material, Appellant went from consumer to distributer, continuing the cycle of exploitation. Appellant, in his request for plain error review, argues "The Government sought and obtained convictions […] for the exact same conduct." (App. Br. at 51.) However, the only similarity between the specifications is the file of child pornography that was distributed and possessed.

Third, the number of charges does not misrepresent Appellant's criminality. The crimes are enumerated separately in the Manual for Courts-Martial. It is the nature of child pornography that files can be possessed by one person, while simultaneously being distributed to others an infinite number of times. Appellant could have possessed the file and *not* distributed it. Appellant could have stored the child pornography on a disk or thumb drive. However, Appellant made the video available for others to download. By possessing child pornography, Appellant committed one crime to gratify his sexual desires. By distributing child pornography, Appellant participated in a second crime of victimizing a child for the sexual gratification of others. Appellant's criminality is accurately reflected in these charges.

Fourth, Appellant argues that his punitive exposure was unfairly increased. (App. Br. at 51.) While the specifications were not merged for sentencing, Appellant was sentenced to serve the confinement periods concurrently. And, in any event, there is nothing unfair about the fact that Appellant, who both possessed child pornography and made is available for others to download, would face more punitive exposure than someone who only possessed such material on their own devices. Finally, Appellant's only argument in support of the fifth factor is an inference that the government must have been trying to double the number of allegations and triple Appellant's punitive exposure. Appellant concedes there is no evidence of prosecutorial overreach. (App. Br. at 51.) Appellant has the burden here, and a mere inference of wrongdoing cannot satisfy his burden of showing plain error.

Appellant's analysis of the Quiroz factors relies heavily on the argument that this Court has found that one text message should not be the basis for three separate convictions of solicitation: distribution, production and rape. United States v. Massey, No. ACM 40017, 2023 CCA LEXIS 46, at *42 (A.F. Ct. Crim. App. 30 January 2023) (unpub. op.) The facts of that case are distinctly different from the case at bar. Massey's motion for the merger of the three specifications was denied at trial. Id. at *33. Appellant sent a single text message, asking an ex-girlfriend to send a sexually abusive picture of her infant child. Id. at *38-39. Massey was found guilty of solicitation in three charges. On appeal, this Court used its Article 66, UCMJ, authority to merge the three specifications. Id. at *40-41. As the Court summarized, the crime of solicitation is in the request. Id. at *39. In the case at bar, the crime of possessing and distributing child pornography, is in the *actual* possession and distribution of the material. Massey caused a single harm when he requested child pornography through a text message. Appellant here caused two separate harms. Again, he gratified his own sexual desires by

possessing child pornography, and he exploited children for the sexual gratification of others, by distributing child pornography.

The case of Stephens involves the same two harms Appellant caused. 2015 CCA LEXIS. Stephens was convicted of possessing and distributing the same file of child pornography. Stephens, unpub. op. at *1. And the appellant in Stephens failed to preserve the issue of unreasonable multiplication of charges at trial. Id. at *8. This Court applied the Quiroz factors, despite this forfeiture, for the sake of argument. Id. This Court then denied the claim of unreasonable multiplication of charges. Id. The Court decided that the appellant could be found guilty of both possession and distribution, when he possessed files using a peer-to-peer file sharing system and distributed the child pornography to law enforcement, with the default settings in the program. Id. at *7. This Court should make the same findings in this case.

Appellant victimized a child when he downloaded and possessed a video file of that child being sexually abused, and he re-victimized that child when he kept that video available for distribution. Appellant committed two crimes, a panel found him guilty of two crimes, and he deserves convictions for both crimes. There was no plain error on the issue of unreasonable multiplication of charges and the Court should deny Appellant's request for relief.

VII.

APPELLANT'S CONVICTIONS ARE FACTUALLY AND LEGALLY SUFFICIENT AS TO THE TERMINAL ELEMENT.

Additional Facts

Internet providers in Okinawa, Japan provide service to American SOFA[3] members. (R. at 339.) In doing so, the Japanese internet service providers put all SOFA members on a "white list." (Id.) A "white list" is an IP block range. (Id.) The "white list" works by blocking the Japanese IP address assigned to an American SOFA member to allow them to access certain American IP addresses. (Id.) The "white list" allows American military members stationed in Japan to access American streaming services, like Netflix and Hulu. (Id.)

After SA Hansen downloaded a suspected child pornography file from a user's account on e-Mule, he looked up the IP address associated with the account. (R. at 355.) The IP address was serviced by GLBB, a local Japanese internet service provider. (Id.) SA Hansen sent a request to GLBB to find out to whom they assigned the IP address in question. (Id.) GLBB informed SA Hansen the IP address belonged to a "Tech Sergeant Charles Nestor" and provided his work location. (Id.) That GLBB had Appellant's rank, name, and military work location, led SA Hansen to believe Appellant was a SOFA, Air Force, member. (Id.)

