IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
JOEL T. BICKFORD, Airman First Class (E-3) United States Air Force *Appellant*	)	No. ACM 40326 5 October 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file an Assignment of Errors. Appellant requests an enlargement for a period of 60 days, which will end on **16 December 2022.** The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 48 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 5 October 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force
[redacted]

6 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 October 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,* v. **JOEL T. BICKFORD,** Airman First Class (E-3) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 1 No. ACM 40326 7 December 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **15 January 2023**. The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). ROT, Vol. 1, EOJ at 1; R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its specification, distributing child pornography in violation of Article 134, UCMJ. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be reduced to the grade of E-1, confined for 18 months,

and dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and one defense exhibit. The transcript is 744 pages. Appellant is confined.

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

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 December 2022.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

8 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 December 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 1
JOEL T. BICKFORD, Airman First Class (E-3) United States Air Force *Appellant*	)	No. ACM 40326 6 January 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **14 February 2023**. The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). ROT, Vol. 1, EOJ at 1; R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its specification, distributing child pornography in violation of Article 134, UCMJ. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be reduced to the grade of E-1, confined for 18 months,

and dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and one defense exhibit. The transcript is 744 pages. Appellant is confined.

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

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

9 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 January 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **JOEL T. BICKFORD,** Airman First Class (E-3) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 1 No. ACM 40326 6 February 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **16 March 2023**. The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 172 days have elapsed. On the date requested, 210 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). ROT, Vol. 1, EOJ at 1; R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its specification, distributing child pornography in violation of Article 134, UCMJ. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be reduced to the grade of E-1, confined for 18 months,

and dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and one defense exhibit. The transcript is 744 pages. Appellant is confined.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 17 clients and is presently assigned 13 cases pending brief before this Court. Eight cases pending brief before this Court currently have priority over the present case:

a. *United States v. Lopez*, No. ACM 40161 – The Government filed its answer brief to the Appellant's eight assignments of error and motioned to file its 105-page answer brief in excess of the page limit on Friday, 3 February 2023. Counsel is reviewing the Government's answer brief and anticipates filing a reply brief.

b. *United States v. Johnson*, No. ACM 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is confined. Counsel has reviewed approximately fifty percent review of this record of trial.

c. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel has begun review of this record of trial.

d. *United States v. Hernandez*, No. ACM 40287 – The record of trial consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is confined.

e. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined.

f. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined.

g. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

h. *United States v. Manzano-Tarin*, No. ACM S32734 – The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement.

(2) In addition, before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending supplement to the petition for grant of review, *United States v. Brown*, USCA Dkt. No. 23-0101/AF, No. ACM 40066.

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

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

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

7 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 February 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 1
JOEL T. BICKFORD, Airman First Class (E-3) United States Air Force *Appellant*	)	No. ACM 40326 6 March 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **15 April 2023**. The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its specification, distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be reduced to the grade of E-1, confined for 18 months, and dishonorably discharged from the service. ROT, Vol. 1,

Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and one defense exhibit. The transcript is 744 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 14 clients and is presently assigned 12 cases pending brief before this Court. Seven cases pending brief before this Court currently have priority over the present case:

a. *United States v. Johnson*, No. ACM 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is confined. Undersigned counsel is currently reviewing this record of trial and beginning to draft the Appellant's Assignments of Error.

b. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Counsel has begun review of this record of trial.

c. *United States v. Hernandez*, No. ACM 40287 – The record of trial consists of 7 prosecution exhibits, 27 defense exhibits, and 10 appellate exhibits. The transcript is 226 pages. Appellant is confined.

d. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript is 105 pages. Appellant is not confined.

e. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined.

f. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

g. *United States v. Manzano-Tarin*, No. ACM S32734 – The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement. Undersigned counsel has begun review of this record of trial and is supervising the review of this record by Mr. Jacob Frankson, a law student extern assigned to the Air Force Appellate Defense Division.

This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 6 March 2023.

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

6 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 6 March 2023.

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


UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40326**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joel T. BICKFORD	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 6 March 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth), requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 7th day of March, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **15 April 2023**.

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

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
JOEL T. BICKFORD, Airman First Class (E-3) United States Air Force *Appellant*	)	No. ACM 40326 3 April 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **15 May 2023**. The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 228 days have elapsed. On the date requested, 270 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its specification, distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be reduced to the grade of E-1, confined for 18 months, and dishonorably discharged from the service. ROT, Vol. 1,

Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and one defense exhibit. The transcript is 744 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 14 clients and is presently assigned 11 cases pending brief before this Court. Six cases pending brief before this Court currently have priority over the present case:

a. *United States v. Ross*, No. ACM 40289 – The record of trial consists of 11 prosecution exhibits, 1 defense exhibit, 2 court exhibits, and 4 appellate exhibits. The transcript is 130 pages. Appellant is not confined. Undersigned counsel has reviewed this record of trial and is discussing potential assignments of error with the appellant.

b. *United States v. Johnson*, No. ACM 40291 – The record of trial consists of 28 prosecution exhibits, 4 defense exhibits, and 23 appellate exhibits. The transcript is 395 pages. Appellant is not confined. Undersigned counsel has reviewed the transcript, is drafting a motion to view sealed materials, and has begun to draft Appellant's Assignments of Error.

c. *United States v. Gammage*, No. ACM S32731 – The record of trial consists of 3 prosecution exhibits, 4 defense exhibits, and 5 appellate exhibits. The transcript

is 105 pages. Appellant is not confined. Undersigned counsel has begun review of this record of trial.

d. *United States v. Portillos*, No. ACM 40305 – The record of trial consists of 4 prosecution exhibits, 8 defense exhibits, 17 appellate exhibits, and 1 court exhibit. The transcript is 124 pages. Appellant is not confined. Undersigned counsel has begun review of this record of trial with her co-counsel, Major David L. Bosner.

e. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

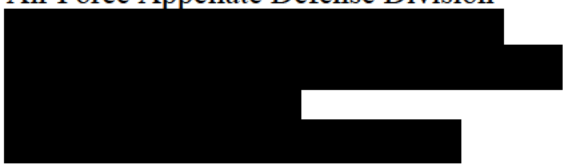
f. *United States v. Manzano-Tarin*, No. ACM S32734 – The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement. Undersigned counsel has reviewed this record of trial and is supervising the drafting of an assignment of error by Mr. Jacob Frankson, a law student extern assigned to the Air Force Appellate Defense Division.

This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division



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 April 2023.

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

4 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **JOEL T. BICKFORD,** Airman First Class (E-3) United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 1 No. ACM 40326 8 May 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **14 June 2023**. The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 263 days have elapsed. On the date requested, 300 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey, after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its Specification, distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be

reduced to the grade of E-1, confined for 18 months, and dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and one defense exhibit. The transcript is 744 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information:

(1) Undersigned counsel currently represents 14 clients and is presently assigned 8 cases pending brief before this Court. Two cases pending brief before this Court currently have priority over the present case:

a. *United States v. Manzano-Tarin*, No. ACM S32734 – The record consists of four prosecution exhibits, seven defense exhibits, and four appellate exhibits. The transcript is seventy-five (75) pages. Appellant is not in confinement. Undersigned counsel will file this Appellant's assignments of error no later than tomorrow, 9 May 2023.

b. *United States v. Goodwater*, No. ACM 40304 – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. Appellant is confined.

(2) In addition, before the United States Court of Appeals for the Armed Forces, undersigned counsel has one case pending supplement to the petition for grant of review, *United States v. Lopez*, USCA Dkt. No. 23-0164/AF, No. ACM 40161, which is due no later than 22

May 2023. This case involved seven attorney raised assignments of error and undersigned counsel is the sole counsel representing this appellant.

Since EOT 6, undersigned counsel completed the following: review of *United States v. Ross*, No. ACM 40289, however, a final brief was not submitted as the appellant ultimately decided to withdraw from appellate review; briefs for *United States v. Portillos*, No. ACM 40305, and *United States v. Hernandez*, No. ACM 40287; and an opposition motion in *United States v. Rocha*, USCA Dkt. No. 23-0134/AF, No. ACM 40134. Undersigned counsel also prepared for and went on temporary duty to Maxwell Air Force Base, AL, to teach at a Defense Orientation Course from 20-21 April 2023. Lastly, during the requested enlargement of time, undersigned counsel will be attending the United States Court of Appeals for the Armed Forces' 2023 Continuing Legal Education and Training Program on 10-11 May 2023 and on leave 18-19 May 2023.

This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[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 8 May 2023.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

9 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 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]
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 9 May 2023.

[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*,	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	Before Panel No. 1
Airman First Class (E-3) **JOEL T. BICKFORD** United States Air Force *Appellant*	)	No. ACM 40326 8 June 2023

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1(c), 23.1(b), and 23.3(f) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel for the Appellant and the Government to examine Prosecution Exhibits 12 and 13, and Appellate Exhibits XV, XIX (except not the images that begin with "3A4" and "A50")[1], XIX, XXII, XXIII, and XXXI. The Government consents to both parties viewing these sealed materials.

Facts

On 17 February 2022 and 11-14 April 2022, Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey, after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[2] ROT, Vol. 1, EOJ at 1;

[1] The images beginning with "3A4" and "A50" were excluded by the military judge. *See* Appellate Exhibit XVI at ¶ 32.

[2] All references to the Uniform Code of Military Justice and Rules for Courts-Martial are to the *Manual for Courts-Martial*, *United States* (2019 ed.) ("*MCM*").

R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its Specification, distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be reduced to the grade of E-1, confined for 18 months, and dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, *Convening Authority Decision on Action*, dated 9 May 2022.

During the proceedings, the military judge sealed Prosecution Exhibits 12 and 13, which both contain images and were admitted into evidence. R. at 566, 570-71. The military judge also sealed the following Appellate Exhibits, which were viewed by trial and defense counsel: XV, XIX (except not the images that begin with "3A4" and "A50")[3], XIX, XXII, XXIII, and XXXI. R. at 98, 208, 212, 259, 262-64, 705.

Law

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

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[4] perform

[3] The images beginning with "3A4" and "A50" were excluded by the military judge. *See* Appellate Exhibit XVI at ¶ 32.
[4] Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).

"reasonable diligence,"[5] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[6] These requirements are consistent with those imposed by the state bar to which undersigned counsel belongs.[7]

This Court may grant relief "on the basis of the entire record" of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's "broad mandate to review the record unconstrained by appellant's assignments of error" does not reduce "the importance of adequate representation" by counsel; "independent review is not the same as competent appellate representation." *United States v. May,* 47 M.J. 478, 481 (C.A.A.F. 1998).

