IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

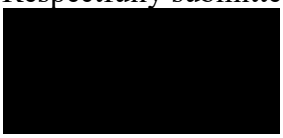
UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 11 January 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for her first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **19 March 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 52 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,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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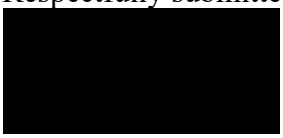
Office: (240) 612-4770
Email: heather.caine.1@us.af.mil

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 11 January 2024.

Respectfully submitted,



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16 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

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

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 8 March 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 April 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 109 days have elapsed. On the date requested, 150 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
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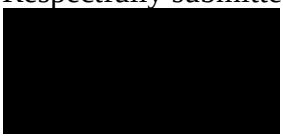
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 8 March 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
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11 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 March 2024.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 9 April 2024

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

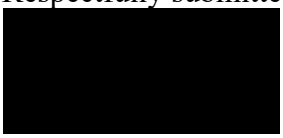
Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **18 May 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 141 days have elapsed. On the date requested, 180 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

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

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
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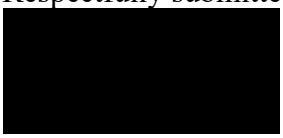
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 April 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
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9 April 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 April 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40540**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adrienne L. CLARK	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 26 April 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel. Appellant's counsel aver they have consulted with counsel for the Government, who consents to this motion.

Appellant requests counsel for both parties be permitted to examine the following sealed materials in the record of trial: Prosecution Exhibit 4, and Appellate Exhibits XIII, LXII, LXIV, and LXVI, which were reviewed by trial and defense counsel at Appellant's court-martial. In addition, Appellant requests permission for her military appellate counsel to transmit the sealed material to her civilian appellate counsel, Ms. Bethany Payton-O'Brien, who has offices in California and Illinois. Prosecution Exhibit 4 and Appellate Exhibit XIII are discs, and Appellant's counsel indicates both these exhibits contain contraband. The court is not inclined to transmit contraband to civilian appellate counsel.

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).

The court finds Appellant has made a colorable showing that review of the sealed materials is necessary to fulfill appellate counsel's responsibilities.

Accordingly, it is by the court on this 30th day of April, 2024,

ORDERED:

Appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel is **GRANTED IN PART**.

Appellate defense counsel and appellate government counsel may examine **Prosecution Exhibit 4, and Appellate Exhibits XIII, LXII, LXIV, and LXVI.**

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

Appellant's military appellate counsel is permitted to scan a hard copy of the printed sealed materials—**Appellate Exhibits LXII, LXIV, and LXVI**—and to transmit encrypted files containing the printed sealed materials to Appellant's civilian appellate counsel, Ms. Bethany Payton-O'Brien, via DoD SAFE. Counsel may not transmit **Prosecution Exhibit 4 or Appellate Exhibits XIII**.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted to Ms. Peyton-O'Brien. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE SEALED**
	)	**MATERIAL AND TRANSMIT**
	)	**TO CIVILIAN COUNSEL**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
ADRIENNE L. CLARK	)	No. ACM 40540
United States Air Force	)	
Appellant	)	26 April 2024

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties, to include civilian appellate defense counsel, to examine the following sealed materials:

1) Prosecution Exhibit 4 – CD with contraband images.
2) Appellate Exhibit XIII – Contraband disc.
3) Appellate Exhibit LXII – Memorandum from 7 AF/CC, Grant of Testimonial Immunity and Order to Testify.
4) Appellate Exhibit LXIV – Email from Joseph Lingenfelter RE: MSgt Clark – Immunized Interview Follow up.
5) Appellate Exhibit LXVI - Declaration of Joseph Lingenfelter.

The Appellant also requests permission for undersigned counsel to transmit the sealed material to Ms. Bethany Payton-O'Brien, his civilian appellate defense counsel. Ms. Payton-O'Brien has offices located in San Diego, CA, and Chicago, IL, and is unable to travel to view the sealed materials in person. The military judge, trial counsel, and defense counsel at trial reviewed these materials.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be in a position to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant.

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

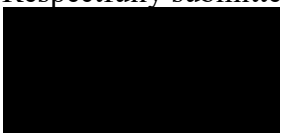
Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4772
Email: heather.bruha@us.af.mil

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 26 April 2024.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

NOTICE OF APPEARANCE

UNITED STATES v. Master Sergeant Adrienne Clark, USA ACM: 40540

To the Clerk of this Court and all parties of record, the undersigned hereby enters an appearance as the appellate counsel for the appellant in the above-captioned case, pursuant to Rule 13 of the Rules of Practice and Procedure of the United States Air Force Court of Criminal Appeals.

I hereby certify that I am admitted to practice before this court.

6 May 2024
Date

[redacted]
Signature

Bethany L. Payton-O'Brien — IL 6225816
Print Name — Bar Number

420 N. Twin Oaks Valley Road #2634
Address

San Marcos — CA — 92079
City — State — Zip Code

619-909-9154 — bethanyobrien.attorney@gmail.com
Phone Number — E-Mail

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40540**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adrienne L. CLARK	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 8 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fourth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, this court's Rules of Practice and Procedure, the Government's opposition, case law, and judicial economy. Accordingly, it is by the court on this 10th day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Fourth) is **GRANTED**. Appellant shall file any assignments of error not later than **17 June 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits. Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

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*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 8 May 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 June 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

Undersigned counsel is currently assigned 19 cases, with 12 initial briefs pending before this Court. 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. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 3 in this case, undersigned counsel has filed the Reply Brief on Behalf of Appellant in *United States v. Arroyo* (ACM 40321 (f rev)) with this Court; an Opposition to the Government's Motion to Cite Supplemental Authorities in *Arroyo* with this Court; the Brief on Behalf of Appellant in *United States v. Douglas* (ACM 40324 (f rev)) with this Court; an Opposition to the Government's Motion for Reconsideration: Citation of Supplemental Authorities in *Arroyo* with this Court; and Motions to Withdraw from Appellate Review and Motions to Attach in *United States v. Johnson* (ACM S32774) and *United States v. Willems* (ACM 40562) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed. Undersigned counsel also represented SrA Arroyo at the outreach oral argument held on 10 April 2024 and spent around 5 hours preparing for a colleague's moots, assisting in moots, and attending oral argument. Of note, the FOA Sports Day is scheduled for Friday, 10 May; the Court of Appeals for the Armed Forces (CAAF) Continuing Legal Education (CLE) training is scheduled for 15-16 May; and Memorial Day weekend—including a Family Day—is 24-27 May.

Additionally on 7 May 2024, the CAAF granted review of one issue in *United States v. Greene-Watson* (ACM 40293) with the Grant Brief currently due 7 June 2024. Undersigned counsel filed a consent motion the same day for an enlargement of time of 19 days—extending the deadline to 26 June 2024. The motion was received by the CAAF but has yet to be ruled on.

This case is currently undersigned counsel's sixth priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Sherman* (ACM 40486): The trial transcript is 469 pages long and the record of trial is comprised of five volumes containing 17 prosecution exhibits, 12 defense exhibits, 25 appellate exhibits, and one court exhibit. Undersigned counsel has completed review of the record and intends to send her draft of the AOEs to civilian appellate defense counsel at the end of this week.
2. *United States v. Holmes* (Misc. Dkt. No. 2024-1): On 5 April 2024, this Court ordered oral argument scheduled for 31 May 2024. After sending the draft AOEs for *Sherman* to the civilian appellate defense counsel, undersigned counsel will turn to preparation for oral argument in *Holmes*.
3. *United States v. Duthu* (ACM 40512): The trial transcript is 178 pages long and the record of trial is comprised of three volumes containing two prosecution exhibits, 10 defense exhibits, nine appellate exhibits, and one court exhibit. Of note, this case moved up in priority for undersigned counsel to attempt to get review done prior to going on leave at the end of June. Given the Grant Brief in *Greene-Watson* will be due to the CAAF before the end of June and takes priority, it is highly unlikely undersigned counsel would be able to finish review of *Martell*'s record prior to taking leave as it is substantially longer than *Duthu*.
4. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.

5. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits.

Appellant's civilian appellate defense counsel's priority list is as follows.

Civilian defense counsel was retained by MSgt Clark on 23 April 2024. Civilian counsel possesses a portion of the record of trial, but not the complete record of trial, and has commenced a review of the record of trial.

Civilian counsel represents servicemembers in matters involving courts-martial, courts-martial appeals, security clearance revocations, administrative separation boards/Boards of Inquiry, and other military law related issues.

First, Civilian defense counsel will be out of the country on travel and her business closed from 2 June 2023 through 4 July 2024. Since retained by MSgt Clark, civilian counsel has had following matters completed or are either currently pending and calendared over the next two months.

1. *1LT Liam Lattin (USAF),* parole board hearing, 24 April 2024.

2. *Senior Chief Greene (USN)*, CMEO appeal to SECNAV submitted 26 April 2024.

3. *CWO2 Cassagnol (USMC)* Board of Inquiry, 29-30 April 2024, 29 Palms CA.

4. *CW2 Seoane (Army)*, Appeal to CID for titling matter submitted 2 May 2024.

5. *LT McIver (Navy),* Board for Correction of Naval Records, Rebuttal to Advisory opinion drafted; submitted on 3 May 2024.

6. *LCPL Lyle (USMC),* parole board petition drafted, completed, and submitted on 8 May 2024.

7. *LT Mera (USN)* – IG Interview (telephonic) scheduled for 9 May 2024.

8. *SSgt Raco* (USMC), administrative separation board scheduled for 13 May 2024 (San Diego, CA).

9. *United States v. Cazarez (Navy)*, Special court-martial. Pretrial motions/responses due 14 May 2024 and 21 May 2024. Article 39a pretrial motions hearing scheduled for 28 May 2024.

10. 14-18 May 2024: Civilian counsel will be on travel with her family for graduation and a wedding.

11. *United States v. Rollins* (NMCCA): Petition for Extraordinary Writ in process of being drafted and expected to be completed and filed by 31 May 2024.

12. *United States v. Cueto*, Navy (Special court-martial, San Diego): Speedy trial demand has been made and counsel is seeking a 28-30 May 2024 trial date, pending court approval.

13. *Sgt Brown*, USA, Discharge Review Board personal appearance (telephonic) hearing scheduled for 3 June 2024.

14. *United States v Clifft* (CGCCA, Misc. Dkt. No. 001-24), Defense reply to government response to Petition for Extraordinary Writ due 4 June 2024.

15. 2 June 2024 - 4 July 2024, Civilian counsel out of the country on travel.

16. *United States v. McKay* (USMC) – General Court-Martial, Camp Pendleton. Arraignment scheduled for 10 May 2024, with requested motions/response due dates of 20-27 June 2024, Article 39a of 8 July 2024.

17. *Chief Petty Officer Bonnie*, Navy: Administrative Separation Board scheduled for 9 July 2024 (Norfolk VA).

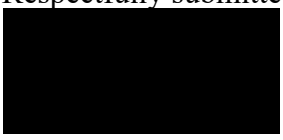
18. *United States v Cazarez (Navy)*, (Special Court-Martial, Guam): Trial Scheduled for 15-19 July 2024.

In addition to the preceding matters, civilian counsel has three Navy Discharge Upgrade Petitions currently in the process of review and drafting, and expected to be submitted by 1 June 2024. Civilian counsel also represents a former Navy Sailor in a Court of Federal Claims matter which is currently being drafted for required submission by 2 June 2024 due to the statute of limitations.

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

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

Respectfully submitted,



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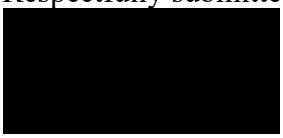
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 8 May 2024.

Respectfully submitted,



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10 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 May 2024.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40540**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adrienne L. CLARK	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 7 June 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

In our order granting Appellant's Motion for Enlargement of Time (Fourth), the court required Appellant's counsel, in any subsequent motions for enlargement of time, to state:

> (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

However, in the present motion, apparently when addressing (2) above, Appellant's military appellate counsel stated, "Appellate defense counsel are in compliance with their ethical obligations as it relates to communications with our client."

Perhaps without exception, the court presumes counsel are in compliance with their ethical obligations. Therefore, stating they are in compliance with their ethical obligations instead of stating whether communication occurred is neither helpful nor in compliance with this court's order. The court required counsel to address the above four matters in any future requests for enlargements of time, but did not require counsel answer each statement in the affirmative as a prerequisite to granting the enlargement of time. With this clarification, we expect our previous order will be followed in any future requests for extensions of time in this case.

As stated in our previous order, counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this

appeal; and any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

The court has considered Appellant's motion, this court's Rules of Practice and Procedure, the Government's opposition, case law, and judicial economy.

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

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **17 July 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 7 June 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **17 July 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 200 days have elapsed. On the date requested, 240 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

Undersigned counsel is currently assigned 22 cases, with 15 initial briefs pending before this Court. 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. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 4 in this case, undersigned counsel has sent the Brief on Behalf of Appellant in *United States v. Sherman* (ACM 40486) to civilian appellate defense counsel for review; filed Motions to Withdraw from Appellate Review and Motions to Attach in *United States v. Brockington* (ACM S32768) and *United States v. Duthu* (ACM 40512) with this Court; and conducted oral argument in *United States v. Holmes* (Misc. Dkt. No. 2024-1) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records in order to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed.

Of note, the FOA Sports Day was Friday, 10 May; the Court of Appeals for the Armed Forces (CAAF) Continuing Legal Education (CLE) training was held 15-16 May; Memorial Day weekend—including a Family Day—was 24-27 May; and Juneteenth is 19 June 2024 with a Family Day scheduled for 20 June 2024. Undersigned counsel also has scheduled leave 13-16 June and 26 June – 1 July.

Undersigned counsel's next priorities are a potential Reply Brief in *United States v. Douglas* (ACM 40324 (f rev)), currently due to this Court on 10 June 2024, and the Joint Appendix and Grant Brief in *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293), which are currently due to the CAAF on 26 June 2024.

This case is currently undersigned counsel's third priority before this Court. Undersigned counsel has not started review of the record of trial in this case. The following cases before this Court have priority over the present case:

1. *United States v. Clark* (ACM 23017): The verbatim transcript is 131 pages long and the record of trial is comprised of two volumes containing five prosecution exhibits, eight defense exhibits, five appellate exhibits, and zero court exhibits. Of note, this case moved up in priority for undersigned counsel partly due to the Motion to Withdraw being filed in *Duthu* and also in an to attempt to get review of a smaller record done prior to going on leave at the end of June. Given the Grant Brief in *Greene-Watson* will be due to the CAAF before the end of June and takes priority, it is highly unlikely undersigned counsel would be able to finish review of *Martell*'s record prior to taking leave as it is substantially longer than *Clark*.
2. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.

Appellant's civilian appellate defense counsel's priority list is as follows.

Civilian defense counsel was retained by MSgt Clark on 23 April 2024. Civilian counsel possesses a portion of the record of trial, but not the complete record of trial, and has commenced a review of the record of trial.

Civilian counsel represents servicemembers in matters involving courts-martial, courts-martial appeals, security clearance revocations, administrative separation boards/Boards of Inquiry, and other military law related issues.

First, Civilian defense counsel is presently out of the country on travel and her business closed from 2 June 2023 through 4 July 2024. Since the last EOT (#4), civilian counsel has had following matters completed or are either currently pending and calendared over the next two months.

1. Counsel on vacation for family graduation and a wedding, 14-19 May 2024.

2. S*SGT JR (USMC),* administrative separation board (San Diego) commenced 13 May 2024, still pending as the board was continued after the first day.

3. *LT RM (USN)* – IG Interview (telephonic) conducted on 9 May 2024.

4. *United States v. Cazarez (USN)*, Special court-martial (Guam), Pretrial motions/responses filed 14 May 2024 and 20 May 2024; guilty plea hearing scheduled for 12 June 2024.

5. *United States v McKay (USMC)*, General Court-Martial (Camp Pendleton) arraignment on 10 May 2024, and ex parte motions prepared and submitted on 31 May 2024.

6. *United States v. Rollins* (NMCCA): Petition for Extraordinary Writ in process of being drafted and expected to be completed and filed by 30 June 2024.

7. *United States v. Cueto* (Navy), Special court-martial (San Diego): Pretrial motions/responses prepared and submitted, and attended Article 39(a) pretrial motion session held on 28 May 2024;

8. *Sgt RB* (Army), attended Discharge Review Board personal appearance (telephonic) hearing held on 3 June 2024.

9. *United States v Clifft* (CGCCA, Misc. Dkt. No. 001-24), Defense reply to government response to Petition for Extraordinary Writ drafted 20 May 2024, submitted to the

10. 2 June 2024 - 4 July 2024, Civilian counsel out of the country on travel.

11 *Chief Petty Officer JB*, (Navy): Administrative Separation Board (Norfolk, VA) scheduled for 16-17 July 2024, travel 14/18 July 2024).

12. *JFC v. USA* (Court of Federal Claims), prepared and filed complaint with the Court on 3 June 2024;

13. *CWO2 JD (*Navy), Security Clearance Matter and NJP appeal. Preparing response to Statement of Reasons from Defense Counterintelligence and Security Agency, due on 27 June 2024; rebuttal to NJP appeal endorsement prepared and submitted, and Article 138 complaint drafted and submitted on 1 June 2024

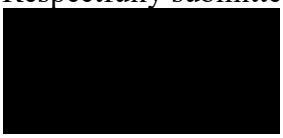
14. *PO1 MB* (Navy), VA character of discharge review submission, being drafted for submission by due date of 17 June 2024.

In addition to the preceding matters, civilian counsel has two Navy Discharge Upgrade petitions presently being drafted and assembled.

Appellant was advised of her right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellate defense counsel are in compliance with their ethical obligations as it relates to communications with our client. Appellant has provided limited consent to disclose a confidential communication with counsel wherein she consented to the request for this enlargement of time.

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

Respectfully submitted,



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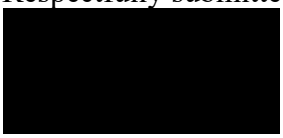
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 June 2024.

Respectfully submitted,



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10 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 10 June 2024.

J. PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 8 July 2024

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

Pursuant to Rule 23.3(m)(2) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **16 August 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 231 days have elapsed. On the date requested, 270 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

Military appellate defense counsel is currently assigned 21 cases, with 14 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 5 in this case, military appellate defense counsel has filed the Motion to Withdraw from Appellate Review and Motion to Attach in *United States v. Duthu* (ACM 40512) with this Court; the Reply Brief on Behalf Appellant in *United States v. Douglas* (ACM 40324) with this Court; the Brief on Behalf of Appellant in *United States v. Sherman* (ACM 40486) with this Court; the Grant Brief and Joint Appendix in *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293) with the Court of Appeals for the Armed Forces (CAAF); and the Brief on Behalf of Appellant in *United States v. Clark* (ACM 23017) with this Court. Motions to Withdraw from Appellate Review and Motions to Attach require review of the records to advise appellants of their options and coordination with appellants on getting the DD Form 2330s completed.

Of note, Juneteenth was 19 June 2024 with a Family Day scheduled for 20 June 2024 and the 4th of July holiday and Family Day were 4-5 July 2024. Military appellate defense counsel also had scheduled leave 13-16 June and 26 June – 1 July and upcoming scheduled leave 8-10 July.

This case is currently military appellate defense counsel's second priority before this Court. Military appellate defense counsel has not started review of the record of trial in this case. The following case before this Court has priority over the present case:

1. *United States v. Martell* (ACM 40501): The trial transcript is 1,032 pages long and the record of trial is comprised of eight volumes containing nine prosecution exhibits, 32 defense exhibits, 48 appellate exhibits, and one court exhibit.

Appellant's civilian appellate defense counsel's priority list is as follows.

Civilian defense counsel was retained by MSgt Clark on 23 April 2024. Civilian counsel possesses a portion of the record of trial, but not the complete record of trial, and has commenced a review of the record of trial.

Civilian counsel represents servicemembers in matters involving courts-martial, courts-martial appeals, security clearance revocations, discharge upgrade matters, administrative separation boards/Boards of Inquiry, and other military law related issues.

First, Civilian defense counsel was out of the country on travel and her business closed from 2 June 2023 through 5 July 2024. She returned to the country on 4 July 2024. Since the last EOT (#5), civilian counsel has had following matters completed or are either currently pending and calendared over the next month.

1. Counsel on vacation 2 June 2024 - 5 July 2024 and the office closed; counsel traveled overseas.

2. Despite her office being closed, counsel met with MSgt AC in confinement to discuss an IG complaint; prepared and submitted the IG complaint to the USAF IG.

3. Despite her office being closed, counsel met with two post-trial confinement clients to discuss and update their cases on appeal.

4. Despite her office being closed and counsel on vacation, counsel was involved in pretrial preparations for trial in the matter of *United States v Cueto* (Navy, San Diego) to

include witness interviews, preparation of exhibits, research, and other trial preparation matters Trial is scheduled for 9-11 July 2024.

5. *United States v. Rollins* (NMCCA): Petition for Extraordinary Writ in process of being drafted and expected to be completed and filed by 30 July 2024.

6. *United States v Clifft* (CGCCA, Misc. Dkt. No. 001-24), prepared and submitted Petitioner's reply to Government's Answer submitted on 5 July 2024.

7. *Chief Petty Officer JB* (Navy): Administrative Separation Board (Norfolk, VA) scheduled for 16-17 July 2024, travel 14/18 July 2024). Counsel preparing for this hearing with consultation with client and military defense counsel, witness interviews and evidence reviews, preparation of exhibits, and other administrative board matters.

8. *CWO2 JD* (Navy), Security Clearance Matter and NJP appeal. Preparing response to Statement of Reasons from Defense Counterintelligence and Security Agency, now due on 6 August 2024.

9. *Maj BG,* (Army), drafting brief for submission to Defense Office of Hearings and Appeals, due on 10 August 2024.

10. *PO1 MB* (Navy), VA character of discharge review submission, being drafted for submission by new due date of 17 July 2024.

11. *MSgt AC (*USAF), parole board telephonic attendance on 12 June 2024, and presently drafting the appeal of the denial of the parole and clemency.

12. *CWO2 KM* (USA), Board of inquiry matter – review transcript of BOI for submission to convening authority.

13. *LTJG TV* (USN), reviewed FOIA response and records from USN, and thereafter drafted and submitted two FOIA appeals to Navy OJAG.

14. *LJ v USN* (Marine Corps), reviewed and assisted in response to court order regarding outstanding matters in FOIA lawsuit.

In addition to the preceding matters, civilian counsel has two Navy Discharge Upgrade petitions presently being drafted and assembled.

Appellant was advised of her right to a timely appeal. Appellant was advised of the request for this enlargement of time. Appellate defense counsel are in compliance with their ethical obligations as it relates to communications with our client. Appellant has provided limited consent to disclose a confidential communication with counsel wherein she consented to the request for this enlargement of time and is aware of counsel's progress in representing her.

This Court stated in its Order dated 17 June 2024 that "Appellant's military appellate counsel stated, 'Appellate defense counsel are in compliance with their ethical obligations as it relates to communications with our client'" in the Motion for EOT 5. First, as lead counsel, I direct all statements in motions for this case. Second, as lead counsel, I believed this statement was in compliance with the Court's order given our ethical obligations include regular communications—to include updating clients on the status of their cases and our work on them—with our clients. However, this Court made clear in its Order that such a statement did not comply with the Court's order. Further, this Court explained that compliance with the Order "did not require counsel answer each statement in the affirmative as a prerequisite to granting the enlargement of time." Understanding this Court's clarifications of its Order dated 10 May 2024 and its subsequent Order dated 17 June 2024, I as lead counsel offer the following:

Appellant has provided limited consent to disclose confidential communications with counsel wherein she was advised of hers right to a timely appeal, counsels' progress on the case, the request for this enlargement of time, and wherein she consented to the request for this

enlargement of time. However, the court should not require defense counsel to provide confidential communications with our client in order to obtain an enlargement of time.

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

Respectfully submitted,

[redacted]

Bethany L. Payton-O'Brien
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 8 July 2024.

Respectfully submitted,

[redacted]

Bethany L. Payton-O'Brien
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11 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

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

[redacted]

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 July 2024.

BRITTANY M. SPEIRS, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 7 August 2024

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

Pursuant to Rule 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 September 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 261[1] days have elapsed. On the date requested, 300 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

[1] The previously filed motion incorrectly stated 259 days had elapsed from the date of docketing to the present date filed (6 August 2024).