Military law enforcement searched Appellant's apartment in Okinawa alongside local Okinawan police. (R. at 430.) Appellant lived in his off-base apartment with his civilian wife and two civilian daughters. (R. at 412, 414.) Law enforcement seized 27 devices from Appellant's residence. (R. at 550.) Two of these devices, both laptop computers, contained

[3] Although not established on the record, "SOFA" commonly refers to a Status of Forces Agreement. Brazell v. Uddenberg, No. 2018-08, 2019 CCA LEXIS 36, at *2-3 (A.F. Ct. Crim. App. 28 January 2019) (unpub. op.)

child pornography. (R. at 312-313.) Appellant's devices also contained search terms for child pornography. (R. at 528, 568, 653.) OSI interviewed Appellant's civilian wife and civilian daughters in connection with the investigation. (R. at 414.)

The military judge instructed the members on the terminal element of Article 134, UCMJ. (R. at 734.) The circuit trial counsel argued the terminal element during his closing argument for possession:

> When you focus on the second, that second element, that second thing you have to find beyond a reasonable doubt. The possession of child pornography falls demonstratively below the standards that our society expects for Airmen. When you engage in that type of conduct, it brings shame on the armed services and that is overwhelming evidence for the second element. Once you have both elements, once you have that checkbox next to both of them, you find him guilty of Specification 1.

(R. at 762.)

In a similar vein, the circuit trial counsel argued the terminal element for distribution:

> For specification 2, it's similar. There are two elements. The biggest change, right, is the distribution. That he distributed child pornography and the military judge explained to you it was plural before and now it is just a single video file that you can focus your attention on, the one that Agent Henson talked about. All of the same definitions apply, and you just need to decide did he knowingly distribute the file?

(Id.)

Standard of Review

Issues of legal and factual sufficiency are reviewed de novo. United States v. Washington, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

The law for legal and factual sufficiency is contained in AOE IV.

To establish a violation of clause 2 of Article 134, UCMJ, the Government must prove beyond a reasonable doubt that (1) the accused engaged in certain conduct, and (2) that the conduct was of a nature to bring discredit upon the armed forces. MCM, pt. IV, ¶ 54b.(2) (2019 ed.). "Serving discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem. Military Judges' Benchbook, Dept. of the Army Pamphlet 3a-62-1. "'Discredit' means to injure the reputation of." MCM, pt. IV, para. 60.c.(3). "The test of service discredit is whether [an appellant]'s acts had a 'tendency to bring the service into disrepute.'" United States v. Saunders, 59 M.J. 1, 11 (C.A.A.F. 2003); MCM, pt. IV, para. 60.c.(3).

In United States v. Phillips, CAAF rejected the appellant's argument that "to be convicted of a clause 2 offense, military law requires that the public know of the accused's conduct." 70 M.J. 161, 165 (C.A.A.F. 2011). Instead, CAAF explained the focus of the terminal element was the tendency of the appellant's acts to bring the service into disrepute:

> The focus of clause 2 is on the "nature" of the conduct, *whether the accused's conduct would tend to bring discredit on the armed forces if known by the public*, not whether it was in fact so known. The statute, which requires proof of the "nature" of the conduct, does not require the government to introduce testimony regarding views of "the public" or any segment thereof. The responsibility for evaluation of the nature of the conduct rests with the trier of fact. As discussed below, the degree to which others became aware of the Accused's conduct may bear upon whether the conduct is service discrediting, but the statute does not establish a requirement that the accused's conduct must in every case be in some respect public knowledge.

Id. at 165-66 (emphasis in original); *see also* Saunders, 59 M.J. at 10 (recognizing that a fact finder may determine conduct charged under Article 134, UCMJ, is service discrediting based on the context); United States v. Vaughan, 58 M.J. 29, 36 (C.A.A.F. 2003) (finding that an unlawful act alone can establish service discredit) (citations omitted).

While CAAF recognized that possession of child pornography alone is not per se service

discrediting, the prosecution is not required to "specifically articulate how the conduct is service discrediting. Rather, the government's obligation is to introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction." Phillips, 70 M.J. at 166. Indeed, the Government can meet its burden with circumstantial evidence alone. King, 78 M.J. at 221 (citations omitted). Moreover, "the ability to rely on circumstantial is especially important in [child pornography] cases … where the offense is normally committed in private." Id.

In Phillips, the Government introduced evidence that Appellant possessed five images and two movies depicting child pornography but presented no evidence on whether the public was aware of the appellant's conduct. 70 M.J. at 166. Even so, CAAF held that the evidence "was sufficient for a rational trier of fact to find beyond a reasonable doubt that [the appellant]'s activity would have tended to bring discredit upon the service had the public known." Id.

CAAF has historically applied a "low evidentiary threshold…to Article 134, UCMJ's terminal element." United States v. Goings, 72 M.J. 202, 206 n.5 (C.A.A.F. 2013).