Analysis

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

[5] *Id*. at Rule 1.3.
[6] AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).
[7] Counsel of record is licensed to practice law in California.

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

Respectfully submitted,

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40326**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joel T. BICKFORD	)	
Airman First Class	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 8 June 2023, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials. Specifically, counsel seeks to examine Prosecution Exhibits 12 and 13, and Appellate Exhibits XV, XIX (except not the images that begin with "3A4" and A50"), XIX, XXII, XXIII, and XXXI. The Government consents to the motion.

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

The court has considered Appellant's motion, the Government's response, case law, and this court's Rules of Practice and Procedure. The court finds Appellant's counsel has made a colorable showing that review of the sealed materials is necessary to fulfill counsel's duties of representation to Appellant.

Accordingly, it is by the court on this 9th day of June, 2023,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view Prosecution Exhibits 12 and 13, and Appellate Exhibits XV, XIX (except not the images that begin with "3A4" and "A50"), XIX, XXII, XXIII, and XXXI, 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, re

produce, disclose, or make available the content to any other individual without the court's prior written authorization.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. **JOEL T. BICKFORD,** Airman First Class (E-3) United States Air Force *Appellant*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)** Before Panel No. 1 No. ACM 40326 5 June 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **14 July 2023**. The record of trial was docketed with this Court on 18 August 2022. From the date of docketing to the present date, 291 days have elapsed. On the date requested, 330 days will have elapsed.

Appellant was tried by a general court-martial composed of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey, after the Appellant entered mixed pleas. Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ) at 1; Record (R.) at 208. On 11 April 2022, consistent with Appellant's pleas, the military judge found Appellant guilty of Charge I and its Specification, possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 257. On 13 April 2022, contrary to Appellant's pleas, the members found Appellant guilty of Charge II and its Specification, distributing child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. ROT, Vol. 1, EOJ at 1; R. at 645. On 14 April 2022, the members sentenced Appellant to be

reduced to the grade of E-1, confined for 18 months, and dishonorably discharged from the service. ROT, Vol. 1, Statement of Trial Results at 2; R. at 743. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action at 1. The record of trial consists of 42 appellate exhibits, 16 prosecution exhibits, and one defense exhibit. The transcript is 744 pages. Appellant is confined.

Undersigned counsel currently represents 18 clients and is presently assigned 10 cases pending brief before this Court. Appellant's case is undersigned counsel's first priority and undersigned counsel is reviewing Appellant's record of trial.

Since moving for a seventh enlargement of time, undersigned counsel has filed two briefs before this Court in *United States v. Gammage* (No. ACM S32731) and *United States v. Manzano-Tarin* (No. ACM S32734). She has also filed one answer brief before the United States Court of Appeals for the Armed Forces (C.A.A.F.) in *United States v. Rocha* (Dkt. No. 23-0134/AF, No. ACM 40134) and two supplements to petitions for grant of review in *United States v. Lopez* (USCA Dkt. No. 23-0164/AF, No. ACM 40161) and *United States v. Rodriguez* (USCA Dkt. No. 23-0166/AF, No. ACM 40218). She was also out of the office for four duty days (attending a two-day C.A.A.F. Continuing Legal Education Program and taking leave for two days).

Through no fault of Appellant, this enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was informed of his right to a timely appeal and this request for an enlargement of time, and Appellant agrees with this request for an enlargement of time.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 June 2023.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

6 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman First Class (E-3) JOEL T. BICKFORD, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40326 Panel No. 1

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its 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 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]
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 6 June 2023.

[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]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40326**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Joel T. BICKFORD	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 5 June 2023, 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 12th day of June, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Eighth) is **GRANTED**. Appellant shall file any assignments of error not later than 14 July 2023.

Appellant's counsel is advised that given the number of enlargements granted thus far, the court will continue to closely examine any further requests for an enlargement of time.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 1
	)	
Airman First Class (E-3)	)	No. ACM 40326
JOEL T. BICKFORD,	)	
United States Air Force	)	14 July 2023
Appellant	)	

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

Assignments of Error

I.

WHETHER TRIAL COUNSEL ELICITED INADMISSIBLE "VICTIM IMPACT" EVIDENCE DURING FINDINGS AND ARGUED THE SAME DURING FINDINGS AND SENTENCING ARGUMENTS, MATERIALLY PREJUDICING APPELLANT.

II.

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

III.

WHETHER THE FINDING OF GUILT FOR CHARGE II AND ITS SPECIFICATION IS LEGALLY AND FACTUALLY SUFFICIENT.

Statement of the Case

On 17 February 2022 and 11-14 April 2022, Appellant was tried by a general court-martial comprised of officer and enlisted members at Joint Base McGuire-Dix-Lakehurst, New Jersey. Record (R.) at 208, 435. He entered mixed pleas. R. at 234. Consistent with his plea, the military judge found Appellant guilty of Charge I and its Specification, possession of child pornography in

violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] R. at 257. Contrary to Appellant's plea, the members found Appellant guilty of Charge II and its Specification, soliciting the distribution of child pornography in violation of Article 82, UCMJ, 10 U.S.C. § 882. R. at 645. The members sentenced Appellant to reduction to the grade of E-1, confinement for 18 months, and a dishonorable discharge. R. at 743. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action – *United States v. A1C Joel T. Bickford*, dated 9 May 2022.[2]

Statement of Facts

Appellant's Guilty Plea

Appellant pleaded guilty without the benefit of a plea agreement. R. at 234. Appellant explained to the military judge during the providence inquiry, "I was looking for adult pornography at the time and saw some things I shouldn't have and I fell down a rabbit hole. … I clicked on some photos and copied and pasted them to the Note on the phone. The images were of various people, but some of them were definitely wrong and were of children in a sexual manner." R. at 241. He possessed the images from mid to late January until mid-February 2020, when he stopped "because [his] conscience got the better of [him] and – [he] was struggling with it the entire time and [he] finally decided to stop." R. at 242. Appellant knew his actions were wrong from both a moral and legal standpoint. R. at 249. Appellant agreed the 18 images contained in Prosecution Exhibit 12 are the child pornography images he possessed. R. at 252. He did not possess any

[1] All references to the Uniform Code of Military Justice, Rules for Courts-Martial, and Military Rules of Evidence are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

[2] Appellant notes the Record of Trial appears to be missing: (1) the memorandum which detailed Judge D.P. as military judge for Appellant's court-martial and (2) the receipt demonstrating delivery of the Record of Trial to Appellant. Appellant does not assert these omissions are substantial or cause the record to be incomplete.

videos. The military judge determined Appellant's plea was provident and accepted it, finding him guilty of Charge I and its Specification. R. at 256-57.

The Prosecution's Case-in-Chief for Charge II and its Specification

Special Agent (SA) M.V., Federal Bureau of Investigations, testified for the Government. SA M.V. was investigating a civilian, P.B., who admitted he used a photo sharing website called "image source" to "post an advertisement for child pornography." R. at 444. According to SA M.V., P.B.'s screen name was "payten1617." R. at 446. SA M.V. opined the use of "1617," "might be used to be suggestive of an interest in underage children." R. at 447. P.B. had two email addresses on his profile and he would receive emails on these email accounts from people who had seen his profile. R. at 444-445. P.B.'s post was also located in a section on the image source website titled "kids." R. at 453; Prosecution Exhibit (Pros. Ex.) 1. P.B. consented to a search of his email account and provided his account credentials. R. at 445, 448.

SA M.V. signed into P.B.'s email accounts and found an email from "farnsworth24@protonmail.com." R. at 445, 447. This email "asked if the offer to trade was still available and it made reference to a recently updated post." R. at 448. Using P.B.'s email account, SA M.V. responded to "farnsworth24@protonmail.com." R. at 448; Pros. Ex. 2. Feigning that he was P.B., SA M.V. stated "farnsworth24@protonmail.com" could contact him via Kik messenger account: "mspplaytime," which SA M.V. controlled. R. at 448; Pros. Ex. 2.

Sometime after sending this email response, SA M.V. received a message on Kik from "Farnsworth240." R. at 449; Pros. Ex. 3. SA M.V. exchanged messages with "Farnsworth240," in which "Farnsworth240" stated, in part, "if you have anything of a girl named April she is a little blonde that would be appreciated." Pros. Ex. 3. "Farnsworth240" also sent a picture to SA M.V. "so we know we're talking about the same person." Pros. Ex. 3. SA M.V. confirmed "April" was

a blonde girl, "in the neighborhood of seven or eight years old" at the time she was abused and that she was featured in a "commonly traded series." R. at 458. SA M.V. issued subpoenas to determine the subscriber information for the Internet protocol (IP) addresses that were used to access "Farnsworth240." R. at 450. The information stated the internet subscription belonged to Appellant.[3] R. at 451.

SA M.V. sent another email to "farnsworth24@protonmail.com" explaining that he "didn't have the files that he was looking for, but [he] knew somebody who would, and […] suggested he would be getting an email from this contact who would have the files that he wanted." R. at 459. SA M.V. did not receive a response. R. at 460.

At the time of trial, SA M.V. had worked in child exploitation full-time for three years, handling several dozen cases. R. at 467. SA M.V. agreed that very often his cases involve large quantities of child pornography, and it is not the norm for a case to involve only 18 photographs and no videos. R. at 467.

SA B.G., Office of Special Investigations, also attempted to email "farnsworth24@protonmail.com" but Appellant did not respond. R. at 518. Appellant had no awareness that his phone would be taken from him when SA B.G. searched his cellphone, and when SA B.G. did search the phone, the Kik messaging application had already been deleted. R. at 519-20. SA B.G. was able to access Appellant's Proton mail account. R. at 511-12, 593. SA B.G. located the emails between Appellant and SA M.V. and from Kik, but no emails transmitting child pornography. R. at 512, 593.

[3] The IP addresses, subscriber information, and potential connection to Appellant was also confirmed by Ms. L.M., Mr. T.D., Ms. S.J., and MSgt J.P., who respectively represent Media Lab (the parent company of Kik), Comcast, T-Mobile (who acquired Sprint), and the 305th Aerial Port Squadron. R. at 478-84, 488-493, 495-98, 500-02.