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

Military appellate defense counsel is currently assigned 21 cases, with 8 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 6 in this case, civilian appellate defense counsel filed the Brief on Behalf of Appellant in *United States v. Martell* (ACM 40501) with this Court.

Of note, military appellate defense counsel had scheduled leave 8-10 July. Additionally, the JAJA Newcomers Training is scheduled for 13-14 August 2021. Military appellate defense counsel is working on the Reply Brief in *Greene-Watson* now due to the CAAF on 15 August 2024. Military appellate defense counsel will then be working on the Petition and Supplement to the Petition in *United States v. Arroyo* (ACM 40321 (f rev)) currently due to the CAAF on 17 August 2024. Further, a potential Reply Brief in *United States v. Clark* (ACM 23017) is tentatively due to this Court on 14 August 2024.

This case is currently military appellate defense counsel's second priority before this Court. Military appellate defense counsel has only reviewed the sealed and contraband portions of the record pursuant to this Court's order. The following case before this Court has priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes

containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Of note, this case has moved up in priority given civilian appellate defense counsel's availability to work this case.

Appellant's civilian appellate defense counsel's priority list is as follows.

Civilian defense counsel was retained by Appellant on 23 April 2024. Civilian counsel now possesses most of the record of trial, but not the complete record of trial (but has not reviewed certain portions which are contraband given their location in Washington, DC), and has commenced a review of the record of trial.

Civilian counsel represents servicemembers in matters involving courts-martial, courts-martial appeals, security clearance revocations, administrative separation boards/Boards of Inquiry, and other military law related issues.

First, Civilian defense counsel was out of the country for a month, until 4 July 2024, and since her return has been actively working on numerous criminal, administrative, security clearance, parole, appeals, and other legal matters. Since retained by Appellant, civilian counsel has had following matters completed or are either currently pending and calendared over the next month.

1. *United States v Cueto* (Special Court-Martial, Navy, San Diego), trial held 9-11 July 2024. After completion of the trial, counsel has also assisted the same client drafting of and submission of request for redress and Article 138 complaints, rebuttal to detachment for cause, and rebuttal to adverse fitness report, all short fused due to client's impending retirement.

2. *United States v. Rollins* (NMCCA): Petition for Extraordinary Writ (Coram Nobis), drafted and filed on 27 July 2024.

3. *Chief Petty Officer JB* (Navy): Administrative Separation Board (Norfolk, VA) held the week of 14 July 2024. Travel on 14 July, preparation with client and co-counsel on 15 July, board held 16-17 July, travel on 18 July. On 12 July, interviews and evidence reviews, preparation of exhibits, and other administrative board matters in preparation. Currently preparing and reviewing transcript of the proceedings, and preparation of Letter of Deficiency which is due 7 August 2024

4. *CWO2 JD* (Navy), Security Clearance Matter and NJP appeal. Preparation and submission of response to Statement of Reasons from Defense Counterintelligence and Security Agency on 5 August 2024.

5. *Maj BG* (Army), drafting brief for submission to Defense Office of Hearings and Appeals, due on 10 August 2024.

6. Out of Office July 24-26 2024 at conference.

7. *PO1 MB* (Navy), VA character of discharge review submission, being drafted for submission by new due date of 18 August 2024.

8. *LCDR AC* (USN), reviewing and drafting of response to Statement of Reasons from Defense Counterintelligence and Security Agency, due on 29 August 2024

9. *LJ v USN* (Marine Corps), reviewed and assisted in response to court order regarding outstanding matters in FOIA lawsuit.

10. *United States v Raco* (USMC, Special Court-Martial, Marine Corps, San Diego), presently in pretrial discovery and investigation phase, with first court appearance set for 20 August 2024.

11. *Senior Chief Petty Officer AG*, (Navy), Administrative Separation Board (San Antonio, TX) scheduled for 2 days the week of 13 August. Presently preparing for board, witness interviews and gathering of evidence.
12. *LTJG AM* (Navy), preparation and submission of Discharge Upgrade Petition to the Naval Discharge Review Board, completed on 29 July 2024.
13. *1stLt GR* (Marine Corps), preparation and submission of Discharge Upgrade Petition to the Naval Discharge Review Board, completed on 2 August 2024.
14. *LCPL Lyle (USMC),* parole board hearing scheduled for 7 August 2024. Presently preparing for hearing, with submission of materials regarding confinement conditions that include lack of sex offender treatment options.
15. *CWO2 GF* (Marine Corps), preparation and submission of Rebuttal to Report of Officer Misconduct for a 21-year Marine Corps Officer, completed on 1 August 2024.
16. *PO1 RG* (Navy), Administrative Separation Board, San Diego, scheduled for 21 August 2024.
17. *Master Chief Petty Officer SM* (Navy), Administrative Separation Board, Battle Creek MI, scheduled for 28-29 August 2024.

Appellant has provided limited consent to disclose confidential communications with counsel wherein she was advised of hers right to a timely appeal, counsels' progress on the case, the request for this enlargement of time, and wherein she consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]
Bethany L. Payton-O'Brien
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 August 2024.

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
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7 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 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]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 7 August 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
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Military Justice and Discipline Directorate
United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**OUT OF TIME MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME (EIGHTH)**
	)	
v.	)	Before Panel No. 2
	)	
Master Sergeant (E-7)	)	No. ACM 40540
ADRIENNE L. CLARK	)	
United States Air Force	)	9 September 2024
Appellant	)	

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **15 October 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 294 days have elapsed. On the date requested, 330 days will have elapsed. The previously filed extension request incorrectly calculated the number of days from the date of docketing to the date requested. This motion is now being filed out of time to withdraw the previous filing and submit a motion with the correct calculations.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

Military appellate defense counsel is currently assigned 20 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 7 in this case, military appellate defense counsel filed the Reply Brief in *United States v. Greene-Watson* (Dkt. No. 24-0096/AF; ACM 40293) with the Court of Appeals for the Armed Forces (CAAF); the Petition and Supplement to the Petition for Grant of Review in *United States v. Arroyo* (ACM 40321 (f rev)) with the CAAF; the Petitions for Grant of Review and Motions to File the Supplement Separately in *United States v. Holmes* (Misc. Dkt. No. 2024-1) and *United States v. Van Velson* (ACM 40401) with the CAAF; and civilian appellate defense counsel filed the Reply Brief in *United States v. Martell* (ACM 40501) with this Court.

Of note, JAJA Newcomers Training was held 13-14 August 2024, and the Joint Appellate Advocacy Training (JAAT) is scheduled for 25-26 September 2024. Military appellate defense counsel is currently working on the Supplement to the Petition in *United States v. Van Velson* (ACM 40401), which will be filed this week. Military appellate defense counsel will next turn to the Supplement to the Petition in *Holmes*. After that, military appellate defense counsel will begin oral argument preparations in *Greene-Watson*, which is currently scheduled as an outreach oral argument with the CAAF on 10 October 2024. Finally, a potential Reply Brief will also be due to this Court in *United States v. Sherman* (ACM 40486) at some point in September 2024.

This case is currently military appellate defense counsel's second priority before this Court. Military appellate defense counsel has begun the review of the record of trial, completed approximately half of the transcript thus far, and has the sealed and contraband portions of the record pursuant to this Court's order. The following case before this Court has priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Of note, this case was previously moved up in priority given civilian appellate defense counsel's availability to work this case, however, that may shift given her current availability.

Appellant's civilian appellate defense counsel's priority list is as follows.

Civilian defense counsel was retained by Appellant on 23 April 2024. Civilian counsel now possesses most of the record of trial, but not the complete record of trial (and has not reviewed certain portions which are contraband given their location in Washington, DC). Counsel has commenced a review of the record of trial, and has completed a review of approximately half of the transcript of the record of trial. Counsel expects that she can complete her review of the transcript by the end of the month.

Civilian counsel represents servicemembers in matters involving courts-martial, courts-martial appeals, security clearance revocations, administrative separation boards/Boards of Inquiry, and other military law related issues, including board for corrections and discharge upgrade, equal opportunity matters, and FOIA/Privacy Act matters.

1. Counsel on vacation 2 June 2024 - 5 July 2024 and the office closed; counsel traveled overseas.

2. *United States v Cueto* (Special Court-Martial, Navy, San Diego), trial held 9-11 July 2024. After completion of the trial, counsel has also assisted the same client drafting and submission of request for redress and Article 138 complaints, rebuttal to detachment for cause, and rebuttal to adverse fitness report, and various pay issues, all shortfused due to client's impending retirement.

3. *Chief Petty Officer JB* (Navy), prepared and submitted letter of deficiency following his administrative separation board. Reviewed the audio recording and board transcript of the board in preparation of the appeal. Submitted on 8 August 2024.

4. *Prisoner DL* (Marine Corps), prepared for and attended telephonic parole hearing on 7 August 2024. Presently drafting for submission his petition for appeal of his parole denial due on 3 October 2024.

5. *United States v Hirst* (NMCCA 202200208), prepared and filed Appellant's Reply Brief to NMCCA on 3 September 2024. Since the NMCCA opinion on 4 September 2024, which set aside the findings and sentence with prejudice, counsel continues to represent the client with Article 75, UCMJ, restoration efforts, including submission of the first demand letter to the Marine Corps.

6. *Senior Chief Petty Officer AG* (Navy), Administrative Separation Board (San Antonio, TX) held the week of 12 August 2024. Travel on 12 August, preparation with client and co-counsel, board held 13-15 August, return travel on 15 August. Following the board, counsel prepared the letter of deficiency which was submitted on 26 August 2024. Counsel also represents

client for Equal Opportunity/Inspector General Complaint, which was prepared and submitted also on 26 August 2024 to Command, DOD Inspector General and the Navy Inspector General.

7. *Master Chief Petty Officer SD* (Navy), Administrative Separation Board (Battle Creek, MI) held the week of 27 August 2024. Travel on 27 August, preparation with client and co-counsel, board held 28-29 August, return travel on 31 August 2024.

8. *Sergeant OR* (Marine Corps), Administrative Separation Board (Camp Pendleton, CA) scheduled for 16 September 2024). Counsel preparing for this hearing with consultation with client and military defense counsel, witness interviews and evidence reviews, preparation of exhibits, and other administrative board matters. Currently also preparing Sgt OR's appeal to a Sexual Harassment complaint substantiation to the Secretary of the Navy, due 30 September 2024.

9. *Petty Officer RG* (Navy), Administrative Separation Board (San Diego, CA) scheduled for 26-27 September 2024). Counsel preparing for this hearing with consultation with client and military defense counsel, witness interviews and evidence reviews, preparation of exhibits, and other administrative board matters.

10. *Petty Officer SG* (Navy), Administrative Separation Board (San Diego, CA) scheduled for 24 September 2024. Counsel preparing for this hearing with consultation with client and military defense counsel, witness interviews and evidence reviews, preparation of exhibits, and other administrative board matters. This is an expedited hearing due to the government's late service of administrative processing notification upon the Sailor, and refusing to grant more than a 12-day delay for counsel preparation, as the government is trying to expedite based on the Sailor's impending expiration of active service.

11. *CWO2 JD* (Navy), Security Clearance Matter and NJP appeal. Prepared and submitted response to Statement of Reasons from Defense Counterintelligence and Security Agency, on 6 August 2024. Prepared and submitted his petition to the Board of Corrections of Naval Records on 25 August 2025.

12. *LtCol BG* (Army), Security Clearance Matter. Prepared and submitted Appellant's Brief to the Defense Office of Hearings and Appeals on 17 August 2024, and appeared on behalf of LtCol BG for the in-person security clearance renovation hearing on 27 August 2024 in Woodland Hills, CA.

13. *Sgt TM*, (Marine Corps), Security Clearance Matter. Drafting brief for submission to Defense Office of Hearings and Appeals, potentially due by early October, for an anticipated in-person security clearance hearing in mid to late-October due to expedited processing of this case.

14. *MSgt AC (*USAF), submitted appeal of parole board denial of parole and clemency on 18 August 2024 to the Air Force Clemency and Parole Board.

15. *LCDR AC* (USN), Security Clearance Matter and Officer Report of Misconduct matter. Drafted and submitted client's response to Statement of Reasons from Defense Counter-intelligence and Security Agency, on 29 August 2024 and submitted additional rebuttal to Officer Misconduct Report to Navy Personnel Command on 5 September 2024.

16. *United States v. Raco* (SPCM, Marine Corps), San Diego. Case is presently pending trial in mid-October. Ex parte expert motions were drafted and submitted on the due date of 2 September 2024. While original due date was 30 August 2024, counsel sought and was granted an extension of time by the Court due to civilian counsel's laptop computer malfunctioning and ceasing to operate while she was on travel for an administrative board, preventing her from being able to access any case materials.

17. *LJ v USN* (Marine Corps), reviewed and assisted in response to court order regarding outstanding matters in FOIA lawsuit.

In addition to the preceding matters, civilian counsel has two Board for Correction of Naval Records petitions presently being drafted and assembled.

Appellant has provided limited consent to disclose confidential communications with counsel wherein she was advised of hers right to a timely appeal, counsels' progress on the case, the request for this enlargement of time, and wherein she consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

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HEATHER M. BRUHA, Maj, USAF
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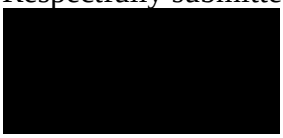
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 9 September 2024.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPELAS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 332 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]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 9 September 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 4 October 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 November 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 319 days have elapsed. On the date requested, 360 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

Military appellate defense counsel is currently assigned 18 cases, with 9 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 8 in this case, military appellate defense counsel filed the Supplements to the Petitions for Grant of Review in *United States v. Van Velson* (ACM 40401, USCA Dkt. No. 24-0225/AF) and *United States v. Holmes* (Misc. Dkt. No. 2024-1, USCA Dkt. No. 24-0224/AF) with the Court of Appeals for the Armed Forces (CAAF); a Motion for Reconsideration in *United States v. Hennessy* (ACM 40439) with this Court; and the Reply Brief in *United States v. Sherman* (ACM 40486) with this Court.

Of note, the family day/Indigenous Peoples' Day is 11-14 October. Military appellate defense counsel was also on unexpected family leave 24-27 September 2024. Undersigned counsel is currently preparing for oral argument in *United States v. Greene-Watson* (ACM 40293, USCA Dkt. No. 24-0096/AF), which is currently scheduled as an outreach oral argument with the CAAF on 10 October 2024.

This case is currently military appellate defense counsel's second priority before this Court. Military appellate defense counsel has only reviewed the sealed and contraband portions of the record pursuant to this Court's order. The following case before this Court has priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits,

and one court exhibit. Of note, this case was previously moved up in priority given civilian appellate defense counsel's availability to work this case, however, that may shift given her current availability.

Appellant's civilian appellate defense counsel's priority list is as follows.

Civilian defense counsel was retained by Appellant on 23 April 2024. Civilian counsel possesses most of the record of trial, but not the complete record of trial (but has not reviewed certain portions which are contraband given their location in Washington, DC), and has commenced a review of the record of trial. Counsel has almost completed her review of the transcript of the record of trial. Counsel expects that she can complete the review of the transcript within the next two weeks and can then commence drafting the brief.

Civilian counsel represents servicemembers in matters involving courts-martial, courts-martial appeals, security clearance revocations, administrative separation boards/Boards of Inquiry, and other military law related issues, including board for corrections and discharge upgrade, equal opportunity matters, and FOIA/Privacy Act matters.

1. Counsel on vacation 2 June 2024 - 5 July 2024 and the office closed; counsel traveled overseas.

2. Counsel on travel 5-8 September 2024 for family matters, for her son's return to college in Wisconsin.

3. Counsel family and personal medical appointments, Sept 4, 9, Oct 9, 10.

4. *Petty Officer Third Class KB* (Navy), counsel represented this Sailor an NJP and administrative separation processing, including reviewing and gathering evidence and preparation of NJP submission to the command prior to Sailor's hearing on 1 October 2024.

5. *Sergeant OR* (Marine Corps), counsel represented Marine for administrative separation board on 16 September 2024. Counsel also prepared and submitted his appeal to Command Managed Equal Opportunity (CMEO) harassment complaint that had been substantiated by the Marine Corps.

6. *Petty Officer Second Class SG* (Navy), counsel represented this Sailor in a short-fused Navy administrative separation board in San Diego, CA on 24 September 2024, after the command notified her for separation processing on 15 August 2024. The short-fused board was due to the Sailor's pending end of enlistment and the government's failure to timely process the allegations which had occurred more than 2 years prior to the board. In order to prepare and investigate the case, counsel had to file various Freedom of Information Act requests and discovery requests with the government, as well as to coordinate with prior counsel (who had to withdraw from the case due to conflict issues) and civilian authorities for evidence, which included almost seven hours of police body worn camera footage.

7. *Petty Officer First Class RG* (Navy), counsel represented this Sailor in a two-day administrative separation board on 26-27 September 2024 in San Diego, CA. The case involved mandatory processing based on Article 120 allegations not referred to court-martial. This was another case in which counsel had to file numerous FOIA and discovery requests due to the government's refusal to provide the entirety of the investigative materials during the pendency of the board process. Due to suspected unlawful command influence in the Convening Authority's refusal to provide evidence and witnesses, on behalf of the Sailor, counsel sought recusal of the Convening Authority based in part on the Convening Authority's own criminal misconduct (that resulted in her being removed by her Immediate Superior in the Chain of Command and her assertion of her Article 31b rights during the board).

8. *Lieutenant Junior Grade JG* (Navy), counsel reviewed the BOI record of proceedings involving 400 pages of exhibits and numerous hours of audio records, and prepared and submitted the letter of deficiency following his officer Board of Inquiry. Submitted on 13 September 2024.

9. *Prisoner JT* (Marine Corps), petition for parole and clemency, submitted to client on 2 October 2024.

10. *United States v Hirst* (NMCCA 202200208). Following the NMCCA opinion on 4 September 2024, which set aside the findings and sentence with prejudice, counsel continues to represent the client with Article 75, UCMJ, restoration efforts, including correspondence and submission for restoration to the Marine Corps.

11. *Senior Chief Petty Officer AG* (Navy), Administrative Separation Board. Following the board, counsel prepared a second letter of deficiency which was submitted on 3 October 2024 following new evidence that the Commanding Officer was fired for a loss of confidence following the board and our preparation and submission of an IG Complaint, and the board members revealed they considered improper evidence during board deliberations.

12. Major JW (Air Force), review OSI report of investigation, file FOIA appeal, and preparation of appeal of Criminal Titling decision of law enforcement.

13. *Sgt TM (Marine Corps*), Security Clearance Matter. Drafting and gathering evidence for Appellant's Brief to the Defense Office of Hearings and Appeals with anticipated hearing date of 29 October 2024 in Woodland Hills, CA, due to expedited processing of this case.

14. *United States v. Raco* (SPCM, Marine Corps), San Diego. Case is presently pending trial in mid-November. The first round of pretrial motions and witness production requests were prepared and submitted on 19 September 2024, with the first pretrial hearing set for 9 October 2024. Pretrial preparation continues with expert interviews.

15. *LJ v USN* (Marine Corps), reviewed and assisted in response to court order regarding outstanding matters in FOIA lawsuit. Commenced petition for discharge upgrade with the Naval Discharge Review Board.

16. *SSgt AC (*Marine Corps), represented Marine at a Pretrial Initial Review Officer Hearing on 17 September 2024, and after securing his release, counsel is involved in investigation and preparation of the case towards anticipated court-martial.

17. *CWO2 GF* (Marine Corps), counsel prepared additional rebuttal to Report of Officer Misconduct after receiving numerous documents in response to a FOIA request. Submitted on 3 October 2024.

18. Counsel has a very robust FOIA/Privacy Act practice and has submitted numerous FOIA/PA requests and appeals on behalf of at least 7-10 clients over the past month

Appellant has provided limited consent to disclose confidential communications with counsel wherein she was advised of hers right to a timely appeal, counsels' progress on the case, the request for this enlargement of time, and wherein she consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPELAS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 360 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 6 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that both Appellant's civilian and military counsel have 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]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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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 October 2024.

[redacted]
JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
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United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 7 November 2024

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

Pursuant to Rule 23.3(m) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **14 December 2024**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 353 days have elapsed. On the date requested, 390 days will have elapsed.

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

Military appellate defense counsel is currently assigned 16 cases, with 8 initial briefs pending before this Court. Through no fault of Appellant, military appellate defense counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. Accordingly, an enlargement of time is necessary to allow military appellate defense counsel to fully review Appellant's case and advise Appellant regarding potential errors. Since filing EOT 9 in this case, military appellate defense counsel filed the Reply Brief in *United States v. Holmes* (Misc. Dkt. No. 2024-1, USCA Dkt. No. 24-0224/AF) with the Court of Appeals for the Armed Forces (CAAF) and prepared for and argued on behalf of the appellant in *United States v. Greene-Watson* (ACM 40293, USCA Dkt. No. 24-0096/AF) at the outreach oral argument with the CAAF on 10 October 2024.

Military appellate defense counsel is currently finishing the Grant Brief and Joint Appendix in *United States v. Arroyo* (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF) due to the CAAF on 12 November 2024.

This case is currently military appellate defense counsel's second priority before this Court. Military appellate defense counsel has only reviewed the sealed and contraband portions of the record pursuant to this Court's order. The following case before this Court has priority over the present case:

1. *United States v. Arizpe* (ACM 40507): The unsealed portion of the verbatim transcript is 1,040 pages long and the record of trial is comprised of four volumes containing seven prosecution exhibits, one defense exhibit, 34 appellate exhibits, and one court exhibit. Military appellate defense counsel has begun minimal review of the record and will return to review once *Arroyo* is filed with the CAAF. Of note, this case was previously moved up in priority given civilian appellate

defense counsel's availability to work this case, however, that may shift pending her current availability.

Appellant's civilian appellate defense counsel's priority list is as follows.

Civilian defense counsel was retained by Appellant on 23 April 2024. Civilian counsel possesses most of the record of trial, but not the complete record of trial (but has not reviewed certain portions which are contraband given their location in Washington, DC), and has completed her review of the transcript of the record of trial. Counsel has commenced the drafting of the appellate brief in this case and expects that the first draft of the brief will be completed by 8 November 2024 for submission to military appellate counsel for review and editing. Counsel also represents MSgt Clark related to other administrative matters including pay and allowances, household goods and other resultant issues from her conviction, and has spent significant effort in attempting to resolve these matters.

Civilian counsel represents servicemembers in matters involving courts-martial, courts-martial appeals, security clearance revocations, administrative separation boards/Boards of Inquiry, and other military law related issues, including board for corrections and discharge upgrade, equal opportunity matters, and FOIA/Privacy Act matters.

1. Counsel on vacation 2 June 2024 - 5 July 2024 and the office closed; counsel traveled overseas.

2. Counsel on travel 5-8 September 2024 for family matters, for her son's return to college in Wisconsin.

3. Counsel was out of the country 18-26 October 2024 for vacation with her family and is presently on travel since 31 October 2024 (which ends on 7 November 2024) for family medical matters.

4. *Petty Officer Third Class (Navy),* counsel represented this Sailor at NJP and administrative separation processing, preparation of evidentiary submission to the command for administrative separation processing following nonjudicial punishment. Prepared and submitted response to client's Security Clearance supplemental information request from the Defense Counterintelligence and Security Agency (DCSA) on 8 October 2024.

5. *Petty Officer Second Class (Navy),* counsel represented this Sailor in a short-fused Navy administrative separation board in San Diego, CA on 24 September 2024, after the command notified her for separation processing on 15 August 2024. Following her administrative separation board, counsel reviewed FOIA response and documents received from the government, prepared client's security clearance submission and Inspector General Complaint and submitted to client on 10 October 2024, to assist client in regaining her security clearance.

6. *Lieutenant Junior* Grade (Navy), counsel represents client for a Board of Inquiry show cause proceeding, pending scheduling, as well as her security clearance matter. Counsel prepared and drafted additional response to the Statement of Reasons on 26 October 2024, as well as preparation for the BOI currently expected to be scheduled in mid-December 2024, including witness interviews and reviewing the government's submitted evidence.

7. *United States v Hirst* (NMCCA 202200208). Following the NMCCA opinion on 4 September 2024, which set aside the findings and sentence with prejudice, counsel continues to represent the client with Article 75, UCMJ, restoration efforts, including correspondence and submission for restoration to the Marine Corps. Counsel's latest efforts including reviewing government submission regarding back pay and allowances, reviewing and responding to the

government pay audit, and assisting client with finalizing his back pay and allowances and obtaining his promotion.