Analysis

The evidence presented to prove Appellant's conduct was service discrediting under Article 134, UCMJ was legally and factually sufficient. The prosecution offered both circumstantial evidence and direct evidence that Appellant's possession and distribution of child pornography tended to injure the reputation of the armed forces. While Appellant raises both legal and factual sufficiency for both specifications, it is unclear at times which standard he is arguing. At any rate, a rational factfinder could find Appellant committed these offenses beyond a reasonable doubt, and his Court should be also convinced.

Circumstantially, the Government elicited evidence that at least one civilian working for a Japanese internet provider knew of Appellant's crimes and status as a military member. SA Hansen made a law enforcement request to GLBB for the IP address that transmitted child pornography. In response, GLBB provided Appellant's rank, name, and work location. Since Appellant was part of GLBB's "white list," the local internet service provider knew that Appellant was an active duty service member. A representative of a local Japanese company knowing that a SOFA member is downloading and sharing child pornography has a "tendency to bring the service into disrepute." Saunders, 59 M.J. at 11.

Directly, the Government established that local Japanese police searched Appellant's house for suspected child pornography, and seized several devices containing child pornography, alongside military law enforcement. Appellant lived with three civilians (his wife and two daughters). OSI interviewed Appellant's wife and two daughters as part of Appellant's child pornography investigation. So at least four civilians knew of Appellant's crimes and military status.

A. The evidence was legally sufficient to show Appellant's conduct tended to discredit the armed forces.

For a conviction to be legally sufficient the evidence must be viewed in the light most favorable to the Government to determine whether a rational trier of fact could find the elements of the offense were met beyond a reasonable doubt. King, 78 M.J. 218, 221.

Appellant's only legal sufficiency argument is that CAAF should reevaluate whether Phillips was correctly decided given its recent decision in United States v. Richard, 82 M.J. 473 (C.A.A.F. 2022). (App. Br. at 59.) But Appellant rightly concedes Phillips is binding precedent that this Court must apply under the principles of vertical stare decisis. (App. Br. at 57, 59.)

Furthermore, Appellant rightly concedes that CAAF did not overrule Phillips when it decided Richard. (App. Br. at 57.)

For conduct charged under Article 134, our superior Court determined the terminal element must be proven beyond a reasonable doubt. Phillips, 70 M.J. at 165. Further, the terminal elements of prejudice to good order and discipline, Clause 1 of Article 134, UCMJ, and conduct of a nature to bring discredit on the armed forces, Clause 2 of Article 134, UCMJ, are "distinct" elements. Richard, 82 M.J. 473.

The Court in Richard determined prejudice to good order and discipline requires actual prejudice to good order and discipline. Id. at 16. Meanwhile in Phillips, the discrediting conduct need only have a tendency or possibility to discredit the armed forces. 70 M.J. at 166. Phillips and Richard define the two distinct terminal element theories under two clauses, and Phillips should not be overturned in light of Richard, as proposed by Appellant, because it focuses on Clause 2, while Richard relates to Clause 1. Nor does this Court have the authority to overturn our superior Court's precedent in Phillips.

Given the "low evidentiary threshold" this Court has applied "to Article 134, UCMJ's terminal element" and that this Court is "bound to draw every reasonable inference from the evidence of record in favor of the prosecution," a reasonable factfinder could have determined Appellant's possession and distribution of child pornography discredited the service. Goings, 72 M.J. at 206 n.5; Pritchett, 31 M.J. at 216.

Appellant was an American Airman living overseas in a host nation. While living off base in the local community, Appellant used a civilian Japanese internet service to find, download, and share, child pornography. When he signed up for this internet service, he provided his military rank and work location, presumably to receive the benefits the Japanese

internet providers provided to SOFA members, such as the ability to watch American streaming services while overseas. Then, local Okinawan police executed a raid of Appellant's off-base home searching for, and finding, child pornography. The public could view Appellant's crimes as disrespectful of the local community when he was a guest in a foreign country as well as disgraceful. A rational trier of fact, viewing the evidence in the light most favorable to the prosecution, would find the evidence proved the essential elements, including the terminal element, beyond a reasonable doubt and so Appellant's convictions are legally sufficient.

B. The evidence was factually sufficient to show Appellant's conduct tended to discredit the armed forces.

The test for factual sufficiency is whether, after weighing the record of trial and making allowances for not having personally observed the witnesses, the Court is convinced of Appellant's guilt beyond a reasonable doubt. Turner, 25 M.J. at 325.

At the outset, Appellant argues Phillips is of limited precedential value because CAAF only addressed legal sufficiency and remanded the case to the Navy-Marine Corps Court of Criminal Appeals for a factual sufficiency review. (App. Br. at 56.)

But when CAAF remanded Phillips to the CCA, the Navy-Marine Court found the appellant's child pornography convictions factually sufficient. United States v. Phillips, No. NMCCA 200900568, 2011 CCA LEXIS 575, at *8-9 (N-M Ct. Crim. App. 28 December 2011) (unpub. op.). In finding Appellant's clause 2 Article 134 offense for child pornography factually sufficient, the CCA emphasized that while "the Government introduced no evidence that any member of [sic] general public knew of his conduct, it did not have to do so." Id. at 8.