Mr. J.M., digital forensics examiner for the Defense Cyber Crime Center, Cyber Forensic Laboratory, detailed his examination of Appellant's cellphone. R. at 558-73. Mr. J.M. located on Appellant's phone: a Virtual Private Network (VPN) and two applications that can be used to encrypt the user's activity (Onion Browser and Proton mail). R. at 559-60; Pros. Ex. 11. While Mr. J.M. noted these findings, it is not unusual for someone to use a VPN and, for example, Mr. J.M. uses a VPN himself. R. at 574. Further, there was no indication that Appellant used the VPN installed on his phone. R. at 575. Similarly, Mr. J.M. had no evidence that the Onion Browser or Proton mail were used to access child pornography. R. at 575.

Mr. J.M. did locate the images contained in Prosecution 12 and 13 in an encrypted "Note" within the Notes application on Appellant's phone. R. at 562-71. In his experience, 18 child pornography images (the number of images underlying Charge I and its Specification) does not constitute a large collection. R. at 579. Moreover, from his review, it appeared these images were on Appellant's phone by 10 February 2020 and there was nothing to show that they were ever accessed after this date.

The Prosecution's Sentencing Case

The prosecution's sentencing case consisted of Appellant's Personal Data Sheet, Enlisted Performance Report, and Appellant's *Care* inquiry with the military judge. R. at 651, 658, 660-71; Pros. Ex. 14-16. The prosecution called no witnesses.

Victim Impact Statement

The prosecution attempted to admit a victim impact statement from "April" as a Court exhibit, however, "April" was not notified of Appellant's court-martial. R. at 674. The military judge sustained defense counsel's objection, finding the Government could not satisfy the

foundational requirement that "the individual was contacted about this particular court-martial and requests this particular statement be admitted at this court-martial." R. at 679.

Appellant's Sentencing Case

Appellant's sentencing case demonstrated his family's history of service, his own accomplishments in the Air Force, and the familial support that he maintains. Defense Exhibit A.[4] Appellant's brother, Airman First Class (A1C) M.B., testified "[he] will always be there by [Appellant's] side." R. at 686. A1C M.B. explained that they share a "close family" and "[Appellant] has 100 percent chance of potential to rehab." R. at 687. Appellant's father, Mr. J.B., explained he too was prior service, along with many of their family members, and that he does not condone his son's actions. R. at 688-89. Mr. J.B. admitted it was devastating for their family but he believes his son is remorseful. R. at 690.

Appellant was deeply ashamed for his actions. R. at 692. He apologized stating:

> I tried to convince myself that I wasn't hurting anybody by doing this and – – but that simply wasn't the case as I was only reinforcing a vicious cycle. I'm sorry for my participation in this cycle which brings real consequences to these victims. That wasn't my intent, but I was horribly wrong.

R. at 693. He apologized to his family, his friends, and the Air Force. R. at 693. Appellant also explained that "the entire time I knew it was wrong." R. at 695. He explained "[e]ventually my conscious [sic] got the better of me and I decided to stop and not pursue that type of content after that timeframe." R. at 695. He has "learned that [his] actions have consequences. What [he] thought was harmless does have real consequences for those victims and I – and I've known since I stopped that I can never do this again. I can't." R. at 696. He had been "depressed, alone, and

[4] Defense Exhibit A was admitted as Appellant's unsworn statement. R. at 654. The Defense did not request to relax the rules of evidence under Rule for Courts-Martial 1001(d)(3).

pornography was the only way [he] could feel good for at least a little bit." R. at 696. Since February of 2020, "[he has] never gone back to [child pornography]." R. at 697.

Argument

I.

TRIAL COUNSEL ELICITED INADMISSIBLE "VICTIM IMPACT" EVIDENCE DURING FINDINGS AND ARGUED THE SAME DURING FINDINGS AND SENTENCING ARGUMENTS, MATERIALLY PREJUDICING APPELLANT.

Additional Facts

A. Trial Counsel's Opening Statement

From the start of trial counsel's opening statement, trial counsel discussed the crimes committed by those other than Appellant, to include the abuser who created the child pornography at issue. In the first thirty seconds, he professed "April was abused and molested *for years*, and photos and videos of her molestation were made and posted to the Internet while it occurred. The man that abused and molested April would then distribute these photos across the Internet for those who wanted to look at child pornography." R. at 436 (emphasis added).[5] Further, he highlighted the crimes of others, asserting "[t]he recordings of her molestation are among some of them [sic] most highly demanded evidence of child pornography across the Internet." R. at 436.

B. Circuit Trial Counsel's Direct Examination of Special Agent J.M. During Findings

During findings, the Circuit Trial Counsel elicited testimony from SA J.M.. However, before doing so, the military judge gave Appellant's counsel a brief recess to interview SA J.M. for the first time because SA J.M. had declined Appellant's request to interview her before trial.

[5] Trial Counsel's accentuation of "*for years*" can be heard in the audio recording of Appellant's court-martial within the folder titled "12 Apr 22" and the file titled "Bickford_20220412-1211_01d84e666248d280.mp3," between the following time hacks: 2 minutes and 50 seconds and three minutes (2:50-3:00).

R. at 470. SA J.M. testified she investigated the abuse of "April." R. at 474. SA J.M. is a Special Agent with the Iowa Department of Public Safety, Division of Criminal Investigation, assigned to the Special Enforcement Operations Bureau. R. at 471. SA J.M. had just under twenty-seven years of experience at the time of trial. R. at 472. In 2013, SA J.M. had been requested by the FBI[6] "to assist on an unnamed child porn series. And, in working that investigation, [she] discovered who the victim was and who the suspect was." R. at 473. SA J.M. explained how "[t]he FBI received a cyber tip from overseas, from Japan," how she served search warrants, which involved three separate locations and three teams, and she searched the suspect's residence and "interviewed the suspect." R. at 473-74. SA J.M. then testified as follows:

> Q. Okay. So you mentioned a suspect. I'm not asking for the name of the presumed suspect, but was that individual arrested and then, I think as you mentioned, questioned by law enforcement?
>
> A. Yes. He was questioned and then arrested.
>
> Q. As part of the questioning of the suspect, did he make any sort of admissions to producing child pornography featuring the victim in the April blonde series?
>
> A. Yes, sir.
>
> Q. Was there any sort of connection between the suspect and the individual who is depicted in the series?
>
> A. He was her step uncle.
>
> Q. Did this individual – – the step uncle – – describe for you approximately how many videos he may have made – – or to law enforcement – – of her sexual exploitation?
>
> A. He said that he made approximately 20,000 photos and videos of the victim.
>
> Q. And how old was the victim during the time of the abuse?
>
> A. She was approximately between the ages of five and nine years old when the abuse happened.

[6] FBI is the acronym for the Federal Bureau of Investigations. *See* R. at 442-43.

Q. I'm not asking you to describe anything specific in any of the videos, but generally speaking, what sort of sexual content was produced as part of this known series of child pornography?

A. There was oral sexual abuse and anal sexual abuse.

Q. As a result of your investigation, were the images related to this series – – or was this particular individual reported to the National Center for Missing and Exploited Children?

A. The victim you mean?

Q. The victim I mean, yes.

A. Yes, she was.

Q. Based on that, is she now considered to be a known victim?[7]

A. Yes, sir.

[Circuit Trial Counsel then provided Pros. Ex. 3 to SA J.M. and asked SA J.M. to turn to page 4 of the exhibit.]

Q. Do you see the photograph of the little girl depicted on that page?

A. Yes, sir.

Q. Do you recognize that individual?

A. Yes, I do.

Q. Is that the individual you know to be the victim in the April blonde series?

A. Yes, it is.

[Circuit Trial Counsel retrieved Pros. Ex. 3 from SA J.M.]

Q. Now, ma'am, I just have a few follow-up questions for you based on your involvement in the case after the individual – – I believe there was an arrest and a prosecution and the individual was convicted; is that correct?

A. Yes, he was.

[7] Earlier, SA J.M. testified "a known series of child pornography" is "a victim that is known by the National Center for Missing and Exploited Children and law enforcement. R. at 473.

Q. Okay. So I want to ask a couple of questions about your involvement after that. So have you continued to have involvement with this particular series of child pornography after that individual was convicted?

A. Yes, I have. I receive numerous emails from various law enforcement entities in the civil and military world requesting information on this series because they have a case with a suspect who is trading and asking for pictures and videos involving this series.

Q. Now, was there also another law enforcement officer who was also sort of serving in this role as a point of contact for this particular series?

A. Yes.

Q. Who was that individual?

A. Special Agent [J.M.] with the FBI.

Q. Now, at some point in time, did you kind of take over the responsibility of being the POC from Special Agent [J.M.]?

A. Yes, I did.

Q. Can you give us a sense for about when that occurred?

A. He's been – – Special Agent [J.M.] retired approximately 2 to 3 years ago, and that's when I took over point of contact.

Q. Now, during this 2-to-3-year time period when you became the primary point of contact for this particular series, could you just give us an approximation of how frequently you get requests for this particular series?

A. I suppose it would be on average 2 to 3 emails a week, sometimes more.

CIV DC: Objection, Your Honor. I think we're getting a little – – relevance.

MJ: Sustained. Trial counsel, you can move on.

CTC: Your Honor, may I just be heard briefly?

MJ: No. I sustained the objection.

Q. Based on your continuing involvement in this case, is it your understanding this is a widely trafficked series of child pornography on the Internet?

A. Yes, sir.

R. at 474-76. Following Appellant's objection, the military judge did not instruct the panel to disregard SA J.M.'s answer nor did she more generally instruct the panel that their determinations must be focused on Appellant's actions and not those of the individual who repeatedly sexually abused "April" and created the child pornography or the multitude of other individuals who have accessed it.

C. Circuit Trial Counsel's Findings Argument

Continuing to introduce the theme of abuse and trauma caused by another, Circuit Trial Counsel argued the following to the members:

> Members, there's one last instruction I want to talk with you about and that's proof beyond a reasonable doubt. What proof beyond a reasonable doubt – – what the instruction actually says is that after looking at the law and the evidence are you firmly convinced? You heard from [SA J.M.]. She was the lady with the Iowa Department of Criminal Investigations. She told you about April. *She told you that her abuser was a family member who abused her for years.*
>
> *Now, members, anyone who has spent time with children knows that kids look to their adult for confirmation. They don't always know or understand why they are being asked to do something, and when that happens, they look at their adult and they ask, "Am I doing it right?"*
>
> *This child has no idea why she is being posed like that, but the person who posed her did.* So did he.
>
> Members, when you read his words in those Kik messages, and you look at his collection, that is proof beyond a reasonable doubt.
>
> He wanted her. He wanted to watch a grown man molest that child because it was sexually gratifying for him.