8. Senior Chief Petty Officer (Navy), Administrative Separation Board. Following the board, counsel prepared a second letter of deficiency which was submitted on 3 October 2024 following new evidence that the Commanding Officer was fired for a loss of confidence following the board and our preparation and submission of an IG Complaint, and the board members revealed they considered improper evidence during board deliberations. Since the last EOT, the Record of Proceedings from the command was received, counsel reviewed and continues to represent client in his multiple IG complaints against his command and the multiple individuals involved in hostile work environment.

9. *Major (Air Force),* counsel reviewed OSI report of investigation, received and reviewed the FOIA response, and prepared and submitted on 29 October 2024 the Privacy Act Amendment Request and appeal of the OSI Criminal Titling decision of law enforcement.

10. *Sgt (Marine Corps*), Security Clearance Matter. Representing client with his appeal with the Defense Office of Hearings and Appeals (DOHA) after the DOHA decision to revoke client's security clearance. Currently gathering, reviewing and preparing client's brief to the DOHA for his court hearing, date of hearing to be scheduled.

11. *United States v. Raco* (*SPCM, Marine Corps*), San Diego. Case was pending a contested trial in mid-November, however, after the first Article 39a motions session and the court's order to the government for discovery, the trial has been rescheduled and a second round of pretrial motions is scheduled for 20 November, with pretrial motions due on 8 November 2024. Pretrial preparation continues with expert interviews, witness interviews and review of late submitted discovery from the government.

12. *LJ v USN* (*Marine Corps*), reviewed and assisted response to court order regarding outstanding matters in FOIA lawsuit. Continued preparation of petition for discharge upgrade with the Naval Discharge Review Board.

13. *SSgt (Marine Corps*), after obtaining client's release from pretrial confinement, counsel is involved in investigation and preparation of the case towards anticipated court-martial. Demand for speedy trial has been made, and counsel has submitted FOIA and discovery requests to prepare for trial.

14. *CWO2 (Navy)*, counsel represents client with NJP appeal, response to security clearance matter and newly ordered Board of Inquiry (5 November 2024), with expected date before the end of the calendar year. Board preparations underway, including evidence gathering and review and witness preparation.

15. *LTJG (Navy),* counsel represents client in post-BOI matters, which included preparation and submission on 31 October 2024 of client's rebuttal to the 2019 withholding of her promotion to O-3.

16. *Mr. DK (former Navy),* counsel represents client in a Privacy Act Amendment request to Navy NCIS to appeal the Criminal Titling decision of law enforcement. Counsel also prepared and submitted client's Inspector General Complaint on 14 October 2024, based on the government's violation of HIPAA law when improperly disclosing his medical records to law enforcement.

17. *CDR (Navy),* counsel represents client in a command investigation after a complaint of misconduct was made and a civilian obtained a restraining order against him. Counsel assisted with client with providing his evidence and statement on 4 November 2024 to the command investigator and obtaining a dismissal of the restraining order.

18. Counsel volunteers at a local high school for the after-school mock trial program, assisting students with preparing for the county-wide competition.

19. Counsel has a very robust FOIA/Privacy Act practice and has submitted numerous FOIA/PA requests and appeals on behalf of at least 5-8 clients over the past month, and reviewing government responses to appeals for an additional 5 clients.

Appellant has provided limited consent to disclose confidential communications with counsel wherein she was advised of hers right to a timely appeal, counsels' progress on the case, the request for this enlargement of time, and wherein she consented to the request for this enlargement of time.

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

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 7 November 2024.

Respectfully submitted,

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13 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPELAS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant over 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 390 days in length. Appellant's over 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 5 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that both Appellant's civilian and military counsel have 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]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 November 2024.

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40540**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adrienne L. CLARK	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 11 January 2024, Appellant's military appellate defense counsel submitted a Motion for Enlargement of Time (First) with this court.[1] This court granted the motion on 17 January 2024. This court also granted defense motions for enlargement of time on 12 March 2024 and 11 April 2024.

On 6 May 2024, Appellant's civilian appellate defense counsel, Ms. Bethany Payton-O'Brien, submitted a notice of appearance in this case.

On 8 May 2024, both counsel for Appellant submitted a Motion for Enlargement of Time (Fourth) requesting an additional 30 days to submit Appellant's assignments of error. Counsel stated that their requested date of 17 June 2024 would be 210 days after docketing. In an order dated 10 May 2024, this court granted the motion. In that order, the court required Appellant's counsel, in any subsequent motions for enlargement of time, to state:

> (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

Additionally, we stated: "Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances."

On 7 June 2024, both counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit

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[1] The Government has opposed all motions for enlargements of time in this case.

Appellant's assignments of error. In an order dated 17 June 2024, this court granted the motion. In that order,

> [t]he court required counsel to address the above four matters in any future requests for enlargements of time, but did not require counsel answer each statement in the affirmative as a prerequisite to granting the enlargement of time. With this clarification, we expect our previous order will be followed in any future requests for extensions of time in this case.
>
> . . . .
>
> As stated in our previous order, counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal; and any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

Thereafter, the court granted defense motions for enlargement of time on 11 July 2024, 9 August 2024, 10 September 2024,[2] and 7 October 2024. Accordingly, Appellant's brief to the court was due on 14 November 2024.

On 7 November 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Tenth) requesting an additional 30 days to submit Appellant's assignments of error. Counsel stated that on 14 December 2024, the date the requested enlargement of time period would end, 390 days will have elapsed since docketing. Counsel did not identify exceptional circumstances. Counsel did not request a status conference. The court denied this motion on 13 November 2024.

On 14 November 2024, counsel for Appellant submitted a Motion for Reconsideration of Enlargement of Time (Tenth) with this court and requested a status conference to be held the same day. The Government submitted a general opposition to the motion, with no comment on the request for a status conference.

In their request for reconsideration, counsel explain events that occurred after they submitted their 7 November 2024 motion. These events include speaking to Appellant "regarding the status of the case and to determine which record to continue reviewing first" as another case was docketed before the present case, holidays and other non-duty time periods, and efforts with other matters before this court, our superior court, or before other authorities. Counsel do not specifically assert any of these events are "exceptional

[2] This defense motion was submitted out of time.

circumstances." Additionally, counsel for Appellant argue that denial of the requested extension of time "effectively stripped [Appellant] of her right to counsel of her choosing for appeal, violating her constitutional and statutory rights." They assert that this court has "impede[d] a criminal defendant's right to counsel of her choosing."

This court is mandated to process appeals in a timely manner. *See*, *e.g.*, *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("Ultimately the timely management and disposition of cases docketed at the Courts of Criminal Appeals is a responsibility of the Courts of Criminal Appeals."). In managing its own appellate practice, this court provided counsel clear expectations. After Appellant was represented by both civilian and military appellate defense counsel, this court provided notice that it expected counsel to file a brief no later than 360 days after docketing absent exceptional circumstances. The court also invited counsel to request a status conference to ensure the timely processing of Appellant's case. Counsel failed on both fronts; accordingly, the court denied the defense motion for an extension of time beyond 360 days after docketing.

It is not for this court to dictate how counsel run their appellate practices, including the priority of counsel's cases. But we do expect counsel to appreciate the gravity of our orders concerning the "management and disposition of cases" before us. The court is cognizant that military appellate counsel are limited resources who generally cannot refuse to represent eligible clients. Civilian appellate defense counsel, however, generally have great flexibility in accepting clients, and surely would not take on a matter knowing their caseload would prevent them from effecting their representation within given time constraints. Prudence would suggest that when counsel anticipate they cannot follow this court's directives for any reason, including steady-state manning and workload challenges, counsel should seriously consider accepting the court's invitation to hold a status conference and explain their challenges at the earliest opportunity.

The court finds nothing exceptional in Appellant's motion for reconsideration. However, Appellant's counsel has convinced us that, without this enlargement of time, they will fail in their responsibility to represent Appellant competently on appeal. Also, it appears counsel will not need to request yet another extension of time. Finally, we are persuaded by Appellant's agreement to past and future enlargements of time as necessary for her counsel to complete the assignments of error brief.

The court has considered Appellant's motion, this court's Rules of Practice and Procedure, the Government's opposition, case law, and judicial economy.

Accordingly, it is by the court on this 19th day of November, 2024,

ORDERED:

Upon reconsideration, Appellant's Motion for Enlargement of Time (Tenth) is **GRANTED**. Appellant shall file any assignments of error not later than **14 December 2024**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR RECONSIDERATION OF ENLARGEMENT OF TIME (TENTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 14 November 2024

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

Pursuant to Rule 31.1 of this Court's Rules of Practice and Procedure, MSgt Clark moves for reconsideration of this Court's Order denying her Motion for Enlargement of Time (EOT) (Tenth). The denial effectively stripped MSgt Clark of her right to counsel of her choosing for appeal, violating her constitutional and statutory rights. This Court should grant the Motion for EOT 10 to permit MSgt Clark time to exercise her rights. Undersigned counsel respectfully requests a status conference today, 14 November 2024, given the Assignments of Error (AOE) are due today. Both counsel are available today, tomorrow, and next week.

Statement of Facts

This motion adopts, by reference, the facts provided in MSgt Clark's Motion for EOT 10. In addition, the following facts are provided.[1]

Since filing EOT 10 on Thursday, 7 November 2024, there was a family day and Veterans Day holiday weekend (8-11 November 2024). Military appellate defense counsel filed the Grant

[1] There was a one-day delay in filing this motion for reconsideration given the need to get MSgt Clark's limited consent to disclose the confidential information contained in this section. She has since limitedly consented. MSgt Clark is currently confined.

Brief and Joint Appendix (JA)[2] in *United States v. Arroyo*, (ACM 40321 (f rev), USCA Dkt. No. 24-0212/AF), with the Court of Appeals for the Armed Forces (CAAF) after hours on Tuesday, 12 November 2024. On Tuesday, 12 November 2024, military appellate counsel spoke with MSgt Clark regarding the status of the case and to determine which record to continue reviewing first. MSgt Clark approved of military appellate defense counsel's proposed plan to complete her review of *United States v. Arizpe* (ACM 40507) prior to reviewing MSgt Clark's record. MSgt Clark expressed the desire for more time to discuss all the issues, including those potentially raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), with both her counsel. MSgt Clark specifically requested military appellate defense counsel to also review her record to discuss the issues she wanted raised. Military appellate defense counsel advised MSgt Clark of her intent to complete review, edit/add to the draft brief, and file by 14 December 2024, the requested EOT deadline. MSgt Clark agreed to the timeline because she wants to ensure military appellate defense counsel has time to complete her review as well and to draft any potential additional issues.

On Wednesday, 13 November 2024, military appellate defense counsel continued her review of the record of trial in *Arizpe* given the communications with and intent of MSgt Clark. Military appellate counsel was occupied from noon until the end of the duty day with a medical appointment for her son.[3] Since seeing the Court's denial of EOT 10 after hours yesterday, military appellate defense counsel has turned to review of the record of trial in this case. Consequently, an

[2] Military appellate defense counsel asked Government appellate counsel to provide the documents it requested be included in the JA, but Government appellate counsel refused stating the rules make it the appellant's exclusive responsibility to compile and redact the JA. As such military appellate defense counsel was solely responsible for the JA.

[3] Military appellate defense counsel elects to not provide further details given all filings are made public. However, further details may be shared in a status conference.

EOT may be necessary in the *Arizpe* case. The reasoning for reviewing *Arizpe* first was to ensure there was enough time to get the draft brief through rounds of review that are not required when working with civilian appellate defense counsel such as in MSgt Clark's case. Additionally, *Arizpe* was docketed with this Court before MSgt Clark's case. As stated in EOT 10, military appellate defense counsel in the last month since filing EOT 9, filed the Reply Brief in *United States v. Holmes* (Misc. Dkt. No. 2024-1, USCA Dkt. No. 24-0224/AF) with the CAAF and prepared for and argued on behalf of the appellant in *United States v. Greene-Watson* (ACM 40293, USCA Dkt. No. 24-0096/AF) at the outreach oral argument with the CAAF on 10 October 2024. As stated above, military appellate counsel also filed the Grant Brief and JA in *Arroyo* with the CAAF. There was no time in between for military appellate defense counsel to review MSgt Clark's record, which is thirteen volumes, prior to the denial of EOT 10. Not stated in EOT 10 was that military appellate defense counsel had an emergency medical issue[4] the week of 20 October 2024, which impacted her ability to perform her job.

Additionally, as of today, the draft brief will not be ready for military appellate defense counsel review until at least Monday, 18 November 2024. The reason for the delay since EOT 10 was filed is due to civilian appellate defense counsel's emergent work on a former Petty Officer (Navy)'s case before the Court of Federal Claims. Civilian appellate defense counsel is presently representing this client who previously filed a Pro Se lawsuit in the Court of Federal Claims. When this client's request for assignment of a pro bono attorney was denied by the judge in her case, and she was unable to locate any pro bono attorney to assist her, this client requested civilian appellate defense counsel to represent her and submit her motion for judgement on the administrative record

[4] Military appellate defense counsel is willing to disclose more details in a status conference, but not in this filing as it is made public.

(similar to a summary judgement motion). Civilian appellate defense counsel has spent the last six days drafting, researching and preparing the motion, which is due in the Court of Federal Claims on 18 November 2024. The Administrative Record in this client's case involves over 1,200 pages and involves numerous issues related to the legal and factual sufficiency of nonjudicial punishment, administrative separation board, and the NDRB and BCNR filings. Civilian appellate defense counsel has been diligent in preparing the motion, which presently is close to 70 pages in length. Due to this matter, counsel was unable to finish the brief in MSgt Clark's case by 9 November 2024, as expected as of the filing of EOT 10. There are currently six anticipated AOEs in this case.

Law and Argument

This motion should be granted because the Court did not have the benefit of additional information about MSgt Clark's wishes and counsels' duties and progress over the last enlargement period. This motion should also be granted as the denial of EOT 10 deprives MSgt Clark of her right to counsel. Granting this motion recognizes the necessity of affording counsel the opportunity to present MSgt Clark's issues to this Court.

"The Supreme Court has extended the right to counsel to first appeals guaranteed as a matter of right." *United States v. Brooks*, 66 M.J. 221, 223 (C.A.A.F. 2008) (citing *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985)). In the military, appellants also have a statutory right to hire civilian appellate counsel to represent them on appeal. Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870. This Court's denial of the Motion for EOT 10 stripped MSgt Clark of her constitutional and statutory right to appellate counsel of her choosing. Civilian appellate defense counsel has reviewed the record of trial and is still working on the draft brief. Due to her unexpected, emergent work on another case, she was unable to finish the draft by 9 November

2024. Currently, she anticipates finishing the first draft of the brief by Monday, 18 November 2024. However, MSgt Clark has expressed her desire to discuss the issues raised further and potentially elect to file additional issues pursuant to *Grostefon*. MSgt Clark not only consents to EOT 10, but specifically requested it.

When, as here, courts impede a criminal defendant's right to counsel of her choosing, the error is structural. *McCoy v. Louisiana*, 584 U.S. 414, 428 (2018) (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006)). Structural errors impact the proceedings themselves, such that they cannot serve their function as vehicles of determining guilt and innocence, and "no criminal punishment may be regarded as fundamentally fair" when it arises from a structurally defunct process. *Arizona v. Fulimante*, 499 U.S. 279, 310 (1991). This is true both at trial and on appeal. *See Martinez v. Court of Appeal*, 528 U.S. 152, 160-61 (2000) (reasoning that the underlying concerns necessitating the Sixth Amendment right to representation at trial are equally present for an appellant on appeal). Further, the risks associated with denial of appellate counsel of one's choosing are exasperated when the appellate attorney provided to an appellant is employed by the same Government prosecuting her. *Id*. ("On appellate review, there is surely a . . . risk that the appellant will be skeptical whether a lawyer, who is employed by the same government that is prosecuting him, will serve his cause with undivided loyalty.")

MSgt Clark chose civilian appellate defense counsel to also represent her on appeal. Civilian appellate defense counsel has completed review of the record and is almost done with the initial draft of the AOEs. Military appellate defense counsel is now continuing review of the record of trial anticipating receiving the draft brief next week. It will take military appellate defense counsel at least a week and a half to complete review of the record of trial, which consists of a verbatim transcript that is 1,579 pages long and a record of trial comprised of 13 volumes

containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits. The requested time is necessary for civilian appellant defense counsel to finish the first draft of the AOEs, military appellate defense counsel to finish review of the record of trial, both counsels to advise MSgt Clark on any additional *Grostefon* issues, and for military appellate defense counsel to edit/add to the draft AOEs.

Additionally, given MSgt Clark's desire for military appellate defense counsel to complete her review of the record and brief issues, this Court should consider *United States v. May*, 47 M.J. 478 (C.A.A.F. 1998), in assessing the relief sought in this motion for reconsideration. That case underscored that this Court's independent review is no substitute for the briefing by appellate defense counsel on behalf of an individual appellant. *Id.* at 481; *see also United States v. Roach*, 66 M.J. 410, 418 (C.A.A.F. 2006). Military appellate defense counsel has an obligation to MSgt Clark under Article 70, UCMJ, to serve as her "champion on appeal." *Douglas v. California*, 372 U.S. 353, 356 (1963).

Here, military appellate defense counsel has only just been able to turn her focus to MSgt Clark's case considering her extensive docket and as articulated in EOTs 1-10. Military appellate defense counsel has ceased her review of *Arizpe* and altered the course of action agreed to by her client in light of this Court's denial of EOT 10. Both military appellate defense counsel and civilian counsel are actively working MSgt Clark's case. Military appellate defense counsel does not have sufficient time to complete her review of the record and brief any potential *Grostefon* issues by the current deadline of 14 November 2024. This Court should grant additional time to ensure MSgt Clark's military appellate defense counsel has sufficient time to review the record of trial and both counsel have ample time to effectively brief multiple assignments of error in accordance with the MSgt Clark's wishes.

WHEREFORE, MSgt Clark respectfully requests that this Honorable Court reconsider its denial of the requested EOT 10.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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14 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPELAS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION OF ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Reconsideration of 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
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United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 14 November 2024.

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40540**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Adrienne L. CLARK	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 19 November 2024, counsel for Appellant submitted a second Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel. Appellant's counsel aver they have consulted with counsel for the Government, who consents to this motion.

Appellant requests counsel for both parties be permitted to examine the following sealed materials in the record of trial: Appellate Exhibits LXIII and LXV, which were reviewed by trial and defense counsel at Appellant's court-martial. In addition, Appellant requests permission for her military appellate counsel to transmit the sealed material to her civilian appellate counsel, Ms. Bethany Payton-O'Brien, who has offices in California and Illinois.

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).

The court finds Appellant has made a colorable showing that review of the sealed materials is necessary to fulfill appellate counsel's responsibilities.

Accordingly, it is by the court on this 20th day of November, 2024,

ORDERED:

Appellant's Consent Motion to Examine Sealed Material and Transmit to Civilian Counsel is **GRANTED**.

Appellate defense counsel and appellate government counsel may examine **Appellate Exhibits LXIII and LXV**, subject to the following instructions:

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

Appellant's military appellate counsel is permitted to scan a hard copy and to transmit encrypted files containing the sealed materials to Appellant's civilian appellate counsel, Ms. Bethany Payton-O'Brien, via DoD SAFE.

Except as specified in this order, no counsel will photocopy, photograph, or otherwise reproduce the sealed material, nor disclose nor make available its contents to any other individual, without this court's prior written authorization.

Once all pleadings in this case are filed with the court, appellate defense counsel shall destroy all copies of the sealed materials created and transmitted to Ms. Peyton-O'Brien. Appellate defense counsel will provide confirmation to this court and to appellate government counsel that all such copies have been destroyed.

FOR THE COURT

[redacted]

SEAN J. SULLIVAN, Maj, USAF
Deputy Clerk of Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**CONSENT MOTION**
Appellee	)	**TO EXAMINE SEALED**
	)	**MATERIAL AND TRANSMIT**
	)	**TO CIVILIAN COUNSEL**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
ADRIENNE L. CLARK	)	No. ACM 40540
United States Air Force	)	
Appellant	)	19 November 2024

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

Pursuant to Rules 3.1 and 23.3(f) of this Court's Rules of Practice and Procedure and Rule for Courts-Martial (R.C.M.) 1113(b)(3(B)(i), the Appellant moves for both parties, to include civilian appellate defense counsel, to examine the following sealed materials:

1) Appellate Exhibit LXIII – Email from Joseph Lingenfelter RE: Immunized Interview of MSgt Clark
2) Appellate Exhibit LXV – Memorandum from Capt Nathaniel Le, RE: Immunized Interview of MSgt Clark

The original consent motion was missing these two sealed appellate exhibits. However, during undersigned counsel's review of the record, both were originally sealed with Appellate Exhibits LXII, LXIV, and LXVI on the record at 1284. Neither exhibit contain contraband. The Appellant requests permission for undersigned counsel to also copy and transmit these two additional sealed exhibits to Ms. Bethany Payton-O'Brien, his civilian appellate defense counsel. Ms. Payton-O'Brien has offices located in San Diego, CA, and Chicago, IL, and is unable to travel to view the sealed materials in person. The military judge, trial counsel, and defense counsel at trial reviewed these materials.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examination of these matters is reasonably necessary to appellate counsels' responsibilities, undersigned counsel asserts that review of the referenced exhibits is necessary to conduct a complete review of the record of trial and be able to advocate competently on behalf of Appellant.

Moreover, a review of the entire record of trial is necessary because this Court is empowered by Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, to grant relief based on a review and analysis of "the entire record." To determine whether the record of trial yields grounds for this Court to grant relief under Article 66, UCMJ, 10 U.S.C. § 866, appellate defense counsel must, therefore, examine "the entire record."

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

United States v. May, 47 M.J. 478, 481, (C.A.A.F. 1998). The sealed materials referenced above must be reviewed to ensure undersigned counsel provides "competent appellate representation." *Id*. Accordingly, examination of these exhibits is reasonably necessary since undersigned counsel cannot fulfill her duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing the complete record of trial.

Appellate Government Counsel have been consulted about this motion and consent to the relief sought by the Appellant.

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

Respectfully submitted,

[redacted]

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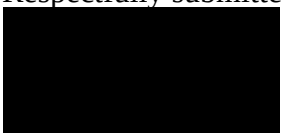
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 19 November 2024.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 2
	)	
Master Sergeant (E-7)	)	No. ACM 40540
ADRIENNE L. CLARK	)	
United States Air Force	)	12 December 2024
Appellant	)	

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

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

[2] Issue VII through IX are raised in accordance with *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1992).

Statement of the Case

A panel of officer members sitting as a general court-martial tried Master Sergeant (MSgt) Clark on 30 May to 3 June 2023. (Statement of Trial Results, Special Order A-31, Special Order A-03, Special Order A-20, R. 357, 838, 1545-1546). MSgt Clark was found guilty of six specifications of service discrediting conduct[3] and one specification of sexual abuse of a child in violation of Articles 134 and 120b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 934 and 920b (2019). (Entry of Judgment (EOJ)). MSgt Clark was sentenced to a reprimand, reduction to the grade of E-1, 32 months' confinement, and a dishonorable discharge from the United States Air Force (USAF). (R. 1591). The Convening Authority deferred the reduction in rank until the EOJ and waived all automatic forfeitures for six months for the benefit of her dependents. (Convening Authority Decision on Action (CADA)). The Convening Authority took no action on the findings and the judgement was entered on 11 July 2023. (CADA; EOJ).

Statement of Facts

On 7 January 2020, Yahoo flagged emails sent from the "applejacks69612@yahoo.com" account to the "luckymango69612@yahoo.com" account. (App. Ex. XL). Yahoo's active monitoring system matched the unique digital fingerprint of photos embedded in these emails to the National Center for Missing and Exploited Children's (NCMEC) database of known child sexual abuse material (CSAM). (R. 876). A Cyber Tipline report was sent to NCMEC. (App. Ex. XL). Yahoo's investigators then reviewed other photos from the "applejacks" account in order to identify the user. (R. 879). Yahoo discovered pictures of a male in an Air Force uniform with a partially visible name tape that showed "CASILL". (R. 915). Based upon browser cookies and login records, the

[3] Extramarital conduct, indecent language, indecent conduct, general disorder offense, and possession and distribution of child pornography.

investigators were also able to tie the "applejacks" account to the "luckymango" account as well as to a "nakedgators@yahoo.com" account. (R. 885, 916). Yahoo sent this information, as well as other identifiers, to NCMEC in a supplemental report. (R. 884). NCMEC contacted the Air Force Office of Special Investigations ("OSI") with this information. (R. 1005). OSI used the identifying information provided to open an investigation into MSgt Nathan Casillas. (R. 1005).