Opinion Testimony

Next, Appellant argues the Government should have called a witness to "elicit testimony that the reputation of the service had been discredited." (App. Br. at 58.) But the Government

did not have to show the public, in fact, had lower esteem for the armed forces, but there was some *tendency* to discredit the reputation of the armed forces. Phillips, 70 M.J. at 166, MCM, pt. IV, 99.c. (2019 ed.). And this Court has interpreted Phillips to "not require testimony regarding either public opinion or even public knowledge of the misconduct for it to be service discrediting." United States v. Smith, No. ACM 37863, 2012 CCA LEXIS 429, at *6 (A.F. Ct. Crim. App. 8 November 2012) (unpub. op.). If Congress had wanted to require evidence that public, in fact, had lower esteem for the armed forces based on an accused's conduct, it would have criminalized "conduct that discredits the armed forces," rather than "conduct *of a nature* to bring discredit upon the armed forces." Article 134, UCMJ; 10 U.S.C. § 934 (2019) (emphasis added). Appellant's desired interpretation of Article 134 would make the statutory words "of a nature" superfluous. And Courts prefer interpretations that give independent legal effect to every word and clause in a statute under the canon against surplusage. Duncan v. Walker, 533 U.S. 167, 174 (2001).

In rejecting the appellant's sufficiency challenge in United States v. Brown, this Court held that a civilian police officer's knowledge of an appellant's child pornography can satisfy the service discrediting element:

> In the instant case there was more evidence available than merely the inference that the appellant's possession of child pornography had a *tendency* to bring the service into disrepute. The civilian police inspector testified at trial that, while at the appellant's home, he observed child pornography on the appellant's computer. There is no reason to believe that at the time of his observation the inspector was a member of the armed forces. Furthermore, the inspector was well aware of the appellant's [sic] being a member of the Air Force. Therefore, sufficient evidence was introduced to indicate that at least one member of the public who knew the military status of the appellant was aware of the nature of the appellant's misconduct.

No. ACM 36695, 2007 CCA LEXIS 534, at *10-11 (A.F. Ct. Crim. App. 16 November 2007) (unpub. op.) (emphasis in original).

Here, like Brown, the Government introduced evidence that at least one local police officer knew of Appellant's military status and the nature of his misconduct. Local Okinawan police accompanied military law enforcement on a "raid" of Appellant's home. (R. at 430.) Civilian police were present at Appellant's home when military law enforcement seized devices containing child pornography.

Moreover, this Court determined in United States v. Moore that even though the victim testified she "did not think any less of the military because of [a]ppellant's actions, the prosecution did not need to prove that [her] opinion of the military was lowered." No. ACM S32477, 2018 CCA LEXIS 560, at *39 (A.F. Ct. Crim. App. 11 December 2018) (unpub. op.). This Court in Moore determined the tendency to discredit the reputation of the service was enough and proving a particular person held the belief was not required. Id.

Trial Counsel's Closing Argument

Next, Appellant argues that the specification is factually insufficient because the circuit trial counsel only discussed the terminal element during closing argument in "two sentences" and "then moved on." (App. R. at 53.) But the Government need not "specifically articulate how the conduct is service discrediting." Phillips, 70 M.J. at 166. In fact, this Court rejected a similar challenge to the one Appellant now raises in United States v. Bavender. No. ACM 39390, 2019 CCA LEXIS 340, at *53-54 (A.F. Ct. Crim. App. 23 August 2019) (unpub. op.).

In Bavender, the trial counsel did not argue any specific facts that established the terminal element. Id. at 55. On the contrary, the trial counsel abruptly argued, "A service member that is receiving and downloading child pornography, that's service discrediting" and

that Appellant "knowingly and wrongfully viewed child pornography and that is service discrediting." Id. at 53. This Court held that the Government was not required to "well-articulate in argument how the evidence proved Appellant's guilt" so long as there was "evidence that a reasonable factfinder could reach the conclusion that it did." Id. at 54.

Appellant argues his convictions are factually insufficient because trial counsel only referred to the terminal element as to the possession specification, but not the distribution. (App. Br. at 53.) But trial counsel acknowledged there were two elements for the distribution specification. (R. at 762.) He told the members the analysis for the distribution specification was "similar" to the analysis for possession, which included the explanation that the Government must prove the terminal element beyond a reasonable doubt. (Id.) Trial counsel reminded the members that "the same definitions apply" from earlier, which included the definition that service discrediting conduct was "conduct which tends to harm the reputation of the service or lower it in public esteem." (R. at 734.) Trial counsel did not have to rehash why distributing child pornography was service discrediting when he had argued before the service discrediting nature of possession. And Appellant points to no case that requires such an argument. Trial counsel could have not addressed the terminal element at all during closing argument, and as long as the Government "introduced sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction," the conviction is sufficient. Phillips, 70 M.J. at 166.