R. at 629-30 (emphasis added). Appellant objected to the final statement above, but the military judge overruled his objection, with no rationale provided. R. at 630.

D. Trial Counsel's Sentencing Argument

Furthering this theme, Circuit Trial Counsel argued in sentencing, "[t]hink about that, a prepubescent child who has not gone through puberty is being assaulted by a fully pubescent grown

man *and what that would've done*." R. at 717 (emphasis added). Finally, Circuit Trial Counsel counseled the members to keep the victims at the forefront, stating: "Let's be clear about one other thing: those children, they are the victims, not the accused. [...] So keep that in mind when you're determining what is an appropriate sentence; who is the victim here?" R. at 717. Defense Counsel did not object.

Standard of Review

Unpreserved evidentiary errors are forfeited in the absence of plain error. *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014). Under this standard, the appellant bears the "burden of establishing (1) error that is (2) clear or obvious and (3) results in material prejudice to his substantial rights." *Id*. (citing *United States v. Brooks*, 64 M.J. 325, 328 (C.A.A.F. 2007)).

This Court evaluates "prejudice from an erroneous evidentiary ruling by 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. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999). "[M]aterial prejudice to the substantial rights of the accused occurs when an error creates an unfair prejudicial impact on the court members' deliberations. In other words, the appellant must show a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *United States v. Lopez*, 76 M.J. 151, 154 (C.A.A.F. 2017) (internal quotation marks and citations omitted).

Law and Analysis

A. It was Plain and Obvious Error to Allow SA J.M. to Testify to Inadmissible "Victim Impact."

Evidence is only relevant if: "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Mil. R. Evid. 401. "Irrelevant evidence is not admissible." Mil. R. Evid. 402(b). "The military

judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence." Mil. R. Evid. 403.

SA J.M.'s testimony supplied no information about Appellant's intent or actions. The evidence Circuit Trial Counsel elicited from SA J.M. was improper victim impact evidence and irrelevant. As irrelevant evidence it was not admissible and should not have been considered by the members.

SA J.M. did not investigate Appellant's case. Rather, she was called to testify about a case she investigated over eight years earlier, involving a different wrongdoer, who committed more serious and repeated aggravated crimes, involving facts and circumstances entirely separate from the case before the members. R. at 473. SA J.M. testified she was familiar with the "April blonde series" because she was requested by the FBI to assist in the investigation and ultimately discovered who the victim and suspect were. R. at 473. The military judge's alarm to the irrelevance of this testimony should have been ringing when Circuit Trial Counsel asked SA J.M.: "[a]nd how did this information initially come to the division of major crimes?" R. at 473. Nevertheless, SA J.M. testified to receiving a cyber tip and her role serving a search warrant on the suspect's house, as part of a larger operation which included three teams searching three separate locations. R. at 473.

The alarms for the military judge only got louder as the questions and answers continued: "So you mentioned a suspect. I'm not asking for the name of the presumed suspect, but was that individual arrested and then, I think as you mentioned, questioned by law enforcement?" R. at 474. What was relevant to Appellant's court-martial was whether Appellant made a serious request to "mspplaytime" for "mspplaytime" to distribute child pornography, intending that

"mspplaytime" distribute child pornography. There was no relevant reason for Circuit Trial Counsel to ask about the investigation, arrest, and questioning of the individual who was suspected of sexually abusing his niece and creating child pornography, when there was never and has never been a connection between Appellant and the suspect that SA J.M. interviewed.

SA J.M. answered "Yes. He was questioned and then arrested." R. at 474. The Circuit Trial Counsel then asked about the admissions this suspect made, that he was the step-uncle to the female child, that he made approximately 20,000 photos and videos of the victim, that she was between the ages of five and nine years old when the abuse happened, the sort of sexual abuse contained in the child pornography, and that she was now a "known victim" identifiable by law enforcement and the National Center for Missing and Exploited Children. R. at 474-75. The only purpose this testimony served was to arouse a sense of horror and promote a desire to punish in the minds of the members, and move the members to base their decision and sentence on irrelevant and extraneous considerations.

If all of that was not enough, the military judge certainly should not have stayed silent when Circuit Trial Counsel asked, "I believe there was an arrest and a prosecution and the individual was convicted; is that correct?" R. at 476. Appellant struggles to find one reason why this was relevant for the members' consideration and challenges the Government to provide one.

Nevertheless, Circuit Trial Counsel persisted, highlighting how multiple agents and agencies had been involved. R. at 476-77

It was only when Circuit Trial Counsel asked "[n]ow, during this 2-to-3-year time period when you became the primary point of contact for this particular series, could you just give us an approximation of how frequently you get requests for this particular series?" and SA J.M. answered "I suppose it would be on average 2 to 3 emails a week, sometimes more[,]" that defense

counsel objected. Here, where the military judge clearly recognized the impropriety of this evidence, she sustained defense counsel's objection and refused to hear Circuit Trial Counsel on the objection. R. at 477. But the military judge did not instruct the members to disregard the answer they had heard, and she had a *sua sponte* duty to intervene sooner. This obligation on the part of the military judge is recognized in the context of victim unsworn statements and should have applied equally, if not more so, here where the information had no relevance to Appellant and was the same information that would not be allowed in a victim unsworn statement: "[T]he military judge has *an obligation* to ensure the contents of a victim's unsworn statement comports with the parameters of victim impact[8] or mitigation[9] as defined by [Rule for Courts-Martial] 1001A (now R.C.M. 1001(c))." *United States v. Tyler*, 81 M.J. 108, 112 (C.A.A.F 2021) (emphasis added). It only makes sense that if the military judge has an obligation to safeguard the contents of a victim unsworn statement, which is not admitted during findings and is not evidence, that this obligation has to apply to the same degree if not more so when the same information is being elicited as *evidence* in findings.

Moreover, if SA J.M.'s testimony had any probative value, it was substantially outweighed by the danger of wasting time, needlessly presenting cumulative evidence, undue delay, misleading the members, confusing the issues, and unfair prejudice to Appellant.

SA J.M.'s testimony wasted the court's time and was a needless presentation of cumulative evidence when SA M.V. had already testified before SA J.M. took the stand and provided "April" was a known victim of child pornography. R. at 458. It led to undue delay of the proceedings

[8] Victim impact "includes any financial, social, psychological, or medical impact on the crime victim directly relating to or arising from the offense of which the accused has been found guilty." R.C.M. 1001(c)(2)(B).

[9] Mitigation "includes any matter that may lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation of clemency." R.C.M. 1001(c)(2)(C).

when the court had to recess mid-trial to allow the Appellant to interview her, when she had previously declined Appellant's interview requests. R. at 470. Worse, SA J.M.'s testimony misled the members and confused the issues before the members, infusing knowledge of April's repeated sexual abuse that was not relevant to Appellent's intent or actions, and which Appellant himself did not know. For example, it was not relevant that it was her uncle, that she endured abuse for years, that her abuser brazenly created over 20,000 pictures and videos of her, or that those pictures were now one of the most widely trafficked series of child pornography on the internet. SA J.M.'s testimony unfairly prejudiced Appellant because it fixated on the facts and circumstances surrounding a much more serious and aggravating crime—the continuing rape by this other man of his niece—intending to arouse a sense of horror and promote a desire to punish Appellant based on extraneous considerations.

Furthermore, at least one question elicited inadmissible hearsay under R.C.M. 801 and 802[10], for which no exception under the rules applies: "Did this individual – – the step uncle – – describe for you approximately how many videos he may have made – – or to law enforcement – – of her sexual exploitation?" R. at 474. With no objection, SA J.M. answered "[h]e said that he made approximately 20,000 photos and videos of the victim." R. at 474.

Finally, this was not an overly eager junior trial counsel who elicited this information and arguably did not know better. This information was elicited by the prosecution's lead counsel, a Circuit Trial Counsel. To make matters worse, the military judge knew that Appellant had only a limited opportunity to interview SA J.M. before her testimony, due to her unwillingness to grant

[10] R.C.M. 801 defines hearsay as a statement that "(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." R.C.M. 802 provides hearsay is not admissible unless an exception under the rules or federal statute applicable in trial by courts-martial applies.

Appellant an interview before trial. *See* R. at 470. When Circuit Trial Counsel bulldozed over the lines of propriety by introducing evidence to the members that should never have been allowed in findings, the military judge needed to engage. All military judges have a "*sua sponte* duty to insure [sic] that an accused receives a fair trial." *United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018) (citations omitted); *see also United States v. Knickerbocker*, 2 M.J. 128, 129 (C.M.A. 1977) ("At the very least, the judge should have interrupted the trial counsel before he ran the full course of his impermissible argument.").

B. Appellant Was Materially Prejudiced in Findings by the Admission of this Inadmissible "Victim Impact" Evidence.

SA J.M. testified before the members, answering thirty-seven questions, none of which related to Appellant but the quality of this evidence was high. R. at 471-77. SA J.M. testified that she was a Special Agent with the Iowa Department of Public Safety, Division of Criminal Investigation, assigned to the Special Enforcement Operations Bureau. R. at 471. SA J.M. had just under 27 years of experience at the time of trial, equating to over 11 years more law enforcement experience than SA M.V. and SA B.G. combined. R. at 472; *see* R. at 443, 505. SA J.M. had worked in the Special Enforcement Operations Bureau (SEOB) for 10 years, before transitioning to work in the Major Crimes Unit where she worked for 15 years, and then had spent the last, approximately, 2 years back in the SEOB. R. at 472. SA J.M. explained that as an investigator in the major crimes section, she investigated major crimes such as murder, child pornography, child exploitation offenses, and officer involved shootings. R. at 472. SA J.M.'s testimony regarding the prolonged abuse of "April" by her own uncle made the matter more personal for the members. SA J.M. was sitting in the room with the members explaining how she discovered who "April" was and who had been abusing her. R. at 473. SA J.M. had sat in the same room with and interviewed the man who had cruelly and repeatedly raped his niece for years

and brazenly documented it. R. at 474-75. Rather than "April" being someone the members had never met but could sympathize for, much like a missing child on a milk box, SA J.M. brought "April" and her abuser into the room. The members were now only one degree of separation away from the harm and trauma that this uncle had subjected his niece to.