MSgt Casillas was interviewed and told OSI agents that he was the primary user of the "luckymango" account but that the "applejacks" account was primarily used by MSgt Adrienne Clark. (R. 1010). OSI agents subpoenaed all account information and all emails from both the "applejacks" account and the "luckymango" account from Yahoo. (R. 1011). The subpoena return on the "applejacks" account included emails that formed the basis for several charged offenses. (Pros. Ex. 2).

The emails sent from the "applejacks" account included a fictional story involving sexual conduct between the two and a notional 16-year-old female. (Pros. Ex. 2). The emails included a video MSgt Clark made of herself masturbating under a table. (Pros. Ex. 2). In the video, MSgt Clark's daughter was in the room, looking at an iPad. (Pros. Ex. 2). The emails also contained a video of MSgt Clark defecating on the floor of a bathroom or locker room. (Pros. Ex. 2). Finally, the emails contained several images of child pornography embedded in the emails originally flagged by Yahoo and NCMEC. (Pros. Ex.4).

I. THE GUILTY FINDINGS TO SPECIFICATIONS 1, 2, 3, 4, 6, AND 7 OF CHARGE I ARE FACTUALLY INSUFFICIENT. THE GUILTY FINDINGS TO SPECIFICATION 1 OF CHARGE I AND THE SPECIFICATION OF CHARGE II ARE LEGALLY INSUFFICIENT.

Additional Facts

Additional facts relevant to each specification are included in discussion of that specification below.

Standard of Review

This Court reviews issues of factual and legal sufficiency de novo. Article 66(d), U.C.M.J., 10 U.S.C. § 866(d); *United States v. McAlhaney*, 83 M.J. 164, 399 (C.A.A.F. 2023).

Law and Argument

In evaluating the factual sufficiency of a guilty finding for an offense that occurred prior to 1 January 2021, this Court takes a "fresh, impartial look" at the evidence presented at trial, "giving no deference to the decision of the trial court on factual sufficiency" beyond the requirement in Article 66, UCMJ, to take into account that the trial court saw and heard the witnesses. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). During such a review, the appellate court adopts "neither a presumption of innocence nor a presumption of guilty" to independently determine whether the evidence constitutes proof beyond a reasonable doubt for each required element. *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 Government's burden is to present evidence that proves guilt to "an evidentiary certainty" and that must "exclude every fair and reasonable hypothesis of the evidence except that of guilt." (Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para 2-5 (28 Feb. 2020).

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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979; *United States v. Phillips*, 70 M.J. 161, 166 (C.A.A.F. 2011).

A. Specification 1 of Charge I is Neither Factually nor Legally Sufficient.

The Government charged MSgt Clark with engaging in extramarital sexual conduct, specifically "genital to genital" sexual intercourse, between 1 May 2019 and 15 January

2020. (Charge Sheet). The Government's evidence only shows that the two were physically co-located during this period from 13-19 May 2019. (Pros. Ex. 6). No evidence was introduced that proved beyond a reasonable doubt that the two engaged in the charged "genital to genital" sexual intercourse during this time frame. Certainly, the two were involved in a relationship and they shared many sexual fantasies and videos with each other through the course of their relationship. However, that is not the charged conduct. No evidence of actual genital to genital sexual activity during this time frame in Virginia was presented to the members. Here, with a fresh, impartial look at the evidence, this Court cannot independently find the Government proved beyond a reasonable doubt that genital to genital contact occurred during the charged time frame.

Even if this conduct did occur, and did occur during the charged time frame, the Government did not prove this conduct to be service discrediting. The allegation of extramarital sexual conduct cannot automatically be considered service discrediting. As the CAAF recently confirmed in *United States v. Wells*, 2024 CAAF LEXIS 552 (C.A.A.F. Sept. 24, 2024), the Government need not prove that conduct actually caused a member of the public to think less of the armed forces. *Id*. at *6-7. However, it must prove that the conduct was specifically of a nature to do so. *Id*. at *7. The Government cannot rely merely on the nature of the offense itself but must show that the specific circumstances of the charged conduct would tend to bring discredit to the service. *Id*. Something about the circumstances of the conduct at issue in this case must cause it to be of a nature to bring discredit upon the armed forces. Nothing in the evidence presented on this specification creates that discredit. Any sexual conduct was discrete, private, and occurred over a period of a few days. No one else was aware of the conduct.

Although the email communications seem to show an emotional relationship between MSgt Clark and MSgt Casillas over a period of time, an emotional relationship is not criminal

under Article 134, UCMJ. The charged conduct is sexual contact—genital to genital contact—that requires the physical co-location of the two individuals involved. The Government's evidence only shows that the two were physically in the same geographical location during the charged time period for a period of a few days in May 2019 when the two were both in a temporary additional duty status (TDY) to Arlington, Virginia, staying in separate hotels. (Pros. Ex. 6). Although the Government attempted to argue that MSgt Clark "orchestrated" TDY orders to facilitate the alleged affair, no evidence of such orchestration was presented during the trial. Regardless, even if the two engaged in private, consensual sexual intercourse over those few days in May 2019, this behavior would not bring discredit to the armed forces.

The guilty finding to this specification is also legally insufficient, as even if the Government's evidence is viewed in its most favorable light, no reasonable factfinder could find the terminal element beyond a reasonable doubt. The Government chose not to charge this offense as conduct prejudicial to good order and discipline. (Charge Sheet). Instead, it selected only to allege the conduct as "of a nature to bring discredit upon the armed forces." (Charge Sheet). As the CAAF noted in *Wells*, the President has explained that "'Discredit' means to injure the reputation of the armed forces and includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem." *Wells*, 2024 CAAF LEXIS 552 at *10 (citing MCM pt. IV, para. 99.c.(1)). Further, while "extramarital conduct that is private and discreet in nature may not be service discrediting by this standard, under the circumstances, it may be determined to be conduct prejudicial to good order and discipline." *Id*.

The Military Judge included several factors in his instructions on this specification that were misleading to the members. (R. 1440-41). These factors come from the President's

explanation of the offense but are provided in order to determine whether conduct might be "prejudicial to good order and discipline or. . . of a nature to bring discredit upon the armed forces, or both." MCM, pt. IV, para. 99.c.(1). These factors, listed in full for the members, did not distinguish between the two theories of liability. (R. 1440-41).

As stated, the government only proceeded on a service discrediting theory. The Government made the charging decision in this case and chose not to charge the conduct as "prejudicial to good order and discipline." (See Charge Sheet). Therefore, it was required to prove that genital to genital sexual conduct between MSgt Clark and MSgt Casillas was of a nature to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem The evidence at trial simply does not support such a finding. Even if the charged genital to genital sexual conduct happened over the six-day time frame when they were co-located, there was no evidence presented by the government that it was of a nature to bring discredit to the armed forces.

During closing argument, the Government did not argue that the conduct was open or notorious, or that it was of a nature to bring disrepute or public ridicule to the armed forces. Instead, the Government focused on factors that the Military Judge erroneously included in the instructions relating to prejudice to good order and discipline. (R. 1440-41;1462). The Government argued that the pair misused Government time and resources to commit the offense. (R. 1462). While arguments of counsel are not evidence, it demonstrates the lengths the Government had to stretch to try to meet the elements of the offense as charged.

Even viewing the facts in the light most favorable to the prosecution, no reasonable trier of fact could find that the evidence proved this terminal element beyond a reasonable doubt. *Wells*, 2024 CAAF LEXIS 552 at *5. The Military Judge's inclusion of irrelevant factors, and the Government's focus on those factors caused the members to reach a conclusion not supported by the evidence.

B. Specification 2 of Charge I is not Factually Sufficient.

The petitioners in *Lawrence v. Texas*, 539 U.S. 558 (2003) challenged the constitutionality of a Texas statute that criminalized same sex sodomy. *Id*. at 562. The Supreme Court held that the state could not make the private sexual conduct of two consenting adults a crime. *Id*. at 578. It found that the Texas statute furthered no legitimate interest which could justify its intrusion into the personal and private life of individuals. *Id*. The Court noted that this case did not involve minors, persons in relationships where consent might not easily be refused, public conduct, or prostitution. *Id*.

The CAAF addressed the *Lawrence* holding and applied it to the military setting in *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). The Court determined that the question of whether an article of the UCMJ is constitutional as applied to a specific appellant's conduct requires the consideration of three things. *Id*. at 206. First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? *Id*. Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? *Id*. at 206-207. Third, are there additional factors relevant solely to the military environment that affect the nature and reach of the *Lawrence* liberty interest? *Id*. at 207.

The defense raised the *Lawrence* and *Marcum* cases in arguing that Specification 2 should be dismissed as it sought to criminalize protected speech between consenting adults. (App. Ex. VII). In his ruling, the Military Judge noted that private consensual sexual activity is not punishable as an indecent act absent aggravating circumstances. (App. Ex. XVIII at 4) (citing *United States v. Goings*, 72 M.J. 202, 205 (C.A.A.F. 2013). He listed the aggravating circumstances sufficient to make conduct punishable as indecent conduct as: open and notorious sexual activity, sexual activity involving animals, and sexual activity resulting in injury. (App. Ex. XVIII at 4). He also stated that whether an aggravating factor exists is a "factual determination that must be made by the trier of fact, not a legal determination to be

made by a court." (App. Ex. XVIII at 4) (citing *United States v. Castellano*, 72 M.J. 217, 218-19 (C.A.A.F. 2013).

Despite this acknowledgment in his ruling, none of these aggravating factors were included in his instructions to the members on Specification 2 of Charge I. (R. 1441-42). He listed the elements of the indecent language offense and then defined indecent and service discrediting according to the UCMJ. (R. 1441-42). He did not instruct the members that in order to be indecent, private sexual conduct, including language, between two consenting adults must include aggravating circumstances. He did not tell them that in order to be guilty of this offense, they had to find that the conduct included one of these aggravating circumstances. Having passed this responsibility for making the determination under *Marcum*, *Goings*, and *Castellanos* to the members, the Military Judge never informed them that it was their determination to make.

MSgt Clark asks this Court, as a *de novo* trier of fact, to consider whether or not any of the factors listed in *Lawrence* as falling outside of the protected liberty interest apply to the charged conduct. *Washington*, 57 M.J. at 399. The story sent from the "applejacks" account to the "luckymango" account concerning a fictional scenario involving a fictional 16-year-old babysitter does not implicate any aggravating factors. The story was shared between two consenting adults. No other individuals were aware of the story and it was purely a fictional account shared between two individuals. There was no actual minor identified or discussed. Had the two been together in a room sharing the same fantasies or role-playing, it likely would not have been charged. The emails were kept private and both MSgt Clark and MSgt Casillas took great pains to keep them secret, until an unrelated email prompted investigation. The means in which the content was communicated cannot make what would be private, sexual conduct protected by *Lawrence* and *Marcum* indecent where it remained private and between the two consenting adults involved in the relationship. Given the lack of aggravating

circumstances, this Court should not be convinced of MSgt Clark's guilt beyond a reasonable doubt.

C. Specification 3 of Charge I is not Factually Sufficient.

In Specification 3 of Charge I, MSgt Clark was charged with indecent conduct for "recording herself masturbating *in front of* a child and transmitting that recording" to MSgt Casillas. (Charge Sheet). Separate from the issue of "in the presence of" raised in the Specification of Charge I, the Government's use of the language "in front of" raises its own question of proximity to, and awareness of, the child.

The video depicted Master Sergeant Clark masturbating below a table. (Pros. Ex. 2). Her daughter was looking at an iPad and was unaware of what she was doing. (Pros. Ex. 2). The use of the term "in front of" alleges an open act done not only in the child's presence but with her awareness. The evidence simply does not support such a factual finding. After reviewing the evidence and the language chosen by the Government in crafting this offense, this Court should find that it is not convinced beyond a reasonable doubt that MSgt Clark committed this conduct "in front of" a child.

D. Specification 4 of Charge I is not Factually Sufficient.

The Government's evidence did not prove beyond a reasonable doubt that the conduct charged in this specification was of a nature to bring discredit to the armed forces. The Government cannot rely on the charged conduct to carry its weight on the terminal element. *Wells*, 2024 CAAF LEXIS 552 at *7. It must provide evidence of the specific circumstances and facts of the charged event that make it of a nature to bring discredit to the service in the eyes of the public on this occasion. *Id*.

Here, the Government has again failed to meet its burden. While the act itself may be distasteful, the circumstances were not such that a member of the public would think less of the armed forces. Primarily because no member of the public was ever aware that it occurred.

MSgt Clark made a recording for MSgt Casillas that went only to him. (Pros. Ex 2). The recording was not shared with any members of the public. After MSgt Clark made the recording, she cleaned up the floor and no one was ever aware of what she had done until the email traffic came to light. (R. 1485). The Government pointed to the fact that someone might have entered the bathroom while she was defecating as an indicator that this terminal element was satisfied. (R. 1466). However, this was a military facility not open to the public at large. While the fact that this was done in a military facility might lend itself to a finding of prejudice to good order and discipline, the Government again chose not to charge the offense under that theory of liability.

This Court's analysis should consider the private and secretive nature of the communications between MSgt Clark and MSgt Casillas. It should consider that no one was ever aware that this conduct took place until the emails came to light via a subpoena regarding a different alleged crime. It should find that the Government has failed to prove beyond a reasonable doubt that this conduct was of a nature to bring discredit to the armed forces.

E. Specifications 6 and 7 of Charge I are Not Factually Sufficient.

The Government failed to prove beyond a reasonable doubt that MSgt Clark was operating the "applejacks" email account when it was used to send CSAM material to the "luckymango" account. The Government's evidence showed that while MSgt Clark was the primary user of the "applejacks" account, she was not the sole user. Both the "applejacks" account and the "luckymango" account were created on the same date at the same time on the same IP address. (R. 887, 911). This IP address corresponded with MSgt Casillas's hotel during his TDY stay in Arlington, Virginia. (R. 889). The investigators from Yahoo found ties between the "applejacks" account, the "luckymango" account, and the "nakedgator" account because all three were logged into in the same browser session in June 2019. (R.

886). Additionally, the date of birth associated with all three accounts was MSgt Casillas's birthday. (R. 912).

Additionally, the logins to the two accounts were frequently through Virtual Private Networks (VPNs) that obscured the location of the user. (R. 915, 1328). The logins to the "applejacks" account on 7 January 2020 were from VPNs and the child pornography images were sent from an IP address belonging to a VPN. (R. 915). VPNs randomly assign IP addresses to users, unless the user requests a specific location, (R. 1329-30). There was no evidence that either MSgt Clark or MSgt Casillas requested an IP address from a specific location. (R. 1331).

In looking at the IP addresses used to log onto the "applejacks" account in the time leading up to 7 January 2020, two IP addresses appeared rather consistently from December 2019 on. (R. 1342). These two addresses ended in 116.29 and 116.47. (R. 1342). These represent two out of a possible 254 addresses associated with the 116 IP address. (R. 978). A VPN allows a user to stay logged onto the same IP address until they either log off the VPN or are disconnected by the VPN. (R. 1337).

Although a user of the Yahoo application can only be signed into one Yahoo account at a time, a user logging in on a browser could log into more than one account at once. (R. 1337-38). Also, more than one user could log into the same Yahoo account at the same time. (R. 1338).

The consistent appearance of the same two IP addresses from a VPN that assigns them randomly establishes that the most likely explanation was that two different devices were assigned these addresses from a VPN in mid-December 2019 and the two devices remained logged into this VPN until at least 7 January 2020. (R. 1345, 1347). The first log onto "luckymango" account from 116.29 came on 15 December 2019. (R. 1343). A short time later, the same IP address was used to log onto the "applejacks" account. (R. 1344). This

same pattern occurred 3 more times, including on 7 January 2020. (R. 1344). The first log onto the "luckymango" account from the 116.47 IP address occurred on 16 December 2019. (R. 1346). This IP address was then used to log onto the "applejacks" account a few minutes later. (R. 1346). This pattern repeated two more times, including on 7 January 2020. (R. 1346). This examination of the IP addresses and log ins to the different accounts establishes that both MSgt Clark and MSgt Casillas had access to both accounts and regularly logged into both. MSgt Casillas had access to the "applejacks" Yahoo account. Further, when juxtaposed with the timeline MSgt Clark provided to the Yahoo Customer Service agent concerning her last log in, this Court can see that the IP address associated with her device is the 116.47 address. (Pros. Ex. 5; Pros. Ex. 15 at 1). The child pornography was not sent from the 116.47 IP address, it was sent from 116.29. (R. 1345).

When OSI searched MSgt Casillas's phone, they found other CSAM images that were unrelated to the images MSgt Clark was charged with possessing and distributing. (R. 1033). This fact, along with the content of the messages exchanged between MSgt Clark and MSgt Casillas demonstrate that he was the one with the interest in this material. He was the one who frequently used the term "young girl" in his fantasies and messages. (R. 1140-43).

On the other hand, the Government presented no evidence demonstrating that MSgt Clark had the knowledge of where to obtain such images, had the interest in possessing such images, or had any CSAM in her possession. It is more likely—or at least a real possibility—that MSgt Casillas used the "applejacks" account to send the charged images. The state of the "luckymango" account and the "applejacks" account also reflect an awareness by MSgt Casillas that he needed to hide his steps. The "luckymango" account was empty of any substantive emails when Yahoo provided its contents to investigators. (R. 1011). The "applejacks" account was also missing any emails from "luckymango" for the last three weeks of its existence. (R. 1148, 1349, 1503). This behavior would account for why, if he

wanted to send child pornography, whether to move it off of another device or out of another account, he would use the "applejacks" account in order to give himself plausible deniability. At the very least, MSgt Casillas's demonstrated interest, demonstrated ability to obtain such images, and access to the "applejacks" account creates a reasonable doubt in MSgt Clark's guilt to Specifications 6 and 7 of Charge I.

F. The Specification of Charge II is Not Legally Sufficient.

United States v. Schmidt, 82 M.J. 68 (C.A.A.F. 2022) is the only case by the CAAF to address the question of whether the current iteration of a "lewd act upon a child" as proscribed by Article 120b(c), UCMJ, requires merely the physical presence of a child, or also the child's awareness to the act in question. Unfortunately, the opinion in *Schmidt* failed to answer the question, as a fractured Court left the matter unresolved. Judge Sparks, announcing the judgment of the Court determined that "in the presence of" did require an awareness of the conduct by the child. *Id*. at 74. He based this analysis on the changes to the statute from its previous forms. The expansion of the definition "in the presence of" to include "via any communications technology" and the elimination of a physical presence requirement led him to find that the focus of the revised statute remains on preventing the type of harm to children caused by exposure to indecent and immoral conduct. *Id*. In order for the conduct to have the type of harm Congress sought to prevent, there must be a sufficient "conjunction" of at least one sense of the victim with those of the accused that makes the child aware of the conduct. *Id*. *(citing United States v. Knowles*, 15 C.M.A. 404, 406 (C.M.A. 1965)).

This Court has also faced this question before in *United States v. Cabuhat*, 83 M.J. 755 (A.F. Ct. Crim. App. 2023). Unlike this case, *Cabuhat* was a guilty plea,[4] requiring this

[4] The appellant pled guilty to the specification of Article 120b(c), UCMJ, with excepted words to which he pleaded not guilty. 83 M.J. at 762.

Court to maintain the guilty finding unless it found a substantial conflict between the plea and the accused's statements or other evidence of record. *Id*. at 765 (citing *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996)). In *Cabuhat*, this Court overturned its previous decision in *United States v. Burkhart*, 72 M.J. 590 (A.F. Ct. Crim. App. 2013) and held that proof of a child's awareness is not required for a conviction under Article 120b(c), UCMJ. *Id*. at 769.

While MSgt Clark acknowledges the binding precedent of *Cabuhat*, she asks this Court to reconsider the issue given the different standard of review due a guilty finding reached at a contested court-martial. Judge Sparks' analysis in *Schmidt* is persuasive in light of the breadth of conduct that could be criminalized by a statute that provides no requirement for physical proximity or awareness of the child. Without the child's awareness as a guardrail, the scope of potentially criminal behavior is unconstitutionally vague and overbroad. Article 120b(c), UCMJ, does not require physical presence nor provide input on how far from the accused the child can be and still be considered "in the presence of." This reading of the statute could criminalize sexual conduct between parents who are sharing a hotel room with a sleeping toddler or who live in a studio apartment with no walls between living areas. With the addition of virtual presence as a possibility, this reading could criminalize sexual conduct by or between adults when a "victim" child is on the phone with another individual in the household and completely unaware of the "lewd" behavior.

The only way to constrain prosecution of Article 120b(c), UCMJ, to offenses which involve the type of harm to children caused by exposure to indecent and immoral conduct is to require that the child have some awareness of the conduct itself. MSgt Clark asks this Court to reconsider its decision in *Cabuhat* and set aside the guilty finding to the Specification of Charge II.

WHEREFORE, MSgt Clark asks this Court to set aside and dismiss Specifications 1, 2, 3, 4, 6, and 7 of Charge I and the Specification of Charge II.

II. THE SEARCH OF MASTER SERGEANT CLARK'S EMAIL ACCOUNT VIOLATED HER RIGHTS UNDER THE FOURTH AMENDMENT.

Additional Facts

On 5 February 2020, the NCMEC reported in a Cyber Tip to OSI that the "applejacks" Yahoo email account had shared several images of child pornography between the dates of 6 and 8 January 2020. (App. Ex. III at 2). Yahoo investigators tied the account, along with two other email accounts to MSgt Casillas. (App. Ex. III at 2). As part of its investigation, OSI interviewed MSgt Casillas on 24 March 2020. (App. Ex. III at 3). He told them that he had been in an extramarital relationship with MSgt Clark and that the "applejacks" and "luckymango" accounts were created for them to communicate. (App. Ex. III at 3). The investigators then sought and received a search authorization to access four email accounts from Yahoo, or Oath Holdings Inc. (App. Ex. III at 3). Three of these were the accounts originally flagged by Yahoo and the other was another tied to MSgt Clark. (App. Ex. III at 3). The warrant sought any message content related to the distribution of child pornography or extramarital sexual conduct. (App. Ex. III at 3). The authorization also sought any evidence of who used, owned, or controlled each account. (App. Ex. III at 4).

As a return for its warrant, OSI received the entirety of the emails from the requested accounts. (App. Ex. III at 5). The "luckymango" account contained no emails pertinent to the investigation. (App. Ex. III at 5). The "applejacks" account contained hundreds of emails, including every email that served as the basis for the charges against MSgt Clark. (App. Ex. III at 5).

At trial, the Defense filed a motion to suppress the fruits of the email search. (App. Ex. III). The Government called Special Agent (SA) E.P. to testify regarding the execution of the search. (R. 20). He testified that the NCMEC Cyber Tip had identified the email with

child pornography was sent between 6 and 8 January 2020. (R. 59). He also testified that he was aware the only time during the existence of the two Yahoo accounts in which travel documents showed that MSgt Clark and MSgt Casillas were physically collocated was 13-19 May 2020. (R. 58). SA E.P. testified that he was further aware that when he encountered evidence of additional misconduct, not contemplated by the scope of the search authorization, he was required to stop investigating and obtain an additional authorization. (R. 74). Yet, when he encountered evidence of potential indecent conduct or indecent language, he did not stop or endeavor to obtain an expanded search authorization. (R. 74).

The Military Judge ruled in favor of suppression. (App. Ex. XXV). He ruled that the search authorization was based upon probable cause and was sufficiently particular. (App. Ex. XXV at 16-18). However, he determined that SA E.P. was aware that the search authorization was limited to the crimes of distribution of child pornography and extramarital sexual conduct. (App. Ex. XXV at 19). Although he found that SA E.P. was authorized to review all of the emails for the evidence of these crimes, he was not permitted to conduct a "general search by opening and viewing videos and emails related to suspicions of indecent/lewd acts and indecent language." (App. Ex. XXV at 19). He found that SA E.P.'s failure to seek additional search authorization when he first encountered attachments to emails that contained evidence of crimes outside the search authority to be problematic. (App. Ex. XXV at 19). The Military Judge further found that this search was not saved by the inevitable discovery doctrine, and that suppression was an appropriate remedy. (App. Ex. XXV at 20).