Appellant vaguely argues that allowing a conviction in the absence of any evidence is unconstitutional. (App. Br. at 57.) But the statute at issue in this case *does* require evidence of what conduct occurred. Then, it is incumbent upon the fact finder to decide whether that evidence is service discrediting in nature. Congress is afforded wide latitude in structuring

statutes how they see fit. And Appellant does not specify which part of the Constitution the statute offends.

Finally, the military correctly instructed the members that the Government had the burden to prove the terminal element beyond a reasonable doubt. (R. at 733-734.) And the military judge properly defined service discrediting conduct for the members. (R. at 734.)

Evidence to Show the Misconduct Was of a Nature to Bring Discredit upon the Armed Forces

Here, although trial counsel did not argue it, the evidence showed Appellant was an active duty military member living overseas in a host nation. He lived off base with three civilian members of his family. An airman, while working under the umbrella of the armed forces, who searches for, downloads, and then shares, child pornography facilitated by an internet service a local Japanese company provides to benefit SOFA members, could have deteriorated the public esteem for the Air Force operating in a foreign country. This is especially the case when local Japanese police participated in a "raid" of Appellant's house and seized 27 devices, some of which contained child pornography. The tendency to cause such injury meets the terminal element, and the conviction is factually sufficient.

Conclusion

A rational trier of fact, viewing the evidence in the light most favorable to the prosecution would find the evidence proved the essential elements beyond a reasonable doubt. The evidence presented at trial also proved Appellant's guilt beyond a reasonable doubt. This Court, after making allowances for not having personally observed the witnesses, should be also convinced of Appellant's guilt beyond a reasonable doubt. Appellant's convictions are legally and factually sufficient as to the terminal element, and this Court should deny this assignment of error.

VIII.

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

Standard of Review

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

Law and Analysis

At the time of Appellant's court-martial, Article 52, UCMJ, required the concurrence of three-fourths of the panel members for a conviction. At trial, the military judge instructed the members as such. (R. at 798.)

Appellant now implicitly argues, given the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment and the Fifth Amendment rights to due process and equal protection required a unanimous verdict by the court-martial panel. (App. Br. at 102.) Appellant does not outright make this argument, but rather cites CAAF's grant of review in United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), *review granted* 2022 CAAF LEXIS 529 (C.A.A.F. 25 Jul 2022). (App. Br. at 60.)[4]

In Ramos, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. Ramos, 140 S. Ct. at 1396-97. The Court further held that the

[4] Appellant argues this Court "should—and must decide this assignment of error in accordance with the CAAF's forthcoming decision in Anderson." (App. Br. at 60.) But it is speculative that CAAF will decide Anderson in favor of Appellant. In the interim, this Court should apply its previous reasoning and deny relief.

Fourteenth Amendment incorporated this right to criminal proceedings at the state level. Id. at 1396-97. The Supreme Court did not state that this interpretation extended to military courts-martial.

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

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

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

CONCLUSION

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

[redacted]
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[5] In accordance with Rule 9.1 of this Court's Rules of Practice and Procedure, Ms. Wooldridge was at all times supervised by attorneys of AFLOA/JAJG during her participation in the writing of this motion.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 16 March 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION**
Appellee	)	**TO FILE UNDER SEAL**
	)	
	)	
v.	)	Before Panel No. 2
	)	
Technical Sergeant (E-6)	)	No. ACM 40250
CHARLES S. NESTOR	)	
United States Air Force	)	16 March 2023
Appellant	)	

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

Pursuant to Rules 13.2(b), 17.2(b) and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, the United States hereby moves to file the following portions of its Answer to Appellant's Assignments of Error under seal:

1. Pages 4-5 (Statement of Facts)
2. Pages 7-14 (Issue II)
3. Pages 27-45 (Issues IV and V)

These portions of the brief must be filed under seal because the information on these pages is derived from material under seal. Specifically, Prosecution Exhibits 5 and 14 are sealed exhibits. (*See* R. at 837.) Pages 4-5 are excerpts from the Statement of Facts discussing the charged content on these exhibits. Issue II alleges the military judge abused his discretion in admitting Mil. R. Evid. 404(b) evidence under seal and the content of that uncharged misconduct is discussed on pages 7-14. Issues IV and V allege legal and factual insufficiency and heavily discuss sealed materials.

WHEREFORE, the United States respectfully requests this Honorable Court grant its Motion to File under Seal.

[redacted]
USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 16 March 2023.

[redacted]SAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**SECOND MOTION TO FILE UNDER SEAL**
v.	)	Before Panel No. 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant.*	)	No. ACM 40250
	)	29 March 2023

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

Pursuant to Rules 13.2(b), 17.2(b) and 23.3(o) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves to file the following portions of his Reply Brief under seal: pages 8-14 (Issues IV and V). These portions of the Reply Brief must be filed under seal because the information on these pages is derived from material under seal. Specifically, Prosecution Exhibits 5 and 14 are sealed exhibits. *See* Record (R.) at 837. Issues IV and V allege legal and factual insufficiency and heavily discuss sealed materials.