SA J.M.'s testimony was also material. From the very beginning of Trial Counsel's opening statement and into Circuit Trial Counsel's findings argument, the members were reminded to focus on the "victim impact," the pain and anguish that Appellant did not cause. In opening statements, Trial Counsel professed: "April was abused and molested *for years*, and photos and videos of her molestation were made and posted to the Internet while it occurred. The man that abused and molested April would then distribute these photos across the Internet for those who wanted to look at child pornography." R. at 436 (emphasis added). While in findings argument, Circuit Trial Counsel argued:

> She told you about April. *She told you that her abuser was a family member who abused her for years.*
>
> *Now, members, anyone who has spent time with children knows that kids look to their adult for confirmation. They don't always know or understand why they are being asked to do something, and when that happens, they look at their adult and they ask, "Am I doing it right?"*
>
> *This child has no idea why she is being posed like that, but the person who posed her did.* So did he.

R. at 629 (emphasis added).

The members are not presumed to know and correctly apply the law. Nor were they instructed to disregard this improper evidence. Here, the quality and materiality of the evidence created an unfair prejudicial impact on the members' findings deliberations.

C. Appellant Was Materially Prejudiced in Sentencing by the Admission of this Inadmissible "Victim Impact" Evidence.

Should this Court disagree that Appellant was materially prejudiced in findings, Appellant was nevertheless materially prejudice in sentencing as the members were tasked with determining a sentence for Appellant using this inadmissible evidence as part of that calculation, with the added reminder from Circuit Trial Counsel to think about who was the victim and about "a prepubescent child who has not gone through puberty [] being assaulted by a fully pubescent grown man *and what that would've done*." R. at 717 (emphasis added). The quality and materiality of SA J.M.'s testimony continued to be high and the "victim impact" would not have otherwise been admissible during sentencing.

a. The Victim Impact Evidence Was Not Admissible under Rule for Courts-Martial 1001(c).

R.C.M. 1001(c) effectuates the right of victims to be heard at presentencing proceedings, and provides, in noncapital cases, the victim has the right to be reasonably heard through a sworn or unsworn statement. R.C.M. 1001(c). The rights vindicated by R.C.M. 1001(c) "are personal to the victim in each individual case. Therefore, the introduction of statements under this rule is prohibited without, at minimum, either the presence or request of the victim," "the special victims' counsel," "or the victims' representative." *United States v. Barker*, 77 M.J. 378, 382 (C.A.A.F. 2018). Article 6b, UCMJ, requires that victims be contacted and have the choice to participate and be consulted in cases where they are victims. *Barker*, 77 M.J. at 383 (*citing* Article 6b(a)(2)-(5), UCMJ, 10 U.S.C. §806b).

Here, the military judge correctly found that because the victim of the "April blonde series" did not know of Appellant's court-martial, her victim impact statement which was not created for Appellant's court-martial was not admissible as a victim unsworn statement. As such, the victim

impact evidence articulated by SA J.M. was not otherwise presented to the members.

b. *The Victim Impact Evidence Could Not Have Been Admitted Under Rule for Courts-Martial 1001(b)(4).*

"Trial counsel may present evidence as to any aggravating circumstances directly relating to or arising from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4). The phrase "directly relating to or resulting from the offenses" imposes a "higher standard" than "mere relevance." *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995) (citing *United States v. Gordon*, 31 M.J. 30, 36 (C.M.A. 1990)). Evidence is admissible in sentencing which shows "the specific harm caused" by the accused. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). An accused is not responsible for a "never-ending chain of causes and effects" of the offenses for which he is found guilty. *Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995).

SA J.M.'s testimony would have also been inadmissible under R.C.M. 1001(b)(4) because the impact SA J.M. testified to did not directly relate to or result from Appellant's actions. Instead, the testimony related to the actions of her step-uncle and here, "April" had no awareness of Appellant's actions. R. at 471-77, 674.

D. The Strength of the Defense Case in Sentencing Demonstrates a Reasonable Possibility that, but for SA J.M.'s Testimony, Appellant's Sentence Would Have Been Different.

There is a "broad spectrum of lawful punishments that a panel might adjudge," as opposed to the "binary decision to be made with respect to the findings (guilty or not guilty)," making it harder to show that an error did not have a substantial influence on a sentence than on the findings. *United States v. Edwards*, 82 M.J. 239, 247 (C.A.A.F. 2022).

But for the prosecution's improper introduction of inadmissible victim impact evidence during findings and effort to focus the members on this improper evidence, there is a reasonable probability that Appellant's sentence would be different. For example, had the members not been

focused on the horrific details of April's abuse by her step-uncle, they might have instead considered that Appellant was not sophisticated in his use of any of the privacy applications that he maintained. He didn't use his VPN. He had already taken steps to delete Kik and not involve himself further. They might have considered that his email did not actually possess child pornography or other instances of trying to obtain it. Or that he possessed no videos and there was no evidence that he ever really did. They might have considered that his criminal behavior spanned at most one month, from mid to late January until mid-February 2020. R. at 242. If Appellant would have received even a day less of confinement, he suffered material prejudice, and here, this possibility is all too real.

Appellant was a young man who was remorseful for his actions. R. at 692-93. He didn't just stand before the members and read a prepared statement. He answered questions under oath to the military judge, which the members heard. R. at 661-70. And he chose to answer questions live in front of them. R. at 692-97. He understood the wrongfulness of his actions and had taken action to address his behavior. R. at 693-97. While his family did not condone his actions, they believed in his potential to rehabilitate and demonstrated that they would be there to help him rehabilitate. R. at 686-87, 688-90.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside the finding of guilty for Charge II and its Specification and set aside the sentence. If this Honorable Court declines to do so, Appellant alternatively respectfully requests this Honorable Court set aside the sentence and authorize a new sentencing hearing.

II.

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

Additional Facts

Appellant filed a motion requesting the military judge honor his right to a unanimous verdict. Appellate Exhibit (App. Ex.) V. The military judge denied the motion. App. Ex. XVIII. In providing Appellant forum advice, the military judge advised Appellant that he could be convicted if three-fourths of the members concurred as to guilt. R. at 7, 207. Later, the members received the same instruction. R. at 637. The members returned a finding of guilty to Charge II and its Specification. R. at 645.

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 United States Court of Appeals for the Armed Forces decided in *United States v. Anderson* that a military accused does not "have a right to a unanimous guilty verdict under the Sixth Amendment, the Fifth Amendment Due Process Clause, or the Fifth Amendment component of equal protection." __ M.J. __, No. 22-0193, 2023 CAAF LEXIS 439, at *1 (C.A.A.F. 29 June 2023). Despite this decision, the litigation of this issue has not concluded, and Appellant respectfully contends he was deprived of his constitutional right to a unanimous verdict.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss the finding of guilty for Charge II and its Specification and set aside the sentence.

III.

THE FINDING OF GUILT FOR CHARGE II AND ITS SPECIFICATION IS LEGALLY AND FACTUALLY INSUFFICIENT.

Additional Facts

Appellant moved the military judge under R.C.M. 907 to dismiss Charge II and its Specification for failure to state an offense. R. at 214. Defense counsel articulated to the military judge that "mspplaytime" is not a person that is subject to the UCMJ and "therefore the [Appellant] could not have solicited ["mspplaytime" to commit] an offense under the UCMJ." R. at 215. In response, the prosecution proffered that "mspplaytime" was the handle used by SA M.V., the undercover FBI agent. R. at 218. SA M.V. was a civilian with no Article 2, UCMJ, connections to the military, and thus SA M.V. was not subject to the UCMJ.

The military judge denied Appellant's motion. R. at 230-33.

Standard of Review

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

Law and Analysis

This Court's "assessment of legal and factual sufficiency is limited to the evidence produced at trial." *United States v. Heppermann*, 82 M.J. 794, 797 (A.F. Ct. Crim. App. 2022) (citations omitted). "The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (*citing United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018)). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the appellate court is] convinced of the [appellant]'s guilt beyond a reasonable doubt."

United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987). "In conducting this unique appellate role, [this Court] take[s] 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [its] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (alteration in original) (quoting *Washington*, 57 M.J. at 399), *aff'd*, 77 M.J. 289 (C.A.A.F. 2018).

The solicitation statute applicable to Charge II states "[a]ny person subject to this chapter who solicits or advises *another to commit an offense under this chapter* (other than an offense specified in subsection (b)) shall be punished as a court-martial directs." Article 82(a), UCMJ, 10 U.S.C. § 882(a) (emphasis added).

In *United States v. Heppermann*, this Court determined the offense of solicitation under Article 82(a), UCMJ, does not require that the person solicited be subject to the UCMJ. 82 M.J. at 800-01. This Court decided the plain language of Article 82(a) "requires that a person subject to the UCMJ solicit 'another to commit an offense' under the UCMJ—not solicit *another person subject to the UCMJ* to commit an offense under the UCMJ." *Heppermann*, 82 M.J. at 800 (emphasis in original). This Court supported its decision with the rationale of the case law addressing this issue in the context of solicitation before it was codified in Article 82, UCMJ, and the President's language addressing the maximum punishment authorized for a violation of Article 82(a), UCMJ.

Appellant asserts Article 82(a), UCMJ, is clear and unambiguous as written and respectfully contends its plain meaning requires that a person be solicited to violate the UCMJ. The legislature specifically chose to criminalize solicitations of offenses "under this chapter."

Here, the target offense "under this chapter" was the distribution of child pornography under Article 134, UCMJ. To violate Article 134, UCMJ, requires that the person be "subject to this chapter." SA M.V., as a civilian, is not subject to the UCMJ and therefore, could never violate Article 134, UCMJ. No rational factfinder could conclude he was subject to the UCMJ because there was simply no evidence offered to support this finding.

Heppermann was wrongly decided; this assignment of error is a request to overturn, modify, or abridge existing precedent.

WHEREFORE, Appellant respectfully requests this Honorable Court set aside and dismiss, with prejudice, Charge II and its Specification, and set aside Appellant's sentence and authorize a new sentencing hearing.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 July 2023.

[redacted]
SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

14 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	ANSWER TO ASSIGNMENTS
	)	OF ERROR
v.	)	
	)	ACM 40326
Airman First Class (E-3)	)	
JOEL T. BICKFORD, USAF	)	Panel No. 1
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER TRIAL COUNSEL ELICITED INADMISSIBLE "VICTIM IMPACT" EVIDENCE DURING FINDINGS AND ARGUED THE SAME DURING FINDINGS AND SENTENCING ARGUMENTS, MATERIALLY PREJUDICING APPELLANT.

II.

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

III.