The Government sought clarification of the Military Judge's ruling. (App. Ex. XIV at 1). The Military Judge provided clarification via email. (App. Ex. XIV at 1). After receiving the Military Judge's clarification, the Government filed a motion for reconsideration. (App. Ex. XV). The motion provided no new evidence but merely argued again that SA E.P. was

within the scope of the warrant when he discovered the evidence related to indecent conduct and indecent language. (App. Ex. XV at 4). The Government further argued that even if the search was outside of the scope, the items were in plain view. (App. Ex. XV at 4-6). The Defense filed a response pointing out the lack of new evidence in the Government's motion. (App. Ex. XVI). The Military Judge did reconsider his ruling, this time finding that while the "evidence of indecent/lewd acts and indecent language was obviously *outside of the scope* of materials in the search authorization, SA E.P. was searching *inside the scope* of the search authorization when he discovered them." (App. Ex. XVII at 20) (emphasis in original). He, therefore, determined that the items were in plain view and lawfully discovered. (App. Ex. XVII at 20). He further found now that SA E.P. acted in good faith and that suppression would be inappropriate. (App. Ex. XVII at 22). He reversed his prior ruling and allowed the evidence from the email accounts to be admitted. (App. Ex. XVII at 24).

Standard of Review

Courts review a military judge's ruling on a motion to suppress evidence for an abuse of discretion. *United States v. Hoffman*, 75 M.J. 120, 124 (C.A.A.F. 2016). Courts review the military judge's findings of fact for clear error and conclusions of law *de novo*. *Id*. Appellate courts review *de novo* a claim that a search authorization was overly broad such that it resulted in a general search prohibited by the Fourth Amendment. *United States v. Eppes*, 2017 CCA LEXIS 152, at *13 (A.F. Ct. Crim. App. Feb. 21, 2017) (citing *United States v. Maxwell*, 45 M.J. 406, 420 (C.A.A.F. 1996).

Law and Argument

"[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. CONST. amend. IV. Evidence obtained in violation of the Fourth Amendment is generally inadmissible. Mil. R. Evid. 311.

To comply with the Fourth Amendment, "[s]earch warrants must be specific." *United States v. Osorio*, 66 M.J. 632, 635 (A.F. Ct. Crim. App. 2008) (citing *United States v. Hill*, 459 F.3d 966, 973 (9th Cir. 2006). The purpose of the particularity requirement is to prevent general searches. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation. *United States v. Richards*, 659 F.3d 527, 541 (6th Cir. 2011) (internal citations omitted). Instead of creating bright line rules for limiting searches of electronic devices, courts have looked to what is reasonable under the circumstances. *United States v. Richards*, 76 M.J. 365, 369 (C.A.A.F. 2017).

> Where officers come across relevant documents so intermingled with irrelevant documents that they cannot feasibly be sorted at the site, the officers may seal or hold the documents pending approval by a magistrate of the conditions and limitations on a further search through the documents. The magistrate should then require officers to specify in a warrant what types of files are sought.

Osorio, 66 M.J. at 637 (internal citation omitted).

In *Osorio*, a search authorization was issued to look for photographs taken on a specific date. *Id*. at 635. Despite this, an agent opened thumbnails of photos and discovered child pornography. *Id.* at 636. She continued to search for additional evidence of this crime. *Id*. This Court found that the search exceeded the scope of the authorization and that it was not saved by the plain view doctrine. *Id*.

"The United States Supreme Court has said the plain view doctrine may 'not be used to extend a general exploratory search from one object to anther until something incriminating at last emerges.'" *Id*. at 637. The distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Here, the Military Judge's reliance on the plain view doctrine was an abuse of his discretion. The doctrine does not allow an investigator to conduct a general search beyond the scope of the authorization

looking for incriminating information. Just as this Court noted in *Osorio*, once SA E.P. came across evidence of a crime not contemplated by the scope of the authorization, he was obligated to stop and request further authority to search. *Osorio*, 66 M.J. at 637. He was aware of this requirement, but simply did not comply. (R. 74). He may not, as he did here, just continue to "stumble" into more and more evidence of crimes outside of the scope of the authorization all in the name of "plain view." The Military Judge's original ruling decided this matter correctly and his reversal on reconsideration was an abuse of his discretion.

A. The Inevitable Discovery Doctrine and Good-Faith Doctrine Do Not Apply.

Evidence that would otherwise be suppressed is admissible if it meets a limited number of exceptions to the exclusionary rule. One such exception is for evidence that inevitably would have been discovered during police investigation without the aid of the illegally obtained evidence. *United States v Wicks*, 73 M.J. 93, 103 (C.A.A.F. 2014) (internal citations omitted). For the inevitable discovery doctrine to apply, the Government must demonstrate by a preponderance of the evidence that "when the illegality occurred, the government agents possessed, or were actively pursuing, evidence or leads that would have inevitably led to the discovery of the evidence" in a lawful manner. *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012).

In his original ruling, the Military Judge did not find that the inevitable discovery exception would apply. (App. Ex. XXV at 20). He did not discuss the concept at all in his subsequent ruling. (App. Ex. XVII). There was no evidence presented by the Government that they were actively pursuing any other evidence or leads that would have led to the discovery of the disputed evidence here.

Although in his initial ruling, the Military Judge found no good faith exception, in his subsequent ruling, he determined that SA E.P. had acted in good faith. (App. Ex. XXV at 20; App. Ex. XVII at 22). This exception permits the admission of evidence which, although

unlawfully obtained, was the result of the good-faith reliance of law enforcement agents on a search authorization. *United States v. Mancini*, 2016 CCA LEXIS 660, at *24 (A.F. Ct. Crim. App. Nov. 7, 2016). The good-faith exception allows the use of such evidence if: a) the search resulted from an authorization to search issued by competent authority; b) the individual issuing the authorization had a substantial basis for determining the existence of probable cause; and c) the officials seeking and executing the authorization reasonably and with good faith relied on the issuance of the authorization or warrant. Mil. R. Evid. 311(c)(3).

In this case, the good faith exception cannot possibly be relied upon when the agent himself testified that he knew that he was required to obtain a new search authorization upon finding evidence of offenses not contemplated by the scope of the existing one. (R.73-74). The agent could not be executing the authorization reasonably and with good faith when he knew that he was not following the requirements of the law.

B. The Exclusionary Rule Should be Applied in This Case.

The exclusionary rule is a judicially created remedy for violations of the Fourth Amendment. *Weeks v. United States*, 232 U.S. 383 (1914). The rule applies to evidence directly obtained through violation of the Fourth Amendment as well as evidence that is the indirect product or "fruit" of unlawful police activity. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). The exclusionary rule applies only where it results in appreciable deterrence for future Fourth Amendment violations and where the "benefits of deterrence must outweigh the costs." *Herring v. United States*, 555 U.S. 135, 141 (2009).

The Military Judge initially determined that the deterrence of future unlawful searches did outweigh cost to the justice system of excluding the evidence. (App. Ex. XXV at 20-21). On reconsideration, that analysis was reversed. (App. Ex. XVII at 22). This is exactly the type of case that calls out for the exclusionary rule. The agent knew what the right thing to do was. (R. 74). He did not do it. (R. 74); *see United States v. Lattin*, 83 M.J. 192 (C.A.A.F. 2023).

Instead, he continued to exceed the scope of the authorization and to search for any evidence of criminal activity he could see while in the "applejacks" email account. Suppression of this evidence would not end the case against MSgt Clark. The evidence from Yahoo and NCMEC concerning the images emailed from the "applejacks" account on 7 January 2020 would still be admissible. Evidence from within the scope of the authorization—that which was pertinent to the extramarital sexual conduct or the distribution of child pornography—would remain. What would be excluded would be evidence of indecent conduct or indecent language that SA E.P. discovered through his search that knowingly exceeded the bounds of the search authorization. On balance, the deterrence that would result to law enforcement officers would outweigh the costs to the justice system of losing the evidence of three specifications.

WHEREFORE, MSgt Clark asks this Court set aside Specifications 2, 3, and 4 of Charge I, the Specification of Charge II, and the sentence.

III. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE CHALLENGE TO TWO MEMBERS.

Additional Facts

Lt Col R.M. and Capt J.S. were among the twelve officers named to the panel in MSgt Clark's case. During voir dire, Lt Col R.M. stated that he had worked closely with the Trial Counsel and the Staff Judge Advocate on several cases in his squadron. (R. 396). He communicated regularly with the Trial Counsel on two separate matters and met in person on several occasions. (R. 404). In those interactions, Lt Col R.M. relied upon Trial Counsel's advice and professionalism. (R. 404).

Lt Col R.M. also noted that he had a personal relationship with the Staff Judge Advocate and considered him a friend. (R. 396). This friendship entailed going out to dinner together both in London and in the local area. (R. 396). The two had also gone together to an

officer's event. (R. 397). Lt Col R.M. would feel comfortable seeking out the Staff Judge Advocate for personal as well as legal advice. (R. 405).

Lt Col R.M. also stated that he has a specialized knowledge of digital devices and computer applications. (R. 400). He is familiar with the digital capabilities related to metadata and other types of information that can be found on cell phones. (R. 400). He has a Master's degree in information systems and security and has training in mobile platforms and digital platforms in terms of information security. (R. 402). He also has training in VPNs and their use in protecting information. (R. 403).

In individual voir dire, Capt J.S. told the Military Judge that she had a best friend who had experienced trauma from learning that her husband was involved in an extramarital affair. (R. 490). Capt J.S. was actually the person who discovered the infidelity and confronted her friend's husband with the information, causing him to admit the affair. (R. 491). She then informed her best friend of what he had done. (R. 492). Capt J.S. described herself as "stuck in the middle of it" for a while, causing her to be impacted by the extramarital affair as well. (R. 490). She was the main person her friend turned to with her feelings after the affair was revealed. (R. 496). These conversations were emotionally charged and difficult for Capt J.S. (R. 496-97).

The defense challenged both members for cause. (R. 500). The Military Judge denied the challenges under both the actual and implied bias standards. (R. 515, 520).

Standard of Review

A military judge's ruling on a challenge for cause is reviewed for an abuse of discretion. *United States v. Armstrong*, 54 M.J. 51, 53 (C.A.A.F. 2000). Military judges are afforded a high degree of deference on rulings involving actual bias. *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). By contrast, rulings involving implied bias are reviewed under a less deferential standard. *United States v. Strand*, 59 M.J. 455 (C.A.A.F. 2004).

"Implied bias is reviewed under an objective standard, viewed through the eyes of the public." *United States v. Napoleon*, 46 M.J. 279, 283 (C.A.A.F. 1997). The standard of appellate review for implied bias challenges is a sliding scale that moves between *de novo* and abuse of discretion based on the specific facts of a case. *United States v. Keago*, 84 M.J. 367, 373 (C.A.A.F. 2024). A military judge who cites the correct law and explains his implied bias reasoning on the record receives deference closer to the abuse of discretion standard, while the military judge who does not will receive deference closer to the *de novo* standard. *Id*. To receive the higher level of deference a military judge must provide analysis as to why "given the specific factors in this case, the balance tipped in favor of denying the challenge." *Id*. (citing *United States v. Peters*, 74 M.J. 31, 35 (C.A.A.F. 2015). "Without the benefit of knowing 'how and with what nuance, the military judge applied the principles embodied in the implied bias doctrine,'" the standard of review moves significantly closer to *do novo*. *Id*. at 373-74. Where the implied bias case is close, the liberal grant mandate prohibits military judges from denying the challenge. *Id*.

Law and Argument

As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *Wiesen*, 56 M.J. at 174. A member shall be removed for cause whenever it appears that the member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N. A causal challenge can be based on either actual bias, implied bias, or both. *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). Implied bias challenges stem from the "historic concerns about the real and perceived potential for command influence" in courts-martial. *United States v. Clay*, 64 M.J. 274, 276-77 (C.A.A.F. 2007). "While actual bias is viewed through the eyes of the military judge or

the court members, implied bias is reviewed under an objective standard, viewed through the eyes of the public." *Napoleon*, 46 M.J. at 283 (C.A.A.F. 1997).

Implied bias exists when most people in the same position would be prejudiced. *United States v. Armstrong*, 54 M.J. 51, 53-54 (C.A.A.F. 2000). "[I]n close cases, military judges are enjoined to liberally grant challenges for cause." *Peters*, 74 M.J. at 34 (C.A.A.F. 2015). "Implied bias review is more than . . . a question as to whether the members were honest when they said they would be fair." *Richardson*, 61 M.J. at 120 . "[I]n the context of implied bias, this case is not about the members' integrity." *Id*. "[T]he question is would the public nonetheless perceive the trial as being less than fair[.]" *Id*.

In this case, although the Military Judge properly recited the standard for implied bias, his analysis in denying the challenge to both members focused on whether actual bias existed. When discussing the challenge to Lt Col R.M., the Military Judge referenced Lt Col R.M.'s assurances of impartiality, the lack of a per se rule of disqualification for professional relationships, and the fact that Lt Col R.M. did not seek out advice on being a member from the Staff Judge Advocate. (R. 514-15). While these factors would likely foreclose a challenge for actual bias, the Military Judge did not address how any of them would affect the public's perception of the fairness of the trial. When he discussed the challenge to Capt J.S., the Military Judge similarly reverted back to employing an actual bias standard in place of the implied bias standard he stated on the record. (R. 519-20). He discussed Capt J.S.'s motivations for her actions regarding her friend's cheating husband but not the public's perception of the impact this situation would have on her ability to be fair as a member. (R. 520).

Without the appropriate analysis on the implied bias challenge, this Court should apply a *de novo* level of review to both challenges. Here, Lt Col R.M. had three areas where the public would perceive that he might not be fair when sitting in this case. First, his

personal friendship with the Staff Judge Advocate. Second, his working relationship with the Trial Counsel. Third, his high-level knowledge of the technical subject matter at issue in this case. With all three concerns, the liberal grant mandate required he be excused from this court-martial. Capt J.S. had significant first-hand experience with adultery. She was the one who confronted her friend's husband and who helped her friend through the end of her marriage. The public would certainly have concerns about her ability to fairly judge a situation that involved a similar allegation. This concern extends beyond her ability to fairly determine whether the extramarital sexual conduct actually took place, but also her ability to fairly consider whether such conduct was of a nature to bring discredit to the armed forces. Members of the public would likely fear that her experience could lead her to ascribe such a nature to this conduct automatically based upon her own experiences. For these reasons, the liberal grant mandate should also have led to the excusal of both members.

WHEREFORE, MSgt Clark respectfully asks that this Court set aside her convictions and sentence.

IV. THE GUILTY FINDINGS TO BOTH SPECIFICATION 3 OF CHARGE I AND THE SPECIFICATION OF CHARGE II AND TO BOTH SPECIFICATIONS 6 AND 7 OF CHARGE I WERE UNREASONABLE MULTIPLICATION OF CHARGES.

Additional Facts

Specification 3 of Charge I alleged that MSgt Clark "did, within the country of Italy, on or about 5 June 2019, commit indecent conduct, to wit: recording herself masturbating in front of a child and transmitting that recording to MSgt Nathaniel A. Casillas, and that such conduct was of a nature to bring discredit upon the armed forces." (Charge Sheet). The sole specification of Charge II alleged that MSgt Clark "did, within the country of Italy, on or about 5 June 2019, commit a lewd act upon a child who had not attained the age of 16 years, by engaging in indecent conduct, to wit: recording herself masturbating in front of a child, intentionally done in the presence of the child, which conduct amounted to a form of

immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." (Charge Sheet).

Before the entry of pleas, the Defense filed a motion alleging that Specification 3 of Charge I and the Specification of Charge II were multiplicious and unreasonably multiplied. (App. Ex. I). The Military Judge denied this motion based upon the Government's additional requirement in Specification 3 of Charge I to prove that MSgt Clark transmitted the recording to MSgt Casillas and that the conduct was service discrediting. (App. Ex. XIX at 5-6). The Military Judge further found the offenses not to be an unreasonable multiplication of charges, yet deferred action on whether he would merge the specifications for sentencing until after the findings stage. (App. Ex. XIX). After the findings of guilty to both Specification 3 of Charge I and the Specification of Charge II were entered, he merged the two for purposes of sentencing only. (R. 1587). The Military Judge stated that he did so because he believed that the two specifications arose out of the same transactions. (R. 1587).

MSgt Clark was also charged with separate specifications for the possession and the distribution of child pornography. (Charge Sheet). Specification 6 of Charge I alleged that she "did, within the country of Afghanistan, between on or about 6 January 2020 and on or about 8 January 2020 knowingly and wrongfully possess child pornography, to wit: digital images of minors, or what appears to be minors, engaging in sexually explicit conduct, and that such conduct was of a nature to bring discredit upon the armed forces." (Charge Sheet). Specification 7 of Charge I alleged that MSgt Clark "did, within the country of Afghanistan, between on or about 6 January 2020 and on or about 8 January 2020, knowingly and wrongfully distribute child pornography, to wit: digital images of minors, or what appears to be minors, engaging in sexually explicit conduct, and that such conduct was of a nature to bring discredit upon the armed forces." (Charge Sheet).

The only evidence of MSgt Clark's possession or distribution of child pornography came from eleven emails sent on 7 January 2020 from the "applejacks" Yahoo email account to the "luckymango" Yahoo email account. (Pros. Ex. 2). No other image of child pornography was found in searches of her home, office, or digital devices. (R. 1151, 1158-60, 1165-66).

Standard of Review

Defenses or objections based on defects in the charges and specifications must be raised before a plea is entered. R.C.M. 905(b)(2). A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012).

A failure to raise an objection which must be made before pleas are entered are forfeited, absent an affirmative waiver. R.C.M. 905(e)(1). An appellate court reviews forfeited claims for plain error. *United States v. Spykerman*, 81 M.J. 709, 734 (N-M. Ct. Crim. App. 2021) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused. *United States v. Rodriguez*, 60 M.J. 87, 88-89 (C.A.A.F. 2004).

Law and Argument

The doctrine in military law relating to the unreasonable multiplication of charges comes from the recognition of those aspects of military law that "increase the potential for overreaching in the exercise of prosecutorial discretion." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001). Courts apply the five-part *Quiroz* factors in determining whether charges against an appellant were unreasonably multiplied. Those factors are: 1) Did the accused object at trial that there was an unreasonable multiplication of charges?; 2) Is each charge and specification aimed at a distinctly separate criminal act?; 3) Does the number of

charges and specifications exaggerate the appellant's criminality?; 4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure?; and 5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? *Id*. at 338.

In first examining Specification 3 of Charge I and the Specification of Charge II under the *Quiroz* factors, it is clear that guilty findings to both of these specifications create an unreasonable multiplication of charges. First, MSgt Clark did object at trial. (App. Ex. I). This factor weighs in the Defense's favor. Second, the two specifications are clearly aimed at one criminal act. Both specifications allege the recording of indecent conduct in the presence of a child. The only difference in the conduct alleged in the Specification 3 of Charge I is the additional step of sending the recording to MSgt Casillas. This is not enough to distinguish the offenses as two separate and distinct acts. Certainly, the Military Judge's determination during the sentencing proceedings that the two offenses arise out of the same transaction is significant. (R. 1587). This factor weighs in the Defense's favor as well. The third factor also leans toward the Defense. Charging MSgt Clark twice for the same conduct, including one offense that is termed Sexual Abuse of a Child, unnecessarily exaggerates her criminality on this act. The fourth factor weighs in the Government's favor because the Military Judge merged the specifications for sentencing. The last factor weighs in favor of the Defense as the charging of these separate specifications along with the separate charging of Specification 6 and 7 of Charge I shows prosecutorial overreach in the drafting of charges against MSgt Clark. The Military Judge's denial of the defense's motion to dismiss Charge II and its sole specification was an abuse of his discretion.

Turning next to an analysis of Specifications 6 and 7 of Charge I, the *Quiroz* factors weigh heavily in favor of a finding of an unreasonable multiplication of charges. The first factor does weigh in favor of the Government, as the Defense did not include these

specifications in its motion at trial. (App. Ex. I). The second factor, however, falls entirely in the Defense's favor. The Government's evidence was of one single act, the emailing of child pornography from the "applejacks" email account to the "luckymango" email account. There are no separate and distinct acts for the specifications to be "aimed" at, as there was only the one act. The Government's evidence did not show any further affirmative steps to possess the material before or after the emails were sent, indeed there is no evidence of MSgt Clark's possession of these materials at all, other than the possession necessary to distribute them. Without such affirmative steps, this Court has found separate specifications for possession and distribution of child pornography to be only one distinct criminal act. *United States v. Williams*, 74 M.J. 572, 575-76 (A.F. Ct. Crim. App. 2014); *United States v. Matthew*, 2024 CCA LEXIS 460 at *12-13 (A.F. Ct. Crim. App. Oct. 31, 2024). The third factor likewise weighs in the Defense's favor, as two specifications for one action is an exaggeration of MSgt Clark's criminality. Although the sentences to confinement were ordered to run concurrently, she was sentenced to 24 months for Specification 6 and 28 months for Specification 7, unreasonably increasing her punitive exposure. (EOJ). Finally, the manner of charging these specifications and the specifications related to the video MSgt Clark sent to MSgt Casillas demonstrate prosecutorial overreach in the charging of this case. The failure of the Military Judge to dismiss Specification 6 of Charge I as an unreasonable multiplication of charges was error. This error was plain as *Williams* was published several years before the court-martial in this case was held. MSgt Clark has been materially prejudiced by the two convictions for this one act, particularly because of the nature of the offense.

The fact that the military judge merged Specification 3 of Charge I and the Specification of Charge II for sentencing or that the adjudged confinement for Specifications 6 and 7 were ordered to be served concurrently, does not moot this issue. *Williams*, 74 M.J at 576. An "unauthorized conviction has 'potential adverse collateral consequences that may not

be ignored' and constitutes unauthorized punishment in and of itself." *United States v. Savage*, 50 M.J. 244, 245 (C.A.A.F. 1999) (quoting *Ball v. United States*, 470 U.S. 856, 865 (1985)).

MSgt Clark asks this Court to find that her convictions for Specification 3 of Charge I and the Specification of Charge II and her convictions for Specifications 6 and 7 of Charge I are an unreasonable multiplication of charges.

WHEREFORE, MSgt Clark respectfully asks this Court to set aside the finding of guilty as to Charge II and its Specification and Specification 7 of Charge I, and set aside both.

V. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING MASTER SERGEANT CLARK'S MOTION TO DISQUALIFY GOVERNMENT COUNSEL AND TO LIMIT THE GOVERNMENT EXPERT'S TESTIMONY DUE TO THE DERIVATIVE USE OF IMMUNIZED TESTIMONY.

Additional Facts

On 5 March 2021, MSgt Clark was granted testimonial immunity in the case against MSgt Casillas and ordered to answer questions posed to her by investigators and counsel, to provide physical evidence to investigators and counsel, and to testify at any proceedings concerning MSgt Casillas. (App. Ex. LXII).

On 24 June 2022, PO1 I.A., a digital forensic examiner with the DoD Cyber Crime Cener submitted a report to OSI regarding the analysis of devices seized from MSgt Casillas. (Pros. Ex. 13 at 1). This report was a follow up report, answering questions that had been asked of him by investigators. (R. 1185). In this report, PO1 I.A. noted the presence of a photo of MSgt Casillas's son that was captured by an iPhone X on 1 January 2020. (Pros. Ex. 13 at 6). He had recovered it from MSgt Casillas' iPhone XR, but noted that MSgt Casillas also owned an iPhone X that had not been able to be analyzed because it could not be powered on. (Pros. Ex. 13 at 6). PO1 I.A. further noted that the picture appeared visually identical to one that was emailed from the "applejacks" Yahoo email account to itself on 7

January 2020. (Pros. Ex. 13 at 6). As a result, PO1 I.A. determined that the presence of the image on MSgt Casillas' device as well as the metadata of the photo showing it was taken in Korea, where MSgt Casillas was stationed in January of 2020, indicated that MSgt Casillas might also have had access to the "applejacks" Yahoo account. (Pros. Ex. 13 at 7).