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

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 March 2023.

Respectfully submitted,

[redacted]

DAVID L. BOSNER, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

CHARLES S. NESTOR
Technical Sergeant (E-6),
United States Air Force,
Appellant.

No. ACM 40250

REPLY BRIEF ON BEHALF OF APPELLANT

DAVID L. BOSNER, Maj, USAF
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 2
Technical Sergeant (E-6), **CHARLES S. NESTOR,** United States Air Force, *Appellant*.	)	No. ACM 40250
	)	Filed on: 29 March 2023

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

COMES NOW, Appellant, Technical Sergeant (TSgt) Charles S. Nestor (Appellant), by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and files this reply to Appellee's Answer [hereinafter Gov. Ans.], filed on 16 March 2023. This Court granted a Government Motion to Exceed the page limit on 24 March 2023. *See* A.F. CT. CRIM. APP. R. 17.3 (discussing timeliness for responsive filings when opposing counsel has filed a Motion to Exceed). Appellant primarily rests on the arguments contained in the Brief on Behalf of Appellant [hereinafter App. Br.], filed on 6 February 2023, but submits the following additional matters for this Court's consideration.[1]

[1] Appellant does not reply to Issues VI and VIII; he relies on his opening brief for the facts, law, and argument contained therein.

I.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE WHERE CHARGED CONTENT IS SUPPOSED TO BE CONTAINED ON "DISC 1A" OF PROSECUTION EXHIBIT 14 BUT THAT DISC HAS NO REVIEWABLE FILE?

Since Appellant filed his opening brief, Court personnel have facilitated counsel's access to the content on "Disc 1A." Counsel has reviewed the content and will discuss its sufficiency in Issue IV, *infra*. The record of trial is complete.

WHEREFORE, Appellant formally withdraws this assignment of error from consideration.

II.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION UNDER MIL. R. EVID. 404(b) WHEN HE PERMITTED THE GOVERNMENT TO INTRODUCE EVIDENCE OF CHILD EROTICA, CLIPS FROM AN ACADEMY AWARD-WINNING FILM, AND FILE NAMES FROM THE RECYCLE BIN WHICH HAD NO CONTENT, IN ORDER TO PROVE APPELLANT KNOWINGLY POSSESSED CHILD PORNOGRAPHY?

An evidentiary shortfall undercuts the admissibility of all three Mil. R. Evid. 404(b) categories of evidence in this case—child erotica, the VLC clips, and the recycle bin content. The Government's general argument is that all of these things go to the "knowing" aspect of the charged possessions and single distribution. *See, e.g.*, Gov. Ans. at 10. But at trial, the Government did not present evidence—such as file interaction or evidence of viewing—which indicated this uncharged Mil. R. Evid. 404(b) possession was itself "knowing." For the Government's argument to hold water, it would need to have proven that, for instance, Appellant's knowing possession of child erotica makes it more likely that he knowingly possessed child pornography. But it has not done so. It does not pass legal or logical muster to argue that possession of uncharged child erotica—without evidence that child erotica is knowingly

possessed—moves the needle at all with respect to whether the charged possession of child pornography was, in fact, knowing. The Government was required to present evidence such that the members could find by a preponderance of the evidence the Mil. R. Evid. 404(b) "possessions" were knowing possessions as well. To allow unknowing possession of uncharged conduct to prove knowing possession of charged conduct permits Mil. R. Evid. 404(b) to yield strength beyond its text and purpose. Moreover, it simply does not make sense to allow unknowing uncharged conduct to prove knowing charged conduct.

The Government cites this Court's unpublished opinion in *Suwinksi* for the proposition that possession of child erotica rebuts a Defense argument the possession was unknowing (i.e., going to absence of mistake). Gov. Ans. at 10-11 (citing *United States v. Suwinski*, No. ACM 38424, 2014 CCA LEXIS 867, at *7-8 (A.F. Ct. Crim. App. 20 Nov. 2014) (unpub. op.)). But in that case, there was overwhelming evidence the child erotica was knowingly possessed because the appellant wrote captions on the photos. *Id*. at *7. That opinion's logic does not extend to a case where, as here, the Government lacked evidence of knowing possession of uncharged misconduct in the same way it lacked evidence of knowing possession of charged conduct.

As to the VLC clips, the Government fails to adequately confront the most forceful argument of error. As the military judge recognized,[2] it was inconclusive whether Appellant created the VLC video snippets, or rather, he downloaded the videos as VLC snippets. The answer to this question changes the outcome on admissibility. If there had been evidence Appellant clipped the videos, it would show user interaction with the files, which would allow the members to find by a preponderance of the evidence that the charged possession was knowing. However, if there were VLC video snippets found on his computer without any indication of whether he was

[2] App. Ex. XVIII at 5, para. 27(b)(i).

the one that clipped them or even viewed them—as is the case here—it does not make the charged knowing possession any more likely. As above, standalone files without any indication of user interaction or evidence the possession of the files was itself knowing cannot be the legal and logical basis to conclude the charged possession was knowing, nor could it prove absence of mistake or lack of accident.