WHETHER THE FINDING OF GUILT FOR CHARGE II AND ITS SPECIFICATION IS LEGALLY AND FACTUALLY SUFFICIENT.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant was charged with possession of child pornography and soliciting the distribution of child pornography. Appellant pled guilty to the possession of child pornography charge. (R. at 234.)

In his plea inquiry to this charge, Appellant stated that he was looking for adult pornography but "fell down a rabbit hole," "was curious," and clicked on and saved some digital images that were "definitely wrong and were of children in a sexual manner." (R. at 241.) He believed there were 15 to 20 such photos. This occurred in his dormitory room on Joint Base McGuire-Dix-Lakehurst. (R. at 242.) Appellant later clarified the images were "of minor girls engaged in various sexual acts." (R. at 243.) Appellant said he knew the images were of minors "just by looking at them," adding, "They had underdeveloped breasts and other underdeveloped sexual features." (R. at 243-44.) When asked if they had any pubic hair, Appellant replied, "Not to my knowledge." (R. at 244.) Appellant believed them to be "[u]nder 12." (Id.) Appellant believed the images involved the children performing oral sex on adult males. (R. at 245.)

Federal Bureau of Investigation (FBI) Special Agent (SA) MV was a criminal investigator and a certified online undercover employee who was specifically trained to work undercover operations involving child exploitation. (R. at 443.) SA MV came to know Appellant because Appellant's name "was the subscriber for an internet service related to an account that I was chatting with as an undercover." (R. at 444.) SA MV explained that the "account that was involved had sent an email to a subject of an investigation that I was already conducting." (Id.) SA MV continued:

> So in late 2019 and into early 2020, the FBI was investigating a civilian, Mr. [PB] and Mr. [PB], through search warrants and then later an interview of Mr. [PB], was found to be using Internet accounts, email and a profile on a photo sharing website to advertise

> and trade child pornography. And on about February 11th of 2022, I participated in a search warrant – – a federal search warrant of Mr. [PB's] residence in St. Paul, Minnesota, and during that search, I interviewed Mr. [PB]. During the interview, he made admissions that he had used a Russian-based photo sharing website that is commonly called "image source" to post an advertisement for child pornography. On his profile, he had two email addresses, and he would receive contacts from people who had seen his profile and would then either decide to trade with them or maybe not, but he received emails on these email accounts.
>
> During the course of that interview, Mr. [PB] agreed to sign over his email accounts to us. And so after we completed the search of his residence, I went back to the task force office, signed into the email accounts, locked Mr. [PB] out of them, and began reviewing the contents of the email accounts. In one of the email accounts, I found an email from a person who later – – through later investigation we developed the name [Appellant's name] as a subscriber for the Internet service.

(R. at 444-45.)

SA MV stated that the website that was being used had been used in the past to distribute child pornography. (R. at 445.) SA MV explained, "Prior to maybe several years ago, "image source" became known in the child pornography trading community as a hub for finding child exploitation imagery." (R. at 446.) SA MV then explained how a user of this website could access child pornography. (Id.)

The "image source" username that Appellant had responded to was "payten1617." (Id.) SA MV said the numbers 16 and 17 had significance because "that might be used to be suggestive of an interest in underage children." (R. at 447.) SA MV said the "payten1617" account had two albums, one called "girls from videos we like" and another called "neighbors." (R. at 452.) Prosecution Exhibit 1 contains screenshots of images taken from the "image source" profile for user "payten1617." SA MV said both of these albums were categorized in "image source" as "kids." (R. at 453.)

Reviewing Prosecution Exhibit 1, SA MV said a user could click the smaller images to make them larger. SA MV continued, "Some of the girls in here are recognizable as victims of commonly traded child pornography series. So these are, I guess, clean or non-explicit images that are taken from sexually explicit videos depicting these children being sexually abused." (R. at 453.)

SA MV stated the email address found that was ultimately associated with Appellant was farnsworth23@protonmail.com. SA MV said an email from this address was sent in late January 2020 to "payten1617." (R. at 448, 455; Pros. Ex. 2.) SA MV stated his understanding was that this person, who would later be identified as Appellant, was responding to the albums contained in Prosecution Exhibit 1. (R. at 455.)

The email from Appellant read as follows:

> Hello there. I saw your post from a few days ago and was wondering if your offer to trade was still open? If so, I could send a sample pic I have so we can trust each other and not waste each other's time. Also if you could let me know your preferred way of sending and receiving images and videos that would be helpful. Please get back to me at your earliest convenience. From Farnsworth.

(R. at 456; Pros. Ex. 2.)

Since he had obtained consent from Mr. PB to use the email address associated with the "payten1617" username, SA MV replied to the farnsworth23 email address and said "Love to trade. Kik is best because I'm not on here much. Mspplaytime. I find a lot of great stuff on groups too. Let me know which vid you are most into and we can start there." (Id.) "Mspplaytime" was the username for a Kik account that SA MV controlled as an undercover agent. (R. at 448.)

Soon thereafter, SA MV received a response on his "mspplaytime" Kik account from someone with the username "farnsworth240." (R. at 449.) The conversation that followed is at

Prosecution Exhibit 3. SA MV said he believed this was the same person as the "farnsworth23" email address because the person in the Kik conversation "refer[ed] to himself as the person that I had been emailing with, discussed trading," and because SA MV "had not had any other . . . significant conversations going on, on Kik, at that time, as an undercover." (Id.)

SA MV stated "farnsworth240" "specifically asked for videos of girls that enjoyed it and that were in English. He had stated that he had had a lot of Asian videos but that he was looking for videos that were in English." (Id.) "Farnsworth240" than sent SA MV a non-explicit image of a girl that SA MV "recognized as being an identified child victim of sexual assault in a commonly traded child pornography series." (R. at 449-50.) SA MV continued, "And I asked him if he wanted content that was oral or anal or both, and his response was 'why not both.' And then we kind of – – at that point, I am trying to buy some time, so I kind of left the conversation with 'I'll get back to you.'" (R. at 450.)

In SA MV's opinion, the person was asking for child pornography. SA MV explained, "There are a couple of points. Starting with the offer to trade; the comments about videos in English and the girl enjoying it; the request for anything of a girl named April, a little blonde," who SA MV stated consisted of a "commonly traded series of a girl who was identified by your abuser as 'April' and she is, in fact, blonde." (R. at 457; Pros. Ex. 3.) At the time of April's abuse, SA MV believed she was seven or eight years old. (R. at 458.) SA MV continued that the person wrote "the stuff I was is anything in English and, for me, any age range is fine." (Id.; Pros. Ex. 3.)

The specific comments and photos sent by "farnsworth240" regarding April include the following:

- also if you have anything of a girl named April she is a little blonde that would be appreciated

- Unfortunately no I got a lot of Asian but I haven't gotten anything of her
- It was just easier to find, that and Russian vids but the stuff I want is anything in English and for me any age range is fine
- I'll see if I have any pics of her so we know we're talking about the same person

(Pros. Ex. 3.) As noted above, the image "farnsworth240" then sent SA MV to make sure they were "talking about the same person" was an image from the April child pornography series. (R. at 449-50.)

SA MV then issued a subpoena to Kik for records that included internet protocol (IP) address logs. (Id.) Based on the logs, SA MV then sent subpoenas to internet service providers, Sprint and Comcast, to identify subscribers for those IP addresses. The subscriber for the IP address that was used to access the Kik account was Appellant with a Tuskegee Airmen street address on Joint Base McGuire-Dix-Lakehurst. (R. at 451.) The IP provider also had a phone number associated with the account. A subpoena for those records showed the number belonged to an account owned by someone with Appellant's last name. (Id.) SA MV said, "I believe it was a family member who was the actual subscriber for the phone number."[1] (Id.)

SA JM, who worked for the Iowa Department of Public Safety, Division of Criminal Investigation, assisted the FBI in late 2013 in discovering the victim of an unnamed child pornography series. (R. at 471-73.) Her efforts led to the arrest of the person responsible for producing the April blonde child pornography series. (R. at 474.) The perpetrator ended up being the child's step uncle. When the April series was made, the child was between the ages of five and nine years old and that approximately 20,000 photos and victims were made of the

[1] Later testimony would reveal the account was under the name DB with an address in Manteno, Illinois. (R. at 498.) A review of Appellant's personnel records showed Appellant's mother was named DB and lived at the same address in Manteno, Illinois. (R. at 501.)

victim, including images of oral and anal sexual abuse. (R. at 474-75.) As a result of the investigation, this child was reported to the National Center for Missing and Exploited Children and is now considered a "known victim." (R. at 475.)

SA JM reviewed the photograph on page 4 of Prosecution Exhibit 3, which is the photo of the young blonde sent by "farnsworth240" sent SA MV over Kik. SA JM said the individual pictured was the victim from the April child pornography series. (R. at 475-76.)

SA JM stated that she "receive[s] numerous emails from various law enforcement entities in the civil and military world requesting information on this series because they have a case with a suspect who is trading and asking for pictures and videos involving this series." (R. at 476.) When asked if the April series was a widely trafficked series of child pornography on the internet, SA JM replied, "Yes, sir." (R. at 477.)

The members of Appellant's court-martial were also informed that Appellant was found guilty of Charge I and its specification and were provided Prosecution Exhibit 12, which consisted of 18 images that both the Government and Defense stipulated met the legal definition of child pornography. (R. at 612; Pros. Ex. 12.) The military judge instructed the panel that this evidence "may be considered for the limited purpose of their tendency, if any, to show the accused specifically intended Kik username 'mspplaytime' commit every element of the offense of distribution of child pornography." (R. at 619.)

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

ARGUMENT

I.

TRIAL COUNSEL DID NOT ELICIT INADMISSIBLE "VICTIM IMPACT" EVIDENCE IN FINDINGS AND DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING EITHER FINDINGS OR SENTENCING ARGUMENTS.

Standard of Review

When an appellant forfeited a right by failing to raise it at trial, courts review it for plain error. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009).

Whether portions of an argument are improper is a question of law that is reviewed de novo. United States v. Pope, 69 M.J. 328, 334 (C.A.A.F. 2011).

However, while the determination of whether an argument was improper is reviewed de novo, failure to object to an argument at the time of trial results in courts reviewing the statements for plain error. United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007). This rule exists "to prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important to encourage all trial participants to seek a fair and accurate trial the first time around." United States v. Reist, 50 M.J. 108, 110 (C.A.A.F. 1999) (internal quotations omitted).

In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." Id. CAAF has identified a three-part test for determining prejudice when trial counsel had engaged in improper argument: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction."