MSgt Clark first met with prosecutors on 8 September 2022, in anticipation of MSgt Casillas's court-martial. (App. Ex. LXIII, LXVI). She was interviewed again on 14 September 2022, and then testified at a pretrial motion's hearing in *United States v. Casillas* on 15 September 2022. (App. Ex. LXIV, LXVI). In her immunized interview on 8 September 2022, MSgt Clark was asked about the photo discussed in PO1 I.A.'s 24 June 2022 report. (R. at 1259). She told the prosecutors that MSgt Casillas had sent her the photo via WhatsApp. (R. at 1258-59). On approximately 16 September 2022, which was after MSgt Clark testified under a grant of testimonial immunity, PO1 I.A. was asked by the Government to investigate why the file name of some photos found as attachments to emails in the "applejacks" account were unusual. (R. 1207). Unlike photos taken on a device that are traditionally named with "image" and then an underscore number and .jpg, some of the photos had a long string of characters as the file name (known as a hexadecimal string). (R. 1198). One such photo with the hexadecimal string of characters for a file name was the picture taken of MSgt Casillas's son in Korea on 1 January 2020. (R. 1203). After his investigation and testing, PO1 I.A. learned that photos sent via WhatsApp change their file name and acquire new file names that contain these strings of characters. (R. 1203). As a result of this research and testing, PO1 I.A. changed his opinion regarding the photo of MSgt Casillas' son. (R. 1204). Instead of believing that the photo had been taken by MSgt Casillas and then sent from his phone's gallery in the "applejacks" email account, PO1 I.A. now believed that it had been sent via WhatsApp after it was taken by MSgt Casillas and that the WhatsApp recipient had emailed it on the "applejacks" account. (R. 1205). When PO1 I.A.

testified at the court-martial of *United States v. Casillas*, he was asked about this photograph of MSgt Casillas's son in his report and whether his opinion in the report had changed. (R. 1194). He testified that it had. (R. 1194).

At some point following the court-martial of MSgt Casillas in February 2023, the Government counsel in MSgt Clark's case were given the audio of the witness testimony from *United States v. Casillas*. (R. 1197). The counsel listened to PO1 I.A.'s testimony in that case and learned of his changed opinion from what was reported in Prosecution Exhibit 13. (R. 1197).

In MSgt Clark's court-martial, Government counsel called PO1 I.A. to testify. (R. 1171). The Government admitted Prosecution Exhibit 13 and began to ask him about the photograph of MSgt Casillas's son. (R. 1187, 1191). The Defense objected and asked for an Article 39(a) session. (R. 1191). At that time, the Defense raised the *Kastigar* issue and asked that the Military Judge to limit PO1 I.A.'s testimony to information originally included in his report. (R. 1193, 1199). *Kastigar v. United States*, 406 U.S. 441 (1972). The Defense asked that the witness not be able to provide the information learned as a result of his investigative lead obtained after MSgt Clark's immunized interview. (R. 1199). A *Kastigar* hearing was then held in MSgt Clark's court-martial with newly detailed conflict-free Government counsel. (R. 1222). The Defense also asked the Military Judge to disqualify the Government counsel because they had listened to PO1 I.A.'s testimony from *United States v. Casillas* that had indirectly come from MSgt Clark's immunized statements. (R. 1271-72). The Military Judge denied the Defense requests, finding that the Government had learned nothing new from MSgt Clark and that the impetus for the new investigative lead was not MSgt Clark's immunized statements, but the *Casillas* prosecutor's "interest and reputation for being proficient in digital forensic issues." (R. 1279-83). PO1 I.A. went on to testify to several images that were sent from the "applejacks" email account, noting which had this WhatsApp

method of file naming and which were more likely from the phone's own gallery. (R. 1294-95). He testified that the images of child pornography sent on 7 January 2020 did not have WhatsApp file names. (R. 1297). Finally, he testified that, in his expert opinion, MSgt Clark was most likely the sole user of the "applejacks" account. (R. 1370-71).

Standard of Review

A Military Judge's decision on a motion to disqualify counsel or limit evidence due to indirect use of immunized statements is reviewed for an abuse of discretion. *United States v. Morrissette*, 70 M.J. 431, 442 (C.A.A.F. 2012). The military judge abuses his discretion when he (1) bases his ruling on findings of fact which are not supported by the evidence; (2) uses incorrect legal principles; (3) applies the correct legal principles to the facts in a clearly unreasonable way; or (4) fails to consider important facts. *United States v. Tapp*, __M.J.__, 2024 CAAF LEXIS 419, at *15 (C.A.A.F. July 24, 2024) (citing *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022)).

Law and Argument

"The United States Supreme Court has exacted a high price for a grant of immunity, regardless of which governmental entity makes the grant." *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 84 (1964). When an accused is granted use immunity, both the witness and the prosecutorial authorities must be left in substantially the same position as if the witness had claimed the Fifth Amendment privilege. *Kastigar,* 406 U.S. at 462. To ensure this, the Government is prohibited from making any use of the compelled testimony or its derivative evidence. *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. at 79. Compelled testimony cannot be used as an investigatory lead, and the Government has the burden to prove by a preponderance of the evidence that the evidence it proposes to use against a previously immunized individual is derived from a legitimate source wholly independent of the compelled testimony. *Kastigar*, 406 U.S. at 460. Neither speculation nor

conclusory denials of use or derivative use by government officials will substitute for the affirmative showing of an independent source required for every item of evidence. *United States v. Hampton*, 775 F.2d 1479, 1489 (11th Cir. 1985). The Government must be especially vigilant in order to meet this burden if it seeks to prosecute an immunized witness using information provided after he has testified. *United States v. Boyd*, 27 M.J. 82, 86 (C.M.A. 1988).

When analyzing whether a military judge erred in its decision on this matter, appellate courts turn to the factors laid out in *United States v. England*, 33 M.J. 37, 38-39 (C.M.A. 1991). First, did the accused's immunized statement reveal anything which was not already known to the Government? Second, was the investigation against the accused completed prior to the immunized statement? Third, had the decision to prosecute the accused been made prior to the immunized statement? Fourth, did the trial counsel who had been exposed to the immunized testimony participate in the prosecution? *England*, 33 M.J. at 38-39.

In evaluating the *England* factors in this case, it is clear that the Government did not prove by a preponderance of the evidence that it had an independent source for the challenged testimony of PO1 I.A. PO1 I.A. held one opinion on 24 June 2022 as to whether the presence of a photograph on MSgt Casillas's device with metadata indicating it was taken in Korea meant that he had access to and was possibly using the "applejacks" email account on 7 January 2020. (Pros. Ex. 13 at 7). Government counsel in MSgt Clark's case learned from MSgt Clark's immunized interview on 8 September 2022 that she had received that same photo from MSgt Casillas via WhatsApp. Armed with that information, government counsel then asked PO1 I.A. to review the manner in which file names are assigned to photos that are transmitted through various means, including WhatsApp. (R. 1207). This investigative lead caused PO1 I.A. to research and test the issue and he discovered that photos sent via WhatsApp are renamed with the unique hexadecimal naming convention. (R.

1198). In comparing this new knowledge to the file name of the photo he had discussed in his 24 June 2022 report, PO1 I.A. now realized that the photo had not been emailed directly from an iPhone's photo gallery as he'd originally believed, but that it had been transmitted through WhatsApp before it was attached to the "applejacks" account email on 7 January 2020. (R. 1203). This led him to change his opinion in regards to not only who was using the "applejacks" account on 7 January 2020, the same day the child pornography images were sent, but as to who was the sole user of the "applejacks" account overall. (R. 1370).

In *England*, the Court held that information is not revealed in an immunized interview when nothing is learned which might incriminate the accused or otherwise be used to his disadvantage. *Id*, at 39. Despite the conclusory denials of the *United States v. Casillas* prosecutors, they did learn something from MSgt Clark's testimonial immunity statements which ended up incriminating her and was used to her disadvantage at her own trial. They learned that, contrary to their digital forensic examiner's report, a photo of MSgt Casillas's son emailed from the "applejacks" account on 7 January 2020 was sent from MSgt Casillas to MSgt Clark via WhatsApp and then emailed from "applejacks" by MSgt Clark. (R. 1258-59).

The second *England* factor asks whether the investigation into MSgt Clark was complete by the time she gave her immunized statements. *England*, 33 M.J. at 39. It was clearly not, as PO1 I.A. was sent off on a new investigative task related to the transmission of photographs just days after MSgt Clark sat for the immunized interview with the *Casillas* prosecutors on 8 September 2022. MSgt Clark's court-martial did not begin until 30 May 2023. (R. 837).

The third factor, as to whether the decision to prosecute MSgt Clark was made prior to the immunized statements is not pertinent to the issue in this case, as the Defense does not claim that the decision to prosecute was made as a result of immunized statements.

The final *England* factor is whether the trial counsel who were exposed to immunized testimony participated in the prosecution. In this case, the *Casillas* prosecutors did not directly participate in the prosecution of MSgt Clark. However, PO1 I.A., the Government's expert witness did participate in both courts-martial, and the trial counsel in MSgt Clarks' case listened to the audio recording of PO1 I.A.'s prior *Casillas* trial testimony. (R. 1197).

While the *Casillas* prosecutors state in their declarations that they shared no information from MSgt Clark with PO1 I.A., they do not state whether or not their conversation with MSgt Clark created any questions about PO1 I.A.'s previous report or about any other technical matter which they then asked him to investigate. (App. Ex. LXV, LXVI). In fact, the declarations do not discuss at all the origin of the question to PO1 I.A. about naming conventions of photos by WhatsApp and Yahoo that they asked him in September 2022. (App. Ex. LXV, LXVI). The only logical explanation behind the timing of the question to PO1 I.A. is that the immunized statement from MSgt Clark created questions over PO1 I.A.'s 24 June 2022 report. These questions by the *Casillas* government counsel to PO1 I.A. led to his investigative lead. PO1 I.A. testified in the prosecution of MSgt Clark and the Government counsel prosecuting MSgt Clark listened to PO1 I.A.'s testimony from the *Casillas* court-martial. Although the *Casillas* prosecutors themselves did not participate in MSgt Clark's trial, they indirectly planted seeds with PO1 I.A. which led to his new investigative tack and, ultimately, to testimony concerning the use of the "applejacks" Yahoo email account that was used against MSgt Clark in her court-martial.

The prosecutors in MSgt Clark's case were tainted by their exposure to PO1 I.A.'s testimony in *Casillas* because that testimony was indirectly influenced by MSgt Clark's immunized statements. The Military Judge abused his discretion in finding that they were not disqualified by this exposure and further abused his discretion in finding that the Government had met its burden to show an independent source of the information that led to PO1 I.A.'s

investigative lead and changed opinion. His findings of fact as to the independent source of the questions to PO1 I.A. are not supported by the record, as the Government provided no evidence of such an independent source. While the Military Judge cited the appropriate law, his application of the facts of this case to that law were unreasonable where the Government clearly did not prove by the preponderance of the evidence that there was an independent source for the investigative lead the Government provided PO1 I.A. There were no assertions of an independent source at all, and no discussion of WhatsApp or naming conventions in the declarations by the *Casillas* prosecutors. The Military Judge abused his discretion in allowing the trial counsel to remain in place after listening to PO1 I.A.'s testimony from the *Casillas* court-martial and in allowing PO1 I.A. to testify to the information he discovered after the prosecutors interviewed MSgt Clark during the *Casillas* court-martial. MSgt Clark asks this Court to set aside the findings and sentence in her case and order a rehearing with a conflict-free Government counsel. If the Court disagrees that the Government counsel were tainted, then MSgt Clark asks this Court to set aside the guilty findings to Specifications 6 and 7 of Charge I.

WHEREFORE, MSgt Clark respectfully asks this Court to set aside the findings and sentence in her case and order a rehearing.

VI. 18 U.S.C. § 922 CANNOT CONSTITUTIONALLY APPLY TO MASTER SERGEANT CLARK, WHO STANDS CONVICTED OF NONVIOLENT OFFENSES, WHERE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HER POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

Additional Facts

After her conviction, the Government determined that MSgt Clark's case met the

firearm prohibition under 18 U.S.C. § 922. EOJ. The Government did not specify why, or under which section her case met the requirements of 18 U.S.C. § 922. *Id.*

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law and Analysis

A. Section 922's firearms ban cannot constitutionally apply to MSgt Clark.

MSgt Clark faces a lifetime ban on possessing firearms—despite a constitutional right to keep and bear arms—for extramarital sexual conduct, indecent conduct, communication of indecent language, wrongful possession and distribution of child pornography, and sexual abuse of a child by communicating lewd language. EOJ. The Government cannot demonstrate that such a ban, even if it were limited temporally, is "consistent with the nation's historical tradition of firearm regulation." *Bruen*, 579 U.S. at 24.

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Id. (quoting *United States v. Konigsberg*, 366 U.S. 36, 50 n.10 (1961)).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to MSgt Clark, who stands convicted of nonviolent offenses. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense

is, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. For example, under the 1926 Uniform Firearms Act, a "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, larceny, burglary, and housebreaking." *Id.* at 701 (cleaned up) (citing Uniform Act to Regulate the Sale & Possession of Firearms (Second Tentative Draft 1926)). MSgt Clark's conduct falls completely outside these categories. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that Section 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years confinement. *Range v. AG United State*s, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated* (U.S. Jul. 2, 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___, 2024 U.S. LEXIS 2714 (June 21, 2024)). Evaluating Section 922(g)(1) considering *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to violent criminals." *Id.* at 104 (emphasis in

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

In light of *Bruen*, Section 922 is unconstitutional as applied to MSgt Clark.

B. This Court may order correction of the EOJ.

The CAAF in *Williams* held that it was ultra vires for a Court of Criminal Appeals (CCA) to modify the statement of trial results to change sex offender registry using its power under Article 66, UCMJ, 10 U.S.C. § 866 (Supp. III 2019–2022). *United States v. Williams*, __M.J.__, 2024 CAAF LEXIS 501, at *14–15 (C.A.A.F. Sep. 5, 2024).[5] The CAAF did not foreclose properly raising an erroneous firearm notation to the service courts of appeal under Article 66(d)(2), UCMJ, when the error raised occurs *after* the entry of judgment, as in MSgt Clark's case. Unlike the appellant in *Williams*, MSgt Clark meets the factual predicate to trigger this Court's review under Article 66(d)(2), UCMJ. First, MSgt Clark is demonstrating error in her case—that she was erroneously and unconstitutionally deprived of her right to bear arms—in this brief to this Court. MSgt Clark is asking for correction of the EOJ, which includes the First Endorsement with the erroneous firearm bar. This requested remedy is in line with Williams. While this Court cannot correct the erroneous firearms ban associated with the STR, it *can* correct the erroneous firearm notation on the First Endorsement attached to the EOJ, which was completed after the entry of judgment during post-trial processing. *Williams*, __ M.J. __, 2024 CAAF LEXIS at *14-15.

Second, the error on the First Endorsement erroneously depriving MSgt Clark of her constitutional right to a firearm was an error in the "processing of the court-martial after the judgment was entered into the record under section 860(c) . . . (article 60(c))." Article 66(d)(2), UCMJ. Under the applicable Air Force regulation, "*[a]fter* the EOJ is signed by the

[5] MSgt Clark acknowledges the CAAF's holding in *Williams*, but nevertheless maintains her argument, for the purpose of preserving the issue, that a CCA can modify the STR and EOJ to correct errors in applying 18 U.S.C. § 922.

military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* ¶ 20.41 (Apr. 14, 2022) (emphasis added). The firearm denotation on the First Indorsement that accompanies the entry of judgment into the record of trial explicitly happens *after* the entry of judgment is signedby the military judge pursuant to Article 60(c), UCMJ. *Id.*

Finally, this Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is not foreclosed by this Court's published opinion in *United States v. Vanzant*, 84 M.J. 671 (A.F. Ct. Crim. App. 2024). In *Vanzant*, this Court determined it did not have authority to act on collateral consequences not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id.* at 680 ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"). The CAAF agreed with this interpretation. *Williams*, __ M.J. __, 2024 CAAF LEXIS at *11-13. However, MSgt Clark is asking this Court to review an error in post-trial processing under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See* 84 M.J. at 680 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)). To effectuate any remedy, this Court should use its power under R.C.M. 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction, as, ultimately, the First Endorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects MSgt Clark's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

WHEREFORE, MSgt Clark respectfully requests that this Court 18 U.S.C. § 922 is unconstitutional as applied to her and order correction of the First Indorsement to the EOJ, pursuant to its authority under Article 66(d)(2), UCMJ.

Conclusion

WHEREFORE, because of errors prejudicial to the substantial rights of MSgt Clark, she respectfully requests that the Court set aside and dismiss the findings of guilt to all charges and specifications.

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APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), MSgt Clark, through appellate defense counsel, personally requests that this Court consider the following matters:

VII. THE MILITARY JUDGE ERRED WHEN HE ALLOWED THE GOVERNMENT TO PRESENT EVIDENCE OF BAD ACTS COMMITTED BY MASTER SERGEANT CASILLAS DURING THE MERITS PHASE OF THE COURT-MARTIAL.

Additional Facts

The Defense objected to all 911 emails the Government asserted were relevant and passed the Mil. R. Evid. 403 balancing test. (R. 337; App. Ex. XXXIV). On the eve of trial, the Government had not identified what exact emails it intended to use as Mil. R. Evid. 404(b) evidence against MSgt Clark. So, the Defense objected identifying the concern that the Government was "on the day of trial, still picking and choosing from this wide world of emails that they've had for months." (R. 337). The military judge responded, "I'll tell you what we're going to do, I'm going to give you some time pick 20 emails . . . pick 20 emails to get with defense that will resolve any cumulative issue." (R 338). The military judge noted that starting with 900 emails to determine which were "relevant, survive a 403, survive 404(b)" was much more involved. (*Id.*). Instead, the military judge had the Government pick 20 emails out of Appellate Exhibit 34 so the court could take up each one of the 20. (R. 339). The Government ultimately offered the emails it chose as Prosecution Exhibit 2. The military judge did not do a separate *Reynolds* analysis for each of the emails.

Standard of Review

A military judge's decision to admit Mil. R. Evid. 404(b) evidence at trial is reviewed for an abuse of discretion. *United States v. Wilson*, __M.J.__, 2024 CAAF LEXIS 287, at *13 (C.A.A.F. May 23, 2024) (citing *Hyppolite*, 79 M.J. at 164). The military judge abuses his

discretion when he (1) bases his ruling on findings of fact which are not supported by the evidence; (2) uses incorrect legal principles; (3) applies the correct legal principles to the facts in a clearly unreasonable way; or (4) fails to consider important facts. *United States v. Tapp*, __M.J.__, 2024 CAAF LEXIS 419, at *15 (C.A.A.F. July 24, 2024) (citing *United States v. Rudometkin*, 82 M.J. 396, 401 (C.A.A.F. 2022)).

Law and Analysis

A. The military judge abused his discretion by allowing the Government to "just pick 20" pieces of evidence to come in under Mil. R. Evid. 404(b) without further analysis.

The Defense objected to the Government attempting to admit 911 emails under Mil. R. Evid. 404(b). (R. 337; App. Ex. XXXIV). After fighting over the emails—that almost solely had to do with conduct of MSgt Casillas not MSgt Clark—the Government was still picking and choosing which inflammatory emails it wanted to use on the eve of trial. (R. 337). In a seemingly exasperated state, the military judge said, "I'll tell you what we're going to do, I'm going to give you some time pick 20 emails . . . pick 20 emails to get with defense that will resolve any cumulative issue." (R 338). The military judge recognized how onerous it would be to follow the law and actually apply the *Reynolds* test for each and every 900+ email. (*Id.*). He was aware that in order for evidence to come in under Mil. R. Evid. 404(b), each piece of evidence must pass the *Reynolds* test to include Mil. R. Evid. 401, 402, and 403. (*Id.*). Yet, when the military judge let the Government pick 20 emails out of Appellate Exhibit 34 it failed to take up each one of the 20 even though he said he would. (R. 339). Ultimately, the Government admitted their pick of the most heinous emails as Prosecution Exhibit 2 with the intent to inflame the passions of the factfinder—and it worked.

The *Reynolds* test is utilized when assessing a military judge's decision to admit evidence under Mil. R. Evid. 404(b). *Wilson*, __M.J.__, 2024 CAAF LEXIS at *13 (citing *United States v. Reynolds*, 29 M.J. 105, 109 (C.M.A. 1989)). The three-prong test asks: (1)

whether the evidence reasonably supports a finding that the accused committed the act(s); (2) whether the evidence of the act(s) makes a fact of consequence more or less probable; and (3) whether the evidence of the act(s)'s probative value is substantially outweighed by the danger of unfair prejudice? *Id.* at *13-14. All prongs of the *Reynolds* test must be met for the evidence to be admitted. *Id.* at *14 (citing *Reynolds*, 29 M.J. at 109).

Mil. R. Evid. 404(b)(1) prohibits the use of evidence of a crime, wrong, or other act "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." The permitted uses of such evidence are to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Mil. R. Evid. 404(b)(2). The third prong of the *Reynolds* test reflects the concerns addressed by Mil. R. Evid. 403. *Wilson*, 2024 CAAF LEXIS 287, at *14 (quoting *United States v. Yammine*, 69 M.J. 70, 77 (C.A.A.F. 2010)). Here, the military judge should not be given any deference as he did not go through each of the 20 pieces of evidence using each *Reynolds* factor. This is in stark contrast to the military judge's ruling in *Wilson* where the "admirably detailed written analysis" was given full deference by the CAAF. __M.J.__, 2024 CAAF LEXIS at *14.

B. The error had a substantial influence on the findings.

The despicable emails offered by the Government had substantial influence on the findings. The conduct contained in the emails was so shocking that one cannot help but assign unwarranted suspicion to the party whom it is being used against—MSgt Clark. The following factors are weighed in determining prejudice arising from non-constitutional evidentiary errors: "(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. Kohlbek*, 78 M.J. 326, 334 (C.A.A.F. 2019) (citing *United States v. Kerr*, 51 M.J. 401, 405 (C.A.A.F. 1999)). Here, the strength of the Government's case was

not strong. The Government used the emails as propensity evidence to show that MSgt Clark was associated with MSgt Casillas so she too must be a bad person, a sexual deviant, or a perverted person. (see R. 159). All of that did inflame the emotions of the factfinder. The Defense had strong arguments on each of the charges (see Issue I supra) and the Government made material use of the Mil. R. Evid. 404(b) evidence. The quality of the evidence was also high, because there was not just testimony on the emails, the members had the emails and videos themselves to watch, which was cumulatively more than the evidence on the charges against MSgt Clark. The shock and disdain the members experienced prejudiced them against MSgt Clark from the beginning, which had a substantial influence on the findings.

Unlike in *Wilson* and *Hyppolite*, the evidence of the 911 emails or even those ultimately admitted in Prosecution Exhibit 2 would not have been before the factfinder absent it coming in under Mil. R. Evid. 404(b). *Wilson*, 2024 CAAF LEXIS 287, at *28-29 (citing *United States v. Acton*, 38 M.J. 330, 334 (C.M.A. 1993) ("[a]ny prejudicial impact based on the shocking nature of the evidence was diminished by the fact [that] the same conduct was already before the court members"); *see also Hyppolite*, 79 M.J. at 166-67 (finding the military judge did not abuse his discretion when he ruled evidence that the appellant committed Specifications 1-3 could come in to show a common scheme or plan in regards to the appellant committing Specifications 4-5). As such, the inflammatory emails and videos had a substantial influence on the findings in this case.

WHEREFORE, MSgt Clark respectfully requests that this Court set aside her convictions and sentence.

VIII. THE CONSTITUTION GIVES MASTER SERGEANT CLARK A RIGHT TO A UNANIMOUS GUILTY VERDICT.

Additional Facts

MSgt Clark elected trial by officer members. (R. 11). The military judge instructed them that the concurrence of at least three-fourths of the panel members present when the vote is taken is required for any finding of guilty and that given the number, six members were required to concur. (R. 1513). It is unknown whether the members convicted MSgt Clark by a unanimous verdict.

Standard of Review

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019). "A new rule of criminal procedure applies to cases on *direct* review, even if the defendant's trial has already concluded." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021) (emphasis in original). Military appellate courts review for plain error, but "the prejudice analysis considers whether the error was harmless beyond a reasonable doubt." *Tovarchavez*, 78 M.J. at 462 (internal quotations omitted).

Law and Analysis

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Following *Ramos*, MSgt Clark was entitled to a unanimous verdict on three bases: (1) under the Sixth Amendment because unanimity is part of the requirement for an impartial jury, and because it is central to the fundamental fairness of a jury verdict: (2) under the Fifth Amendment's Due Process Clause; and, (3) under the Fifth Amendment's Equal Protection Clause.

There is no way of knowing whether a nonunanimous verdict secured any of MSgt Clark's convictions. But that is a problem for the Government, not MSgt Clark. Where constitutional error is at hand, the Government bears the burden of proving harmlessness beyond a reasonable doubt. And, because there is no way of knowing the vote count (especially since the Rules for Courts-Martial explicitly preclude the members from being polled), the Government cannot meet this already onerous burden. *See* R.C.M. 922(e); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("It is long-settled that a panel member cannot be questioned about his or her verdict . . . .").