Finally, the recycle bin content generates confusion this Court must grapple with, both from a pure Mil R. Evid. 404(b) sight picture, but also with regards to the transformation of uncharged into charged misconduct via the instructions. *See* Issue III. At trial, there was unending confusion about what was charged versus uncharged. *See* App. Br. at 10-11 (summarizing the military judge's and defense counsel's difficulty trying to figure out what was charged and uncharged). Now, the Government on appeal hooks onto a statement the trial counsel mentioned in passing at the motions hearing that some recycle bin content was charged and some was uncharged, as if that dispels the obvious confusion expressed by defense counsel and the military judge. Gov. Ans. at 15 (citing R. at 99). The military judge, however, did not rule on the recycle bin content being charged, he ruled on it as Mil. R. Evid. 404(b) evidence. *See* App. Ex. XVIII at 6, para. 27(c)(iii). So that is what it was: Mil. R. Evid. 404 evidence. He recognized the file names without associated content were inflammatory. *Id*. He only admitted the file names because a limiting instruction on how to use that content could cure the potential danger, but with how the litigation unfolded, the instructions informed the members the recycle bin was actually charged content. *See* Issue III. Recognizing substantial overlap of Issues II and III, here, the important thing to recognize is the recycle bin content—per the military judge's ruling—would only be admissible because a limiting instruction would temper its use. But no such limiting instruction was ever given to temper its use; the evidence transformed into a basis for the conviction. This

massive confusion substantially outweighed any probative value stand alone file names devoid of any content could have had.

For these evidentiary errors, Appellant relies on his prejudice argument articulated on opening brief. App. Br. at 26-27.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt, and the sentence.

III.

WHETHER THE MILITARY JUDGE COMMITTED REVERSIBLE ERROR WHEN HE INSTRUCTED THE MEMBERS THAT MATERIAL WHICH WAS INITIALLY ADMITTED FOR A LIMITED MIL. R. EVID. 404(b) PURPOSE CONSTITUTED EVIDENCE OF CHARGED MISCONDUCT?

There is no waiver at play here. As a starting point, the Defense filed a motion in limine to exclude Mil. R. Evid. 404(b) content. App. Ex. X. As discussed above and on opening brief, the admission of such evidence was heavily litigated. The larger issue of the admissibility of the recycle bin content and the way it could be used is clearly preserved, such that there is no "intentional relinquishment of a known right" when it comes to instructions about the evidence. *United States v. Bench*, 82 M.J. 388, 392 (C.A.A.F. 2022). The defense counsel took a position that the evidence should have never come in because of potential prejudice to the client; this cannot be squared with the same counsel passively allowing their client to be convicted of allegations based on evidence it sought to exclude. If defense counsel so performed, it would be constitutionally ineffective performance. However, appellate defense counsel did not raise that issue because trial defense counsel performed admirably and—on this specific issue of the recycle bin—preserved appellate litigation on the topic of the evidence *and* how it could be used by the factfinder vis-à-vis the instructions.

Moreover, there are certain examples of what defense counsel *did waive* in the instructions discussions; this issue is not among them. They waived instructions on affirmative defenses. R. at 707. The Defense also waived other "evidentiary instructions that the parties request [] that are commonly found in the Benchbook?" R. at 708. Transformation of uncharged misconduct into charged misconduct is neither an affirmative defense nor is it an evidentiary instruction commonly found in the Benchbook.

Finally, as to waiver, the Government relies on *United States v. Davis*, 79 M.J. 329 (C.A.A.F. 2020). Gov. Ans. at 22. In *Davis*, the Court of Appeals for the Armed Forces (CAAF) found waiver where a military judge affirmatively asked the defense if it had *any* requested changes to the instructions, to which the Defense said, "No changes, sir." 79 M.J. at 330. That question was never asked here. The military judge never asked for the parties for a final commentary or objection on the instructions as a whole. The Government cannot point to a single statement by the Defense wherein counsel affirmatively acquiesced to the entirety of the instructions. If it could, Appellant would have no claim on appeal. The only limited waivers regarding the instructions were to affirmative defenses and "evidentiary instructions."

The plain error here lies with the military judge, who without question or second-guessing, allowed the Government to insert a list of uncharged files into the charged files instructions. The military judge knew better, precisely because he ruled on the recycle bin evidence as Mil. R. Evid. 404(b) content, and thus, understood it was not charged. The military judge—as demonstrated at the motions practice—was under the impression the Government intended to prove possession of three or four files. R. at 88, 100-01. The military judge's stance on the record and his ruling on the motion cannot be reconciled with the decision to instruct dozens of content-less file names as charged conduct.