United States v. Hornback, 73 M.J. 155, 160 (C.A.A.F. 2014) (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005)). Appellant alone bears the burden of persuading the Court that the three prongs of the plain error test are satisfied. United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006) (citation omitted). The comments must be so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007) (*quoting* Fletcher, 62 M.J. at 184).

Law

Trial counsel is "charged with being as zealous an advocate for the government as defense counsel is for the accused." United States v. McPhaul, 22 M.J. 808, 814 (A.C.M.R. 1986), *pet. denied,* 23 M.J. 266 (C.M.A. 1986). It is well established that arguments may be based on the evidence as well as reasonable inferences drawn therefrom. United States v. Nelson, 1 M.J. 235, 239 (C.M.A. 1975). Trial counsel "may strike hard blows but they must be fair." United States v. Doctor, 21 C.M.R. 252, 256 (C.M.A. 1956).

"[A]rgument by a trial counsel must be viewed within the context of the entire court-martial. The focus of [the] inquiry should not be on words in isolation but on the argument as 'viewed in context.'" United States v. Baer, 53 M.J. 235, 238 (C.A.A.F. 2000) (*quoting* United States v. Young, 470 U.S. 1, 16 (1985)). "[I]t is improper to 'surgically carve' out a portion of the argument with no regard to its context." Baer, 53 M.J. at 238. As quoted by our superior Court in Baer, "[i]f every remark made by counsel outside of the testimony were ground for reversal, comparatively few verdicts would stand, since in the ardor of advocacy, and in the excitement of trial, even the most experienced counsel are occasionally carried away by this temptation." Baer, 53 M.J. at 238 (*quoting* Dunlop v. United States, 165 U.S. 486, 498 (1897)).

Analysis

- ***SA JM's Testimony***

Appellant first claims error on this issue by stating SA JM's testimony regarding the background of the April series of child pornography constituted "inadmissible victim impact" testimony that was "irrelevant . . . and should not have been considered by the members." (App. Br. at 13.) Appellant believes there was "no relevant reason" for SA JM's testimony and that it "wasted the court's time" and "led to undue delay of the proceedings." (App. Br. at 14-16.)

Appellant is mistaken. First, a review of SA JM's testimony on the April series of child pornography shows that it was not "victim impact" testimony at all, but instead was a factual background on the child pornography series that Appellant was seeking from "mspplaytime." This testimony, from an investigator who was directly involved in that case, provided first-hand, direct evidence to the members that the person in the pictures at issue was an actual child, provided the members the age of the child, that the child was a "known victim," and that this series was known to be child pornography. Contrary to Appellant's claim, this testimony was relevant and necessary as it proved elements of the offense to which Appellant was charged. Specifically, the evidence proved known child pornography images and a known child pornography series were being discussed between Appellant and "mspplaytime" as Appellant solicited the distribution of this images. The testimony also proved that the images themselves were child pornography.

Next, as Appellant is forced to admit by citing plain error as the proper standard of review for this issue, neither Appellant nor his trial defense counsel objected to the overwhelming majority of SA JM's testimony. While Appellant states that SA JM "answer[ed]

thirty-seven questions," Appellant's counsel objected to just one, which was sustained.[2] For the other 36 questions, Appellant's counsel remained silent, likely because Appellant's counsel recognized this evidence was relevant to the issue of whether or not the images being discussed were, in fact, child pornography.

Here, there was no plain or obvious error. Yet, even if there was, Appellant has failed to show he was materially prejudiced. Instead, Appellant relies on pure conjecture that SA JM's testimony about the April series somehow "created an unfair prejudicial impact on the members' findings deliberations." (App. Br. at 18.) Appellant is again incorrect. First, contrary to Appellant's assertions, SA JM's testimony did not "wast[e] the court's time" and cause "undue delay." A review of her testimony shows it spanned just seven pages of transcript and included no cross-examination from Appellant's counsel. (R. at 471-77.) Moreover, while Appellant implies a long and drawn out recess occurred when claiming SA JM's testimony "led to an undue delay of the proceedings when the court had to recess mid-trial to allow the Appellant to interview her," the record shows Appellant's counsel requested just a ten minute break to do so. (App. Br. 16; *but see* R. at 470.) In short, SA JM's testimony, which related directly to elements necessary to prove the Government's case, neither wasted the court's time or caused undue delay.

Moreover, the evidence against Appellant was overwhelming. Testimony and evidence showed Appellant, using his own email, solicited "mspplaytime" to distribute images of a known child pornography series while referring to "April" as a "little blonde," saying "any age range is

[2] To this point, Appellant claims further error by the military judge because she "did not instruct the members to disregard the answer they heard." (App. Br. at 15.) However, Appellant fails to note that neither he nor his counsel requested a curative instruction, even when directly asked if there were "any other instructions the parties request." (R. at 584.)

fine," and sending a non-explicit image of the girl to ensure "we're talking about the same person." (Pros. Ex. 3.)

In fact, the evidence was so overwhelming that the defense did not even challenge it. Appellant's counsel, in his opening statement, admitted Appellant had the communications with "mspplaytime," when he stated, "Then he made communication -- and we freely admit this. He communicated with someone who had their email address posted on that website, and those are communications the government has shown you and they will show you more of those. And, yes, he had those conversations." (R. at 440.) Then, in closing argument, Appellant's counsel stated, "we wholly admit that was [Appellant] using that email address," affirmatively stated that the defense was "not disputing any of the actual facts in this case," and that Appellant downloaded Kik. (R. at 631-32.)

To this point, whether at trial or now before this Court, Appellant has never disputed that he asked "mspplaytime" to distribute child pornography, that he specifically intended "mspplaytime" to distribute child pornography, or that he knew when he asked for more pictures of "April" that he knew those images constituted child pornography. Notably, while Appellant raises a legal and factual sufficiency issue below related to his conviction, that issue centers solely on a general legal question on whether the person being solicited must be subject to the UCMJ.

In sum, Appellant has failed to show error, let alone plain error, with SA JM's testimony. Appellant's counsel recognized the testimony was relevant to the specification at hand, which is likely why there was no objection to 36 of the 37 questions asked to SA JM. Further, even if there was plain error, Appellant has failed to show how SA JM's testimony materially prejudiced him, especially in light of the overwhelmingly evidence produced at trial of his guilt as well as

Appellant's counsel's own admissions in his opening statement and closing statement that the facts of the case were not in dispute.

- ***Trial Counsel's Opening Statement and Closing Argument***

Next, Appellant takes aim at the trial counsel's opening statement and closing argument, claiming that it "discussed the crimes committed by those other than Appellant" and impermissible "victim impact" evidence. (App. Br. at 7, 11, 18.) However, as Appellant notes, neither he nor his counsel objected to any portion of the Trial Counsel's opening statement and only objected to one line of the Trial Counsel's closing argument. However, since that line, which involved the trial counsel stating, "Appellant wanted to watch a grown man molest that child because it was sexually gratifying to him," centered on Appellant's own wants and actions, it is not pertinent to Appellant's present contention with the trial counsel's supposed discussion of crimes committed by others. Thus, as with SA JM's testimony above, Appellant's claims should be reviewed for plain error.

Here again, there is no error, let alone plain error. When placed in context, the trial counsel's statement and argument are meant to show Appellant's intent in seeking out pictures specifically of the child portrayed in the April child pornography series. In his opening statement, the trial counsel opens by stating the April series, or "April blonde," is "what she is referred to by those seeking to receive and watch videos of her being sexually abused" and then details how Appellant was "one of those individuals who wanted and solicited images and videos of her molestation" and specifically sought after "April."

Here, Appellant seeks to "surgically carve" two sentences from the trial counsel's opening statement that spans over four pages. (App. Br. at 18; *but see* R. at 436-39.) However, these two sentences, when placed in context, show the trial counsel is simply providing a short

background on how the April photos originated at the very beginning of his opening statement. The opening statement then quickly turns to the primary focus - Appellant's own acts in "hunt[ing] for child pornography," and him "want[ing] April specifically" – before concluding as follows:

> Members, [Appellant] wanted to see images of April and other children being molested as you will see from the email that we will present to you, the Kik messages, the witness testimony, and he solicited the – – these pictures, he solicited these videos using the Kik messenger application, attempting to get [SA MV] to send him these videos. He wanted those images of April so that he could add them to his collection of other child pornography, and he wanted more videos of her. That is why at the end of this case, the only verdict is for you to find [Appellant] guilty of the Charge and its Specification.

(R. at 436-38.)

Appellant's argument here is a classic example of "surgically carving" out a portion of an argument without regard for context, a tactic frowned upon by our superior Court, and should be dismissed by this Court. At no point did the trial counsel argue, or even insinuate, that the panel members should find Appellant guilty due to the acts of others. Thus, there was no error, plain or otherwise.

The trial counsel's closing argument was no different. There, when placed in context, any mention of the origins of the April series of child pornography was not an argument that Appellant should be punished for crimes committed by others, but, instead, was done to highlight Appellant's own intent in specifically seeking out photos of the April series. Here again, Appellant emphasizes but a portion of the trial counsel's argument without providing the greater context. (App. Br. at 11, 18, *citing* R. at 629-30.) Below is the full page 629 of the transcript:

> *The sixth reason you know he specifically intended to get child pornography was because of "April Blonde" herself. He had a still image of her, but he didn't want – – but he wanted more.*

> *Members, the seventh and final reason why you know when he sent those messages he specifically intended to get child pornography is because, unfortunately, he already had it.*
>
> *Members, when you go back and have a chance to read those instructions, please read the instructions that has to do with use of evidence generally. It talks about Prosecution Exhibit 12. It talks about how having 18 images of child pornography tells you he wanted more. He wants it in English and where the girl is enjoying.*
>
> Members, there's one last instruction I want to talk with you about and that's proof beyond a reasonable doubt. What proof beyond a reasonable doubt – – what the instruction actually says is that after looking at the law and the evidence are you firmly convinced? You heard from [SA JM]. She was the lady with the Iowa Department of Criminal Investigations. She told you about April. She told you that her abuser was a family member who abused her for years.
>
> Now, members, anyone who has spent time with children knows that kids look to their adult for confirmation. They don't always know or understand why they are being asked to do something, and when that happens, they look at their adult and they ask, "Am I doing it right?"
>
> This child has no idea why she is being posed like that, but the person who posed her did. So did he.

(R. at 629.) (emphasis on portions not included in Appellant's brief.)