MSgt Clark recognizes that the CAAF's decision in *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), binds this Court and that the Supreme Court denied the petitions for certiorari in several cases on this issue. However, she continues to raise the issue in anticipation of further litigation.

WHEREFORE, MSgt Clark asks this Court to set aside and dismiss her convictions and the sentence.

IX. THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE R.C.M. 917 MOTION TO DISMISS SPECIFICATION 2 OF CHARGE I.

`Additional Facts

The Defense objected to an email with WhatsApp screenshots attached to it that the Government sought to enter as evidence of indecent communication, Specification 2 of Charge I. (R. 342-46). Specifically, the Defense objected to hearsay within hearsay. (R. 346). The Government responded that the statements of the other person (not MSgt Clark) were not being offered for the truth of the matter asserted, but instead were effect on the listener. (*Id.*). The military judge ultimately let the email with the WhatsApp screenshots into evidence. Prior to findings arguments, the Defense then filed a Bench Brief in support of an R.C.M. 917 motion. (App. Ex. LXXV). The Defense argued that because the other person's statements—allegedly

MSgt Casillas's—did not come in for the truth of the matter, but only for effect on the listener, that the Government did not prove that the communications allegedly made by MSgt Clark were delivered to or received by MSgt Casillas. (App. Ex. LXXV). This was an additional argument to the statements allegedly made by MSgt Clark or by "Jess2" alone were not indecent. (App. Ex. LXXV).

Argument

The Government identified the specific the email and screenshots in the bill of particulars that it was relying on as evidence to support Specification 2 of Charge I. App. Ex. LXXV. However, in that exhibit, there was hearsay within hearsay. (R 346). The Government explained it was not offering the messages from the other party—allegedly MSgt Casillas—for the truth of the matter asserted, but instead only for effect on the listener—MSgt Clark. (*Id.*). As the messages allegedly coming from MSgt Casillas were not offered for the truth of the matter asserted, the members could not consider the texts for that purpose either. The military judge even instructed on this. (App. Ex. LXXVIII). Given the members could only consider those messages as effect on the listener, the Government never proved that the texts allegedly sent by MSgt Clark were actually delivered to MSgt Casillas, which is an element of the offense. Further, the Government did not prove the messages seemingly sent by "Jess2" were in fact sent by either MSgt Casillas or MSgt Clark. The Defense objected to those statements coming in under Mil. R. Evid. 801 and 803 as hearsay. (R. 529-30). The Government did not prove who "Jess2" was, nor that MSgt Clark was the other person, so those could not come in under the party opponent exception to hearsay. (*Id.*) The military judge, therefore, abused his discretion in denying the Defense motion to dismiss under R.C.M. 917.

WHEREFORE, MSgt Clark requests this Court to set aside and dismiss her conviction of Specification 2 of Charge I and the sentence.

6 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF *Appellant.*	))))))))	MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

Pursuant to Rule 23.3(m) of this Court's Rules of Practice and Procedure, the United States hereby requests a brief enlargement of time of 14 days, until 27 January 2024, to submit an Answer to Appellant's Assignments of Error in the above-styled case. Currently, the United States' answer is due on 13 January 2025. This case was docketed with the Court on 20 November 2023. Since docketing, Appellant has requested and been granted 10 enlargements of time. Appellant filed his Assignments of Error with this Honorable Court on 12 December 2024, 388 days after this case was docketed. This is the United States' first request for an enlargement of time. As of the date of this request, 413 days have elapsed since docketing.

Good cause exists for granting the United States a brief enlargement of time in this case. Appellant raised nine issues in his Assignments of Error. However, within one assignment of error (Issue I), Appellant raises factual and/or legal sufficiency claims against seven of her convictions (factual sufficiency against Specifications 1, 2, 3, 4, 6, 7 of Charge I and legal sufficiency against Specification 1 of Charge I and the Specification of Charge II). Additionally, Appellant's record of trial spans 13 volumes, including 1,579 pages of transcript and over 100 total exhibits. Considering Appellant's factual and legal sufficiency claims against seven of her

convictions, as well as claims involving motion rulings and member excusals, a review of the entire record is required.

In the last 45 days, undersigned counsel, a reservist on active duty orders for less than half of that time, has filed briefs in United States v. Howard (7 issues) and United States v. Moore (Motion for Reconsideration), as well as multiple other motions. Additionally, undersigned counsel will file a brief in United States v. Hunt (six issues) tomorrow, 7 January 2025, and is finalizing an additional Motion for Reconsideration in a separate case that is due this Friday, 10 January 2025.

Notably, undersigned counsel has already completed his review of this case's transcript and is working diligently to complete all necessary work as fast as possible. The United States respectfully requests a brief 14-day enlargement to ensure a proper, responsive brief is filed with this Honorable Court. The rest of the Appellate Government Office is experiencing a heavy workload, which has included a large number of briefs due at this Court and CAAF due in December and January, plus preparation for 3 oral arguments in January. There is no other attorney in the office who could file a brief sooner, especially given the progress undersigned counsel has already made on the case.

It is possible undersigned counsel will not need the entire requested enlargement. In the event that the United States' answer is completed before 27 January 2025, it will be promptly filed with this Court.

WHEREFORE, the United States requests this Court grant this Motion for Enlargement of Time.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 6 January 2025 via electronic filing.

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27 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	MOTION TO EXCEED PAGE LIMIT
v.	)	
	)	ACM 40540
Master Sergeant (E-7) ADRIENNE L. CLARK, USAF *Appellant*.	)	Panel No. 2

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

Pursuant to Rules 17.3 and 23.3(q) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States moves to file its Answer to Appellant's Assignments of Error in excess of Rule 17.3's page length limitations. This Answer requires exceeding this Honorable Court's page length limitation due to the nature and number of issues raised by Appellant in her Assignments of Error brief.

On 12 December 2024, Appellant filed her Assignments of Error brief. The brief raises a total of nine issues, six raised through counsel and three raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). Though raised under only one of those issues, Appellant questions the factual and/or legal sufficiency of all seven of her convictions (factual sufficiency against Specifications 1, 2, 3, 4, 6, 7 of Charge I and legal sufficiency against Specification 1 of Charge I and the Specification of Charge II), requiring in-depth discussions of the facts and witnesses testimonies regarding each of those convictions. Additionally, within her factual and legal sufficiency claims, Appellant questions the military judge's motion rulings and finding instructions (which are not raised in separate issues), and invites this Court to overturn published precedent, all of which require additional in-depth analysis of case law. Further, Appellant's case involves child pornography and highly technical information

technology testimony, which requires additional detail and explanation due to the issues and arguments raised by Appellant.

In separate issues, Appellant also raises claims regarding multiple motion and reconsideration rulings, as well as multiple member selection challenges, all of which require in-depth analysis on witness testimony during motions, member responses during voir dire, and discussions between the parties and the military judge.

Appellant's record of trial spans 13 volumes, including 1,579 pages of transcript and over 100 total exhibits. Considering Appellant's factual and legal sufficiency claims involving all seven of her convictions, as well as claims involving multiple motion rulings and member excusals, the Government's response requires discussion of nearly all of the transcript and dozens of exhibits. Thus, good cause exists to grant this motion to exceed page limitations.

WHEREFORE, the United States respectfully requests this Court grant this motion to exceed length limitations in its Answer.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, appellate defense counsel, and the Air Force Appellate Defense Division on 27 January 2025 via electronic filing.

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27 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40540
Master Sergeant (E-7) ADRIENNE L. CLARK, USAF *Appellant*.	)	Panel No. 2

ANSWER TO ASSIGNMENTS OF ERROR

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	
	)	ACM 40540
Master Sergeant (E-7) ADRIENNE L. CLARK, USAF *Appellant*.	)	Panel No. 2

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

ISSUES PRESENTED

I.

[WHETHER] THE GUILTY FINDINGS TO SPECIFICATIONS 1, 2, 3, 4, 6, AND 7 OF CHARGE I ARE FACTUALLY INSUFFICIENT. [WHETHER] THE GUILTY FINDINGS TO SPECIFICATION 1 OF CHARGE I AND THE SPECIFICATION OF CHARGE II ARE LEGALLY INSUFFICIENT[?]

II.

[WHETHER] THE SEARCH OF [APPELLANT'S EMAIL ACCOUNT VIOLATED HER RIGHTS UNDER THE FOURTH AMENDMENT[?]

III.

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE CHALLENGE TO TWO MEMBERS[?]

IV.

[WHETHER] THE GUILTY FINDINGS TO BOTH SPECIFICATION 3 OF CHARGE I AND THE SPECIFICATION OF CHARGE II AND TO BOTH SPECIFICATIONS 6 AND 7 OF CHARGE I WERE UNREASONABLE MULTIPLICATION OF CHARGES[?]

V.

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING [APPELLANT'S] MOTION TO DISQUALIFY GOVERNMENT COUNSEL AND TO LIMIT THE GOVERNMENT EXPERT'S TESTIMONY DUE TO THE DERIVATIVE USE OF IMMUNIZED TESTIMONY[?]

VI.

[WHETHER] THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO [APPELLANT] BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN MASTER SERGEANT CLARK WAS CONVICTED OF NON-VIOLENT OFFENSES AND THIS COURT CAN DECIDE THAT QUESTION[?]

VII.[1]

[WHETHER] THE MILITARY JUDGE ERRED WHEN HE ALLOWED THE GOVERNMENT TO PRESENT EVIDENCE OF BAD ACTS COMMITTED BY MASTER SERGEANT CASILLAS DURING THE MERITS PHASE OF THE COURT-MARTIAL[?]

VIII.

[WHETHER] THE CONSTITUTION GIVES [APPELLANT] A RIGHT TO A UNANIMOUS GUILTY VERDICT[?]

IX.

[WHETHER] THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED THE DEFENSE R.C.M. 917 MOTION TO DISMISS SPECIFICATION 2 OF CHARGE I[?]

[1] Issues VII through IX are raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Investigation on this case began on 7 January 2020 when Yahoo flagged emails sent from the email account "applejacks69612@yahoo.com" (herein "applejacks") to the email account "luckymango69612@yahoo.com" (herein "luckymango"). The ensuing investigation would result in charges against Appellant that included: (1) extramarital sexual conduct with MSgt NC; (2) communicating indecent language to MSgt NC about sexual fantasies with children; (3) indecent conduct, to wit: Appellant recording herself masturbating in front of her child and sending the recording to MSgt NC; (4) Appellant defecating on the floor of an Aviano Air Base facility and recording it; (5) the possession and distribution of child pornography; and (6) committing a lewd act upon her child, who was under 16, by recording herself masturbating in front of her own child. (Charge Sheet.)

- ***Investigator Testimony, Appellant's Call to Yahoo, and Other Evidence***

Ms. JK, a criminal investigator for Yahoo, testified regarding Yahoo's systems flagging suspected child pornography, how Yahoo deactivates a user account transmitting the materials, and how a cybertip is submitted to the National Center for Missing and Exploited Children (NCMEC). (R. at 870-80.) Ms. JK also discussed how Yahoo performs an investigation to determine who owns and operates the Yahoo account that sent the materials.

In this case, the "applejacks" account was flagged by Yahoo's system on 7 January 2020 and deactivated. (R. at 914.) Images sent from the account are at Prosecution Exhibit 4. (R. at 905.) Ms. JK said she reviewed the images, reported the suspected child images, and began to investigate the identity of the account's owner. (R. at 907-08.) The account was linked to two

additional Yahoo accounts, including the "luckymango" account and a "nakedgators" account. (R. at 886, 888.) Ms. JK said the "applejacks" and "luckymango" accounts were linked because they had used the same web browsing session on the same date (16 May 2019) and time using the same IP address. (R. at 886-87.) Ms. JK said both accounts were created on this date as well.

Ms. JK said the investigation into this case warranted supplemental reporting within Yahoo because it appeared the user had access to children and because non-reported images within the account showed what appeared to be users in United States Air Force uniforms. (R. at 884.) Ms. JK said one of the images was of what appeared to be an adult male wearing a military uniform and a nametag that included the first six letters of MSgt NC's last name. (R. at 908.) Ms. JK said other messages discussed the users' children, and discussions about specific locations including Hagerman, New Mexico, and Italy. (Id.)

Ms. JK stated that once an account is deactivated, a user can no longer access the account. (R. at 878.) Ms. JK testified that Appellant called Yahoo's customer care department three times throughout the day on 8 January 2020 regarding the "applejacks" account being deactivated. (R. at 893-95.)

Prosecution Exhibit 1 contains audio recordings of the calls to Yahoo, which occurred approximately seven-and-a-half hours after the "applejacks" account was deactivated. (R at 895.) In that call, Appellant identified herself by name and said the "applejacks" account "seems to have disappeared." (Id.) Appellant said she could not log in, that she was in Afghanistan, and that she was able to log in six to eight hours ago. (R. at 896.) Ms. JK said this call was notable because the caller (Appellant) identified herself, said the account was her account, claimed to have accessed the account six to eight hours previously, and could no longer access the account.

(R. at 897.) On the call, when asked when she last accessed the account, Appellant responded, "Earlier, well, let me, I'm in Afghanistan, probably I don't know, 6 hours ago. Maybe 8 hours ago." (Pros. Ex. 1; R. at 640.)

17 hours later, Appellant called Yahoo again concerning the account. Appellant did not identify herself by name, instead calling herself "Jane Doe," but said she was "sitting in the middle of Afghanistan." (R. at 899.) Appellant now claimed her account had been hacked and wanted "this account fucking shut down and I'll make a report with the local cops as well." (Id.) Appellant claimed that she received a call from a friend "asking me why I sent such nasty things to him," claimed she had "no fucking clue what you're talking about," and that "I got on there, and sure enough, like it looks like I had sent porn and I assure you that did not happen . . . ." (R. at 900.) When asked when she was able to last access the account, Appellant stated, "I got in after I got the phone call yelling at me, but I think it was a couple of days ago." (R. at 901.)

Appellant called Yahoo a third time approximately 25 minutes after the second call. (R. at 902.) Again, Appellant refused to identify herself by her name, but instead identified herself as "Jane Doe." (R. at 903.) Appellant again claimed her account had been hacked and asked that the account be deleted. (R. at 904.)

Ms. JK stated that she reviewed all of the login records for the "applejacks" account. (R. at 909.) Ms. JK said that in suspected hacking cases, she looked for consistency in IP address log-ins and to see if there were any anomalies. (R. at 910.) Ms. JK explained:

> So again, if an account is hacked, what we expect is to see you know, a trend of similar IP's and then to see something that is you know an anomaly that is from somewhere else different Internet service provider. So we would see it, you know, if I log, if I have 10 login events for today all from my Comcast Cable IP and somebody else hacked into my account, then you would see ten of my IP's from

> Comcast Cable and one IP from the bad actor wherever they may be using their ISP.

(R. at 910.) Ms. JK said the IP address range used for the "applejacks" account were consistent from 15 December 2019 until the last login in January 2020. (R. at 977.) Ms. JK concluded this indicated the "same user logging on to the account." (Id.)

When asked if she had found any evidence of hacking in terms of the account's activity on 7 January 2020, Ms. JK responded, "I did not." (R. at 971.) When asked if the login data and the range of IP addresses were consistent with a single user being logged into the account on 7 January 2020, Ms. JK responded, "Yes." (Id.) Ms. JK also said she had never seen an individual hack into another person's account to send child pornography.

Ms. JK said she reviewed the types of things that were being sent from the "applejacks" account in the days leading up to 7 January 2020 and the "young girls 1" email.[2] (R at 953.) She said, "I believe there were images of [Appellant] and other personal conversations and messages." (Id.)

Capt JM was deployed with Appellant in Afghanistan in January 2020. (R. at 995.) Capt JM detailed an interaction where a very stressed Appellant told him that she had maybe been hacked or that her phone had maybe been stolen. (R. at 998.) Appellant told Capt JM that a friend of hers had angrily contacted her about sending disgusting material, and that when she checked the email account that had sent this material she was "sick to her stomach about what she had found." (Id.) Appellant told Capt JM that it "might have been one of the army folks who I let borrow my phone," or that she might have left her phone sitting around unlocked and

[2] The eleven emails containing child pornography had the subject lines "young girls 1," "young girls 2," "young girls 3," etc. (Pros. Ex. 2 at Slide 94.)

someone took it. (R. at 1000.) Capt JM continued, "The extent of what she told me at the time was that she had a separate Yahoo account from her main one that she used typically for whatever personal reasons that herself and some friends had access to." (Id.)

Air Force Office of Special Investigation (AFOSI) Special Agent (SA) EP became involved in the case when he received the NCMEC cybertip through AFOSI headquarters. (R. at 1005-06.) He stated that Yahoo had performed a preliminary investigation that identified MSgt NC as a potential subject, Yahoo notified NCMEC, who referred the case to AFOSI headquarters, and ultimately to SA EP's Osan AB detachment since MSgt NC stationed in Korea and was within their area of responsibility. SA EP said the "applejacks" email account was identified in the NCMEC report. (R. at 1008.)

SA EP said an investigation was opened with MSgt NC as the subject. When AFOSI interviewed MSgt NC, MSgt NC said Appellant was involved in creating the "applejacks" account. (R. at 1010.) SA EP said the Aviano AFOSI detachment was brought into the investigation since Appellant was stationed at Aviano Air Base and was under their area of responsibility.

SA EP said the "applejacks" account and the "luckymango" account were created at the same time on 16 May 2019. (R. at 1011, 17.) Yahoo provided AFOSI the full contents of each email account. SA EP said the "luckymango" account had either spam email or the email account was completely empty. The "applejacks" account, however, contained over 500 emails. (R. at 1012.)

SA EP said the "applejacks" and "luckymango" accounts were created within minutes of each other on 16 May 2019 and both contained MSgt NC's birthdate. (R. at 1017.) SA EP said the "applejacks" account had the name "Jane Doe" while the "luckymango" account had the

name "John Doe." (Id.) SA EP said that the telephone number used when opening the "applejacks" account tied back to Mr. KP, who was Appellant's father. (R. at 1018-19.)

Prosecution Exhibit 11 is an internet provider (IP) address login activity summary for the "applejacks" account. (R. at 1020.) Prosecution Exhibit 12 is an IP address login activity summary for the "luckymango" account. (R. at 1021.) Based on the activity, SA EP said both email accounts were created in Arlington, Virgina in May 2019. (R. at 1023.) SA EP said his investigation revealed both Appellant and MSgt NC were TDY to that location at that time. (R. at 1024.)

Prosecution Exhibit 6 is a TDY authorization for Appellant to Arlington County, Virginia, beginning on 13 May 2019 for a period of 10 days. (R. at 1026.) SA EP said there were also photos in the email content that showed Appellant and MSgt NC together in the Washington, DC area during this timeframe.

Prosecution Exhibit 6 also showed a travel voucher for Appellant from 25 March to 7 April 2019 from Aviano AB to Seoul Korea. SA EP said MSgt NC was stationed at Camp Humphries, Korea, at that time. (R. at 1027.) SA EP said a review of the email materials provided by Yahoo for the "applejacks" account included a picture of MSgt NC and Appellant on Appellant's couch in Korea. (R. at 1027.)

Prosecution Exhibit 6 also showed a travel record for Appellant to Bangkok, Thailand beginning on 11 January 2019 for a period of 11 days. (R. at 1028.) A review of MSgt NC's travel records show MSgt NC was in Thailand during this same timeframe. SA EP said a review of the email materials provided by Yahoo for the "applejacks" account included a picture of MSgt NC and Appellant together in Thailand in January 2019. (Id.) SA EP said both Appellant and MSgt NC were married to other people during this timeframe. (R. at 1029.)

AFOSI SA JR took over the investigation from SA EP when he was reassigned to another AFOSI detachment. (R. at 1046.) SA JR testified that Appellant and MSgt NC met at the Non-Commissioned Officer (NCO) Academy in 2012 and had maintained communications with each other since that time. (R. at 1055.) Later testimony showed Appellant and MSgt NC has a son together. (R. at 1129.)

SA JR reviewed 1,200 emails found in the "applejacks" account. (R. at 1048.) SA JR said the email communications were generally sexually explicit conversations between Appellant and MSgt NC. SA JR said there was an email where Appellant and MSgt NC had gone to Thailand together and had taken pictures together. (R. at 1049.) SA JR agreed that all emails in the account had some tie to Appellant's relationship with MSgt NC. (R. at 1050.) SA JR said there were roughly 100 photographs found in the account and "maybe less than 100" videos, but a "substantive amount." (Id.)

Having read all the emails and viewed all the photographs and videos, SA JR said there was identifying information that revealed Appellant was the "Jane Doe" user behind the "applejacks" account." (Id.) SA JR provided several examples, including emails from MSgt NC that referred to Appellant by name. (R. at 1051.) There was also discussion about children and family members' birthdays, their respective AFSCs, and a screenshot of a Skype conversation between Appellant and MSgt NC were their full names, ranks, and duty stations were displayed. Based on this same review, SA JR determined that MSgt NC was the primary user of the "luckymango" account. (R. at 1052.)

Prosecution Exhibit 2 is a portion of the email content obtained from the "applejacks" account. (R. at 1053.) SA JR detailed an email sent on 23 May 2019 from the "applejacks" accounts to the "luckymango" account. (Pros. Ex. 2, Slide 3.) The email talks about chest tubes

and medical procedures, which SA JR said was Appellant's AFSC. (R. at 1057.) The email is also signed with Appellant's actual first name. (Id.) The email talks about "hard spanking and things like that and spending the night together," which SA JR said was indicative of "a romantic relationship or sexual relationship." (R. at 1058.) SA JR testimony included a review of each page of Prosecution Exhibit 2 and how each tied to Appellant as the user of the "applejacks" account and/or how each email showed a continuing sexual relationship between Appellant and MSgt NC. (R. at 1059-1164.)

SA JR stated that in the June 2019 timeframe, Appellant and MSgt NC were geographically separated but would send each other sexually explicit messages, photographs, and videos. (R. at 1072, referencing Pros. Ex. 2, Slide 15.) SA JR said in some videos MSgt NC would be masturbating and saying Appellant's name. (Id.) In another email, Appellant and MSgt NC are discussing their respective spouses and whether or not they like having sex with their spouses. (R. at 1075.) SA JR also said multiple emails referenced feet, including videos and photographs depicted feet as in a sexual context. (R. at 1080.)

SA JR noted that one email, on 5 June 2019, included a video of MSgt NC masturbating in what appeared to be an office setting. (R. at 1081.) SA JR said that multiple emails included sexual stories sent by Appellant to MSgt NC. (Id.)

Prosecution Exhibit 4 includes contraband images contained within emails in the "applejacks" account. (R. at 825.) In one video, MSgt NC is masturbating while saying, "You like to see me stroke my dick for you [Appellant's first name]?" (R. at 1083; Pros. Ex. 4.) SA JR estimated there were 30-50 sexually explicit videos found within the emails he reviewed. In a video attached to an email sent by Appellant to MSgt NC, with the subject line "wet and not alone," Appellant is masturbating in front of her daughter, AC. (R. at 1083-84; Pros. Ex. 2, 4.)

A reply email from MSgt NC to Appellant states "everything about the video had me hard all day." (Id.)

SA JR said Appellant and MSgt NC would exchange sexually explicit stories or fantasies, "usually involving young girls." (R. at 1084.) In some emails, MSgt NC's 15-year-old daughter is referenced. (R. at 1085.) In another, MSgt NC's four-year-old son is referenced. (R. at 1085, 1088-89.) In another email, Appellant ends a message to MSgt NC by stating "love you baby." (R. at 1086.)

Another email, with the subject line "story time" on 8 June 2020, included a reference to "bright red toes." (Id.) SA JR said that the "applejacks" account contains photographs of Appellant's feet, which are painted with red toenail polish. (R. at 1087.) In another email, Appellant and MSgt NC discuss their own three-year-old son. (R. at 1088.) Yet another email states, "We've been at this longer than most marriages." (R. at 1089.) In other emails, SA JR said Appellant repeatedly refers to MSgt NC's spouse as a "cunt." (R. at 1090.)

SA JR detailed how, in another email, Appellant sent an email to a company in Thailand called Tiger Kingdom asking for pictures taken at the company's theme park. (R. at 1091, 1093.) The email includes Appellant's name and the phrase "my husband and I." (Id.) SA JR stated that Appellant and MSgt NC were in Thailand together in January 2019, and that there was no evidence that Appellant's spouse visited Tiger Kingdom with Appellant in January 2019. (Id.)