In a footnote, the Government suggests, "Appellant has pointed to nothing in the record to even suggest that the military judge might have plainly erred in his instructions." Gov. Ans. at 23 n. 1. To the contrary, converting uncharged misconduct into charged conduct via findings instructions, where the military judge was plainly aware of the files the Government had sought to prove, is clear or obvious error. The prejudice, too, is obvious. With the general guilty verdict, this Court has no way of knowing what the members convicted Appellant for, yielding vast consequences for factual and legal sufficiency review.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt, and the sentence.

Pages 8-14 filed separately under seal.

VII.

WHETHER THE FINDINGS OF GUILTY FOR BOTH SPECIFICATIONS OF THE CHARGE ARE LEGALLY AND FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT FAILED TO PRESENT ANY EVIDENCE TO PROVE APPELLANT'S CONDUCT WAS "OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES?"

Despite the CAAF explicitly rejecting the argument just months ago, the Government is still arguing this Court should apply a lower evidentiary threshold, something less than proof beyond a reasonable doubt, to the terminal element. Gov. Ans. At 54, 56 (citing *United States v. Goings*, 72 M.J. 202, 206 n.5 (C.A.A.F. 2013)). The CAAF recently pronounced, "To satisfy the due process requirements of the Fifth Amendment, the Government must prove beyond a reasonable doubt every element of the charged offense." *United States v. Richard*, 82 M.J. 437, 2022 CAAF LEXIS 637, *17 (C.A.A.F. 7 Sep. 2022) (citing *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008); *In re Winship*, 397 U.S. 358, 364 (1970)). The CAAF squarely refuted the argument the Government is now making when it said, "That constitutional mandate applies just as much to the terminal element of Article 134, UCMJ, as it does to every other element of a criminal offense." *Id*. (citing *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011)). This Court must hold the Government to its burden, despite its request and suggestion to the contrary.[5]

Appellant does not ask this Court to overturn *Phillips*, in light of *Richard*, as the Government suggests. Gov. Ans. at 56. For starters, Appellant fully recognized on opening brief, as now, the basic proposition that this Court cannot overturn its superior court. App. Br. at 57. What this Court *can* do however, is conclude the findings are factually insufficient or acknowledge through its opinion to the CAAF that its precedent should be reconsidered. A senior member of

[5] The Government also writes, "Appellant does not specify which part of the constitution the statute offends." Gov. Ans. at 61. That is not correct. Appellant, on multiple occasions, invoked the Due Process Clause. App. Br. at 55.

this Court recently did so. *See United States v. Hernandez*, No. ACM. 39606 (rem), 2023 CCA LEXIS 104, at *24 (A.F. Ct. Crim. App. 28 Feb. 2023) (unpub. op.) (Key, S.J., dissenting) ("I would advocate for the CAAF to revisit its law in this arena and place the burden of proof on the Government to provide independent evidence corroborating urinalysis results in order to prove the 'knowing' element of wrongful use.").

The "of a nature" language in Clause 2 offenses, conduct which has a "tendency" to discredit the reputation of the armed forces, is an unworkable element with constitutional implications arising from its unworkability. It cannot be the case that an accused may be convicted because someone's opinions on the military *could* be lowered. The element and the offense must demand that someone's opinion *was* lowered *because of* the conduct; only that could ever truly prove beyond a reasonable doubt the conduct was of a nature to bring discredit upon the armed forces. Without this, a panel or military judge, and this Court, are merely hypothesizing about non-existent events and conclusions; this may never form the basis of a federal conviction.[6] If the "of a nature" language is to stand, evidence in the record must demonstrate beyond a reasonable doubt the conduct is of a certain nature that does, in fact, tend to lower the reputation in the military. That is a far cry from it being a type where it *could* lower the reputation of the community. In its Answer, the Government is, at best, able to point to an Internet Service Provider or the existence of a Status of Forces Agreement to satisfy its burden. Those are good starts, but they are not the end because the existence of these facts does not, in and of themselves, indicate anything about

[6] There is a critical distinction between a witness testifying about the effect of the conduct on the reputation in the military from the perspective of the witness, from which the factfinder could conclude the conduct is of a nature to bring discredit upon the armed forces, as compared to a situation were the Government only elicits evidence the conduct occurred and the factfinder imparts its own determination whether that conduct is of a type which has a tendency to lower the military's esteem in the community. If the latter is the standard, the factfinder is overcoming a deficit in proof with its own conclusions.

the nature of the conduct and its effect on the community. They suggest hypothetical questions, unanswered by this record. Did the employee working at the ISP develop a lower opinion of the military, from which the members or this Court could conclude the conduct was of a nature to bring discredit upon the armed forces? Did the host nation suffer any impact from the conduct? Was the SOFA implicated by the conduct? There is no evidence to answer these questions. That is the problem. At most, one could theorize these possibilities could or "tends" to lower the esteem of the military, but that is insufficient.

Appellant respectfully requests this Court conclude all findings are factually insufficient or, alternatively, suggest to the CAAF that it revisit this issue by granting review of this case (in the event Appellant does not succeed on other grounds in his appeal).

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the findings of guilt, and the sentence.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 29 March 2023.

Respectfully submitted,

[redacted]

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