Here, when reviewing the trial counsel's argument in the moments leading up to the discussion of SA JM's testimony, the context is clear that the trial counsel's focus was on Appellant's specific intent to find images of April and, even more specifically, for images where "April" was posed in a way that she is "enjoying it." (R. at 629, referencing Prosecution Exhibit 1 where Appellant states in the Kik chat, "I'm looking more specifically for any videos in English and the girl is enjoying it.") Here again, when discounting the "surgically carved" portions Appellant cites in his brief and looking at the whole context, the trial counsel's focus here was squarely on Appellant's own intent and was not an attempt to get the members to find

Appellant guilty based on the actions of another. Again, at no point did the trial counsel argue, or even insinuate, that the panel members should find Appellant guilty due to the acts of others. Thus, there was no error, plain or otherwise.

Still, even if there was plain error, Appellant has failed to show material prejudice. Here again, Appellant, who owns the burden of showing material prejudice, simply claims "the quality and materiality of the evidence created an unfair prejudicial impact on the members' findings deliberations." (App. Br. at 18.) Appellant's unsupported claim does not meet his burden, especially in light of the overwhelming evidence supporting his conviction that was previously discussed. Considering this overwhelming evidence, any of the trial counsel's comments, to the extent they were damaging at all, were not so damaging that this Court "cannot be confident that the members convicted the appellant on the basis of the evidence alone." *See* Schroder, 65 M.J. at 58.

- ***Sentencing***

Appellant next argues he was "materially prejudiced in sentencing by the admission of this inadmissible 'victim impact' evidence and by the trial counsel's sentencing argument." (App. Br. at 19-21.) Appellant is again mistaken.

To start, SA JM's testimony was never mentioned in either the Government's sentencing case or the trial counsel's sentencing argument. Still, Appellant blindly asserts that the supposed "inadmissible evidence" was "part of [the member's] calculation" in determining a sentence. (App. Br. at 19.) However, Appellant provided no evidence to show SA JM's testimony had any impact on the member's sentence, especially considering SA JM's testimony was not mentioned by the Government in its sentencing argument.

Instead, Appellant attempts to draw a parallel between SA JM's testimony and the trial counsel's sentencing argument by stating that the trial counsel told the members to "think about who was the victim and about 'a prepubescence child who has not gone through puberty [] being assaulted by a fully pubescent grown man and what that would've done." (App. Br. at 19, *citing* R. at 717.) However, a review of this portion of the trial counsel's argument shows the trial counsel was not referencing SA JM's testimony at all. Instead, the trial counsel was referencing the child pornography images themselves when he argued:

> Now, the list goes on with these images. These are children whose bodies have not even remotely started to develop, but in those videos, they are assaulted in every orifice. And they are assaulted by men with grown penises. Think about that, a prepubescent child who has not gone through puberty is being assaulted by a fully pubescent grown man and what that would've done. Every image he collected, every video he wanted is another child who is being exploited.

(R. at 717.) Here, there was no objection by Appellant's trial defense counsel and no error, plain or otherwise, in the trial counsel referencing the very child pornography images that Appellant had plead guilty to possessing. Further, contrary to Appellant's assertions now, the trial counsel never referenced SA JM's testimony in making this argument.

Here, the trial counsel's argument fits squarely within what constitutes proper argument for these types of offenses. Our Superior Court has recognized that those who possess and distribute child pornography directly contribute to the child's continuing victimization. *See* United State v. Barker, 77 M.J. 377, 381 (C.A.A.F. 2018) (*citing* United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007) (recognizing that even those "who 'merely' or 'passively' receive or possess child pornography directly contribute to [the child's] continuing victimization"). The Supreme Court has even acknowledged that child pornography is a continuing crime: it is "a permanent record of the depicted child's abuse, and the harm to the child is exacerbated by [its]

circulation." Paroline v. United States, 572 U.S. 434 (2014) ("The unlawful conduct of everyone who reproduces, distributes, or possesses the images of the victim's abuse . . . plays a part in sustaining and aggravating this tragedy."). Accordingly, the trial counsel was not precluded from arguing Appellant's conduct directly contributed to the child's victimization.

Still, Appellant claims material prejudice by arguing that "[b]ut for the prosecution's improper introduction of inadmissible victim impact evidence during findings and effort to focus the members on this improper evidence, there is a reasonable probability that Appellant's sentence would be different." (App. Br. at 20.) In making such a claim, Appellant then simply recounts his sentencing case at trial. (Id. at 21.)

What Appellant fails to mention is the sentence he received, which included being sentenced to just 18 months confinement, amounts to only 7.5% of the maximum 20-year confinement he faced. (R. at 740, 743.) This 18-month total was also only 25% of the six-year confinement sentence recommended by the trial counsel in his sentencing argument. (R. at 721.) The member's confinement sentence shows they were not unreasonable swayed by any supposed inadmissible evidence or improper argument.

Furthermore, the lack of an objection by defense counsel is some measure of the minimal impact of trial counsel's argument. United States v. Gilley, 56 M.J. 113, 123 (C.A.A.F. 2001) (*citing* United States v. Carpenter, 51 M.J. 393, 397 (C.A.A.F. 1999)). This demonstrates to this Court that, in the context of the trial as a whole, trial defense counsel did not see any prejudicial impact in trial counsel's arguments.

As to the argument itself, Appellant complains about only one line in a sentencing argument that spanned six pages of transcript. (R. at 716-721.) Thus, any supposed misconduct in the trial counsel's argument was confined to a very small portion. Further, a review of the

trial counsel's entire argument shows that it focused on the young ages of the children, the bondage and sadomasochistic nature of a particular image, Appellant's egregious and deliberate nature in committing his crimes, and comments Appellant made to "mspplaytime."

Most importantly, the weight of the evidence strongly supports Appellant's sentence. When improper argument happens during sentencing, the question is whether the court can be "confident that [the appellant] was sentenced on the basis of the evidence alone." United States v. Halpin, 71 M.J. 477, 480 (C.A.A.F. 2013). Here, this Court can be confident that Appellant was sentenced on the basis of the evidence alone. Appellant possessed numerous computer files of child pornography, some of which contained images of heinous sexual acts being committed on young children. Appellant then solicited another to gain even more child pornography, going so far as to request particular images of a particular child and stating that "any age range is fine." Considering this, along with the fact that the members sentenced Appellant to only 25% of the six-year sentence recommendation by the trial counsel in his argument, this Court can be confident that Appellant was sentenced on the basis of the evidence alone and was not substantially influenced by any supposed inadmissible evidence or improper argument. Accordingly, Appellant was not materially prejudiced and his claim for relief should be denied.

II.

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

In United States v. Anderson, No. ACM 39969, 2022 CCA LEXIS 181, at *55-56 (A.F. Ct. Crim. App. Mar. 25, 2022), this Court rejected the same claims Appellant raises now. Then, as Appellant readily admits, our Superior Court just last month affirmed this Court's decision and definitively held that military members do not have a right to a unanimous verdict at court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection. *See* United States v. Anderson, 83 M.J. ___, 2023 CAAF LEXIS 439 (C.A.A.F. 2023). Accordingly, Appellant's claim must fail.

III.

APPELLANT'S CONVICTION FOR CHARGE II AND ITS SPECIFICATION ARE LEGALLY AND FACTUALLY SUFFICIENT.

Standard of Review

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

Law

The test for legal sufficiency of the evidence is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Humpherys, 57 M.J. 83, 94 (C.A.A.F. 2002). Applying this test, this Court draws every reasonable inference from the evidence in the record of trial in favor of the prosecution. United States v. McGinty, 38 M.J. 131, 132 (C.M.A. 1993).

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," this Court is

"convinced of the accused's guilt beyond a reasonable doubt." United States v. Reed, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting United States v. Turner, 25 M.J. 324, 325 (C.M.A. 1987)). This Court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. Article 66(d)(1), UCMJ; United States v. Beatty, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted).

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

At trial, the military judge instructed the members as to the elements of the offense, as follows:

> (1) That at or near Joint Base McGuire-Dix-Lakehurst, New Jersey, between on or 15 about 28 January 2020 and on or about 18 February 2020, the accused solicited Kik username "mspplaytime" to distribute child pornography, to wit: a video of a minor engaging in sexually explicit conduct; and
>
> (2) That the accused specifically intended that Kik username "mspplaytime" commit the offense of distribution of child pornography, to wit: a video of a minor engaging in sexually explicit conduct.

(R. at 613.)

Analysis

Here, Appellant does not dispute that he was the person talking to "mspplaytime" on Kik or dispute any of the facts of the case. As his trial defense counsel stated in closing arguments, "we wholly admit that was [Appellant] using that email address. We're not disputing any of the actual facts in this case." (R. at 631.)

Instead, Appellant's only contention within this issue is the same legal issue he brought before the military judge at trial and was denied. (R. at 230-33.) There, as he does now, Appellant claimed that "mspplaytime" was not a person subject to the UCMJ and, thus, Appellant could not have solicited "mspplaytime" to commit an offense under the UCMJ. (App. Br. at 23-24, *citing* R. at 215.) Appellant claims, "Article 82(a), UCMJ, is clear and unambiguous as written and respectfully contends its plain meaning requires that a person be solicited to violate the UCMJ." (App. Br. at 24.)

However, as Appellant is forced to admit, this Court has repeatedly held that the question at issue in solicitation offenses is whether the solicited offense would be punishable under the UCMJ if committed by someone subject to the UCMJ, not whether the solicited person him-or herself is in fact subject to the UCMJ. *See*, e.g., United States v. Heppermann, 82 M.J. 794, 799 (A.F. Ct. Crim. App. 2022), rev. denied, No. 23-0017, 83 M.J. 103, 2022 CAAF LEXIS 839 (C.A.A.F. 22 Nov. 2022); United States v. Massey, 2023 CCA LEXIS 46, *18 (A.F. Ct. Crim. App. 30 January 2023) (unpub. op.).

Here, Appellant makes no new argument that was not already put forth to this Court in cases such as Heppermann or Massey. Instead, Appellant simply asserts that "Hepperman was wrongly decided" and that "this assignment of error is a request to overturn, modify, or abridge existing precedent." (App. Br. at 25.) With no new arguments or reasoning to substantiate his claim that this Court has continuously erred on this issue, this Court should decline Appellant's unsupported request to overturn its prior holdings and, instead, dismiss Appellant's claim.

CONCLUSION

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

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate counsel, and the Air Force Appellate Defense Division on 14 August 2023 via electronic filing.

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