Another video attached to an email showed a video of Appellant penetrating MSgt NC's anus. (R. at 1094.) In it, MSgt NC states, "Oh, [Appellant's first name]. Oh, fuck my ass baby." (R. at 1096; Pros. Ex. 4.) SA JR also determined Appellant and MSgt NC would frequently send messages, photographs, and videos to each other while they were at work. (R. at

1095.) In one video, MSgt NC is masturbating in his office at work and states, "Ohh [Appellant's first name], I'm going to cum baby." (R. at 1097; Pros. Ex. 4.)

One email from the "applejacks" account to the "luckymango" account includes the word "patient." (R. at 1099; Pros. Ex. 2 at 51.) SA JR stated this was significant because it "[s]peaks to the medical career field," which was Appellant's AFSC. (Id.) In another video involving a conversation between Appellant and MSgt NC, each tells the other, "Love you." (R. at 1101-02.)

SA JR agreed that it was relatively common throughout the email account content that either Appellant or MSgt NC would be at work and do something sexual. (R. at 1102.) One video involved Appellant defecating on the floor. (Id.) When asked about Appellant's response to messages or stories involving underage girls, SA JR, referencing Slide 69 of Prosecution Exhibit 2, stated that Appellant replied by saying, "I'm turned on. I love that idea." (R. at 1106.)

SA JR stated that MSgt NC was the godfather to the children of Mr. MB, including a 10-year-old daughter. (R. at 1106.) An email contained in the "applejacks" account with the subject line "[Mr. MB's] daugher's panties," included a video where MSgt NC states, "You want to see me cum in these dirty panties, baby?" (R. at 1107.) SA JR noted the panties had either a Mickey Mouse or Minnie Mouse design on the waistband. (Id.) SA JR stated there were other emails in the "applejacks" account that related to Mr. MB's daughter. (R. at 1108.)

SA JR said multiple emails in the account referenced urination, fecal matter, feet, and armpits in a sexual nature. (R. at 1108-09; *see also* Pros. Ex. 2, Slides 76-77.) Other emails discussed Appellant's daughters, who were 13 at the time. (R. at 1110.)

In October 2019, Appellant deployed to Afghanistan. SA JR said emails in the "applejacks" account discussed Appellant arriving in Afghanistan, getting WiFi set up, etc. (R. at 1110-11.) There was also a picture Appellant took of her computer screen where she was trying to check the Yahoo account downrange. SA JR explained, "There's an attachment to an email where it was, [Appellant] taking a picture of this, the computer screen that she was trying to check the Yahoo account on, down range and it was the, it had her name at the top, it was a block, block screen when in the AOR you can't access like personal email and things like that. So when she tried to go to that website it showed the blocked website notice with her name at the top as well as the location." (R. at 1111.)

SA JR said that sexually explicit images were being sent from the "applejacks" account during this time. (R. at 1112.) SA JR referenced an email from Appellant to MSgt NC that included pictures of Appellant's armpits and exposed breasts. (Id.; *see also* Pros. Ex. 2, Slide 84.)

In another exchange, MSgt NC stated, "one rule no one over 16," to which Appellant replies, "done." (Id.; *see also* Pros. Ex. 2, Slide 85.) Another message sent from Appellant to MSgt NC refers to "her crying and spanking her." (R. at 1123.) In another, Appellant writes, "I want to do this." (R. at 1123; Pros. Ex. 2, Slide 86.) Another message from Appellant says, "12YO," a reference to a 12-year-old. (R. at 1123; Pros. Ex. 2, Slide 87.)

Email communication continued between Appellant and MSgt NC throughout November and December 2019 while Appellant was deployed, including Appellant sending MSgt NC pictures of herself using the "applejacks" account. (R. at 1125; Pros. Ex. 2, Slides 89-90.)

In January 2020, Appellant sent multiple emails to MSgt NC, including one discussing their children's birthdays. (R. at 1125; Pros. Ex. 2, Slides 92-93.) Another email contained references to Italy where Appellant was stationed. (R. at 1127.) Another referenced Hagerman, New Mexico, which was a location tied to MSgt NC. (R. at 1128.) Another email referenced Appellant by name and discussed Appellant's and MSgt NC's child. (R. at 1129; Pros. Ex. 2, Slide 98.)

SA JR highlighted that Appellant and MSgt NC talked within their emails about deleting messages and concealing their conversations. (R. at 1162.) SA JR stated, "There's also an email when [Appellant] was in Afghanistan about, she, she said the cloud somehow restored a whole bunch of photos and messages and things like that, and she's hesitant to send any new ones until she could re-delete them. So there's more evidence that stuff had been deleted." (Id.)

In an email from 23 June 2019, the "luckymango" account sent an email saying that he was sitting next to a young female dependent. (R. at 1163.) The "applejacks" account responded, "good," and "I hope she smells good." (R. at 1164.) In another email from 19 September 2019, the "luckymango" account sent a message to the "applejacks" account stating "you snuck into an exam room and took pictures of a young girl," or words to that effect. When asked which individual would be in an exam room in the course of their duties, SA JR replied, "[Appellant], being in the medical career field." (Id.)

PO1 IA, a digital forensic examiner, analyzed the 1,000+ emails found within the "applejacks" account from the account's creation in May 2019 until it was locked down in January 2020. (R. at 1177, 1179.) PO1 IA said the "luckymango" account predominantly used the Safari web browser to view emails while the "applejacks" account predominantly used the Yahoo iOS application. (R. at 1180.) Reviewing Prosecution Exhibit 8, PO1 IA reviewed an

email sent on 7 January 2020 at 0647 UTC and agreed that this email was the last email sent by the "applejacks" account before the "young girls" emails were sent. (R. at 1181.) PO1 IA testified that the forensic data he reviewed showed that the same device that sent this email also sent the "young girls" emails. (R. at 1183, 1302.) Using Prosecution Exhibit 15, PO1 IA explained that the "young girls" emails all came from the same IP address. (R. at 1303.)

PO1 IA also testified that the naming conventions for the file names of the child sex abuse material (CSAM) attached to emails sent by the "applejacks" account matched the file naming convention of a picture Appellant took of herself in Afghanistan. (R. at 1322.) PO1 IA also agreed that the forensic data for the last email that was sent from the "applejacks" account before the CSAM was sent, the last email sent from the "applejacks" account before it was shut down, and all the emails including CSAM that was sent between these two emails all matched. (R. at 1323.)

Using Prosecution Exhibit 15, PO1 IA showed numerous instances where the "applejacks" account was accessed using an IP addresses based in Vodafone, Italy or Aviano AB, Italy, which was Appellant's location from May 2019 until October 2019. (R. at 1305-07.) However, in October 2019, PO1 IA said the "applejacks" account began being accessing using IP addresses in Afghanistan, which is where Appellant deployed to in October 2019. (R. at 1307.)

Prior to her deployment to Afghanistan in October 2019, PO1 IA said that the "applejacks" account had never been accessed by a VPN, which PO1 IA said was a "method of anonymizing your online activity" and shows a user's location as different that where they are actually located. (R. at 1308.) However, PO1 IA said that screenshots from emails showed that Appellant utilized a VPN while in Afghanistan. (R. at 1309-10, 1359.)

PO1 IA said that the "applejacks" account was never logged into by an IP address in Korea. (R. at 1311.) As for the "luckymango" account, PO1 IA's review of the IP data showed this account was logged into in Virginia, Italy, Korea, and Afghanistan. (R. at 1313-16.) PO1 IA said this information indicated Appellant was logging into the "luckymango" account since Appellant was stationed both in Italy and Afghanistan. (R. at 1315-16.) Again, PO1 IA highlighted that only the "luckymango" account had ever been accessed from Korea and that the "applejacks" account had never been accessed from Korea. (R. at 1316-17.) PO1 IA testified that multiple log-ins between the "applejacks" and "luckymango" accounts correlated with Appellant logging into both of the accounts because each account had IP addresses from Italy and Afghanistan, which is where Appellant was located. (R. at 1361.) PO1 IA explained:

> It follows the same kind of pattern, and by looking at those times, one of the things that I notice is you see account login to Luckymango and then roughly couple of minutes later it logs into Applejacks. So to me one of the possibilities that is that its users logged into Applejacks disconnects login Luckymango, disconnects again, logs into the Applejacks again.

(R. at 1362.) PO1 IA then confirmed again that he saw no evidence that indicated MSgt NC had ever logged into the "applejacks" account. (Id.) PO1 IA also highlighted that while in Italy, Appellant had changed the login password for the "applejacks" account shortly after the account was created. (Id.) When a member asked if it was possible for someone from Korea to log into Yahoo using an Italian internet service provider, PO1 IA answered, "Not that I'm aware of, without jumping through a lot of hoops." (R. at 1364.)

PO1 IA continued, "Based on everything that I analyze [sic] everything that I was able to see, I did not see any kind of indication, I did not see any Korean IP's logging into Applejacks. I did not, so my belief is most likely that the sole user was [Appellant]." (R. at 1371.)

PO1 IA also highlighted that while some CSAM was found on MSgt NC's iPhone, none of those images were the same images found in emails within the "applejacks" account. (R. at 1184-85, 1351.) Additionally, PO1 IA said that the "WhatsApp" application was installed on MSgt NC's iPhone and that MSgt NC had three contacts within that application, one of which was Appellant. (R. at 1188.) PO1 IA said this phone number associated with Appellant in MSgt NC's application was the same telephone number contained in emails from the "applejacks" account to the "luckymango" account. In those emails, the sender of the "applejacks" emails said "this is my phone number." (Id.)

AFOSI SA AQT, an agent assigned to Aviano AB, reviewed emails between Appellant and MSgt NC. (R. at 1378.) One email, contained on Slide 61 of Prosecution Exhibit 2, included a video of a female urinating and defecating in a bathroom. (Id.) SA AQT said the video was filmed in one of the bathrooms at the 57th Rescue Squadron. (R. at 1379.) SA AQT explained that he went to different areas on base that Appellant would have access to and that the 57th Rescue Squadron was where Appellant worked. (R. at 1380.)

SMSgt SM worked with Appellant at the 57th Rescue Squadron in Aviano. (R. at 1383.) SMSgt SM said that Appellant's daughter, AC, was either 12- or 13-years-old in 2019. Looking at the video included at Slide 26 of Prosecution Exhibit 2, SMSgt SM was asked if he recognized the child in the video. SMSgt SM replied, "I would say that is [AC]." (R. at 1384.)

- ***Emails from the "applejacks" account***

Prosecution Exhibit 2 includes the following emails, which are detailed below sorted by date:

- 16 May 2019: Email from "applejacks" to "luckymango" with subject line "I love you"

- Email states, in part, "You are . . . hands down the sexist man I know . . . I love you with all my heart and I love us!!!" (Pros. Ex. 2, Slide 2.)

- 23 May 2019: Email from "applejacks" to "luckymango"
  - Email states, in part, "I just got home to Italy" and mentions being in medical training
  - Email also states, "It was fun but we can't do the hard spanking or rough slap before I have to home. I bruise to [sic] easy. I have been able to cover my cheek with makeup but my ass is black and blue."
  - The email continues, "I am going to need you to come back to bed, cuddle up, and sleep with me every night. I slept so well in DC with [sic] curled up with you. But I don't sleep well without you that's for sure."
  - The email is signed, "Love [Appellant's first name]" (Pros. Ex. 2, Slide 3.)

- 23 May 2019: Email from "applejacks" to "luckymango" with subject line "my bruised ass"
  - The email contains a photo of a bruised buttocks (Pros. Ex. 2, Slide 4.)

- 25 May 2019: Email with subject line "Early morning kisses"
  - Email contains photos of Appellant and MSgt NC lying down under bed sheets (Pros. Ex. 2, Slide 5.)

- 25 May 2019: Email with subject line "Sexiest man alive"
  - Email contains photo of a shirtless MSgt NC lying down (Pros. Ex. 2, Slide 6.)

- 25 May 2019: Email with subject line "I love our sex adventures" (Pros. Ex. 2, Slide 7.)
  - Email contains screenshots of a text conversation between Appellant and MSgt NC where MSgt NC states, "I always think about fucking your ass in front of the open window," "I tore your ass up and your tits bounced as I fuck to [sic] you," "Or us fucking in the parking lot outside of the restaurant for everyone to see," and "Or me fucking you from behind in the hot tub while people were in the pool and lounging out"
  - Appellant responded, "You tore my ass up for everyone to see," "They were jealous," "I always wonder how many people watched us through the restaurant windows," and

"And don't forget the swimming pool while being spied on and recorded" (Pros. Ex. 2, Slide 8.)

- 25 May 2019: Email with subject line "Work Skype – lack of [Appellant's and MSgt NC's son's name] pic" (Pros. Ex. 2, Slide 10.)
  - Email contains screenshots of a Skype conversation between Appellant and MSgt NC
  - Conversation is using official Skype software and the names of Appellant and MSgt NC, along with their duty titles and rank, are visible
  - In the conversation, Appellant states, "But just like I like to take pics of the two of us. I want a picture of the other half of my heart. I want a picture of our 'family'." (Pros. Ex. 2, Slide 11.)

- 27 May 2019: Email from "luckymango" to "applejacks" with subject line "Miss your face"
  - Email states, "I miss your smell. I miss your feet . . . I miss us fucking too. I rubbed one out in the shower to thoughts of you today!" (Pros. Ex. 2, Slide 12.)

- 27 May 2019: Email from "applejacks" to "luckymango" with subject line "Re: Miss your face"
  - Email states, "I woke up in the middle of the night and rubbed my clit to thoughts of you!" (Pros. Ex. 2, Slide 13.)

- 1 June 2019: Email from "applejacks" to "luckymango" with subject line "Wondering fingers"
  - Email states, "I'm going to lay here, think about fucking you and finger myself until I get off. (Pros. Ex. 2, Slide 15.)

- 2 June 2019: Email from "applejacks" to "luckymango"
  - Email states, "Btw I love that you message me as I'm playing with my pussy and looking at your pics" (Pros. Ex. 2, Slide 16.)

- 4 June 2019: Email from "luckymango" to "applejacks"
  - Email states, "Her and I fuck like a married couple. You and I fuck like pornstars every time." (Pros. Ex. 2, Slide 17.)
- 4 June 2019: Email from "applejacks" to "luckymango"
  - Email states, "I don't want you fucking anyone else but me . . ." (Pros. Ex. 2, Slide 17.)

- 4 June 2019: Email from "applejacks" to "luckymango" with subject line "Re: Miss you"
    - Email states, "I need you and your pornstar cock" (Pros. Ex. 2, Slide 19.)

- 5 June 2019: Various emails from "applejacks" to "luckymango" with subject line "Re: Love you"
    - Emails state, "can you video yourself rubbing your dick through your pants," and "Go in the bathroom and vid yourself stroking your cock" (Pros. Ex. 2, Slide 21.)

- 5 June 2019: Email from "applejacks" to "luckymango"
    - Email states, "How about a driving and stroking your cock vid" (Pros. Ex. 2, Slide 22.)

- 5 June 2019: Email from "luckymango" to "applejacks" (Pros. Ex. 2, Slide 23.)
    - Email contains a video of MSgt NC in a vehicle. (Pros. Ex. 2, Slide 24.)
    - The video, contained in Prosecution Exhibit 4, shows MSgt NC, who states, "How's that baby? You like to see me stroke my dick for you [Appellant's first name]?" (R. at 1082-83; *see also* Pro. Ex. 4.)

- 5 June 2019: Email from "applejacks" to "luckymango" with subject line "Wet and not alone" (Pros. Ex. 2, Slide 25.)
    - Email contains a video of Appellant (Pros. Ex. 2, Slide 26.)
    - The video, contained in Prosecution Exhibit 4, shows Appellant masturbating in front of her daughter, AC. (R. at 1083-84; Pros. Ex. 2, 4.)

- 5 June 2019: Emails from "luckymango" to "applejacks" with subject line "Re: Wet and not alone"
    - Emails state, "I love that you are doing this and she is totally unsuspecting," "Fuck I love you," and "Everything about that video had me hard all day." (Pros. Ex. 2, Slide 27.)

- 8 June 2019: Email from "applejacks" to "luckymango" with subject line "Story time"
    - Email is a story about MSgt NC sitting in a dentist officer where he sees a mother "and her even hotter daughter," who is "about 16" and has "big beautiful tits"
    - The email then describes a sexual encounter between MSgt NC, the mom, and the 16-year-old (Pros. Ex. 2, Slide 31.)

- 8 June 2019: Email from "luckymango" to "applejacks" with subject line "Re: Story time"
    - Email states, "Holy hell this is the hottest thing I've ever read," and "My jaw is on the floor and cock is so hard!" (Pros. Ex. 2, Slide 31.)

- 8 June 2019: Email from "applejacks" to "luckymango" with subject line "Re: Story time"
    - Email states, "I hope it's a good thought to stroke your cock to" (Pros. Ex. 2, Slide 31.)

- 12 June 2019: Email from "applejacks" to "luckymango" with subject line "In need"
    - Email states, "Baby I need fucks so bad!!!!!! Please come fuck me!!!!!!" (Pros. Ex. 2, Slide 32.)

- 21 June 2019: Email from "applejacks"
    - This email contains screenshots of a conversation between Appellant and MSgt NC in which the couple discuss their son, Appellant saying, "I want you to be a dad to [the couple's son's first name," MSgt NC saying, "We have lasted longer than most marriages," Appellant refers to MSgt NC's wife as a "cunt," and tells MSgt NC to "do right by our son" (Pros. Ex. 2, Slides 36-38.)
    - MSgt NC also states, "you honestly think that me telling my 15 daughter that I cheated on her mother and had a child with another woman won't fucking kill her?!?!?!"

- 22 June 2019: Email from "applejacks" to Tiger Kingdom
    - In this email, Appellant, using her actual first and last name, states, "On 28 Jan 2019 my husband and I visited your facility," said the pictures taken at the facility were "honeymoon pictures," and asked for the pictures to be sent to the "applejacks" email account (Pros. Ex. 2, Slide 39.)

- 22 June 2019: Email from "applejacks" with subject line "Couple big tiger 2"
    - Email contains photos of Appellant and MSgt NC at the Tiger Kingdom park (Pros. Ex. 2, Slides 40-41.)
- 23 June 2019: Email from "applejacks" to "luckymango"
    - Email states, "I just finished getting off to some of your vids," and "Tonight I watched the vid of me fucking your ass." (Pros. Ex. 2, Slide 42.)

- 24 June 2019: Email from "applejacks"

- The email contains a video of someone inserting a cucumber into a male's anus (Pros. Ex. 2, Slides 44-45.)
- In the video, MSgt NC states," Oh. Oh. Oh, [Appellant's first name]. Oh, [Appellant's first name]. Oh, fuck my ass baby. Fuck that ass. Ooh yeah. Oh, mmm. Oh, [Appellant's first name]. Oh, fuck baby." (R. at 1096; Pros. Ex. 4.)

- 2 July 2019: Email from "applejacks" with the subject line "Cumming for me in his office"
  - The email contains a video of MSgt NC masturbating in his office at work. (Pros. Ex. 2, Slides 48-49.)
  - In the video, MSgt NC states, "Ohh [Appellant's first name], I'm going to cum baby." (R. at 1097; Pros. Ex. 4.)

- 8 July 2019: Email from "applejacks" to "luckymango" with subject line "Finger fucking myself"
  - Email states, "Laying in bed watching your vids and fingering myself. I wish it was your dick inside me right now!!" (Pros. Ex. 2, Slide 50.)

- 12 July 2019: Email from "luckymango" to "applejacks" with subject line "Re: Dental princess today lol"
  - Email states, "Are you busy today? Can you sneak away for a bathroom flash pic?" (Pros. Ex. 2, Slide 51.)

- 12 July 2019: Email from "applejacks" to "luckymango"
  - Email includes photos of Appellant taking a photo of herself fully clothed in medical scrubs in front of a mirror, as well as pictures of her exposed breasts (Pros. Ex. 2, Slides 52-54.)

- 20 July 2019: Email from "applejacks" to "luckymango" with subject line "As requested"
  - Email contains a video of Appellant focusing on her vaginal area and Appellant is holding a toothbrush (R. at 1100; *see also* Pros. Ex. 4.)

- 8 July 2019: Email from "applejacks" to "luckymango" with subject line "Finger fucking myself"
  - Email states, "Laying in bed watching your vids and fingering myself. I wish it was your dick inside me right now!!" (Pros. Ex. 2, Slide 50.)

- 17 July 2019: Emails from "applejacks"
  - Emails contain a video and photographs of Appellant masturbating and posing fully naked in his work office with his uniform hanging in the background (Pros. Ex. 2, Slides 58-60.)

- 17 July 2019: Email from "applejacks"
  - Email contains a video of Appellant defecating on a floor (Pros. Ex. 2, Slides 61-63.)

- 22 July 2019: Email from "applejacks" with subject line "Sext convo"
  - Email contains screenshots of a text conversation between Appellant and MSgt NC where Appellant and MSgt NC send nudes pictures of themselves and talk about having sex (Pros. Ex. 2, Slides 64-67.)

- 24 July 2019: Email from "applejacks" with subject line "Fantasy"
  - Email contains screenshots of a text conversation between Appellant and MSgt NC where MSgt NC discussed having sex with Appellant and an "underage girl," and Appellant responds by stating, "I am so turned on and love that idea!!!" (Pros. Ex. 2, Slides 68-69.)

- 20 August 2019: Email from "applejacks" with subject line "[Mr. MB's] daughters panties"
  - Email contains a video of MSgt NC masturbating using the panties of Mr. MB's young daughter (Pros. Ex. 2, Slides 71-73; R. at 1107-08; Pros. Ex. 4.)
  - In the video, MSgt NC states, "You want to see me cum in these dirty panties, baby?" (R. at 1107.)

- 15 September 2019: Email from "luckymango" to "applejacks" with subject line "Dream 1"
  - In the email, MSgt NC details a dream he had where he had sex with Mr. MB's wife, recorded it so he and Appellant could watch later, how he set up a camera to spy on Mr. MB's 10-year-old daughter while she showered, and how he and Appellant then had sex while watching the 10-year-old (Pros. Ex. 2, Slide 75.)

- 19 October 2019: Email from "applejacks" to "luckymango" with subject line "Come fuck this ass" (Pros. Ex. 2, Slide 82.)

- 2 November 2019: Email from "applejacks" to "luckymango" with subject line "Proof I'm being your good girl"
    - Email contains photographs of Appellant, including her exposed breast (Pros. Ex. 2, Slide 84.)

- 16 November 2019: Email from "applejacks" to "luckymango"
    - The email contains screenshots from a text conversation in which Appellant says they should run away and get married, and "hire babysitters for the littles . . . we can come home and you can fuck her [the babysitter] for payment"
    - MSgt NC replies, "One rule no one over 16," to which Appellant says, "Done"
    - MSgt NC then said, "I think you meant to say rape her for payment," to which Appellant replied, "I absolutely did"
    - After MSgt NC shares two pornographic video links and says, "The neighbors daughter…she's 12," Appellant stated, "Lol. Yeah but there was something about her over my lap, fucking her s, her crying, and spanking her"
    - When MSgt NC replied, "I'd love to watch this," Appellant said, "I WANT TO DO THIS"
    - The couple then discuss the girl's "young naked body," spitting on her anus, licking her anus, MSgt NC "watching as you ruin her virgin ass," Appellant saying she would "need lube" and would shove MSgt NC's "face in her ass," and MSgt NC talking about sodomizing the young girl by "shoving her own hair brush in her asshole
    - Appellant then stated, "I'm also going to make her suck your dick while she's laying across my lap and she so much as stops for a second I beat her ass again"
    - Appellant continued, "When we come back in the evening and she's asleep we will drug her so she doesn't remember and to whatever the fuck we want to her"
    - When MSgt NC said, "let's make her our little fuck toy," Appellant responded, "Yes!"
    - Appellant also said, "I want to finger her . . . I want to feel how tight she is . . . I want to feel her stretch against my fingers," adding that she wanted to "Finger her tight young Pussy, suck her little titties, fuck her ass, taste her," and that "I want to finger fuck her 12 yo pussy" (Pros. Ex. 2, Slides 85-88.)

- 26 December 2019: Email from "applejacks" to "luckymango"
    - Email contains multiple naked photographs of Appellant (Pros. Ex. 2, Slide 90.)

- 2 January 2020: Email from "applejacks" to "luckymango" with subject line "All our kids bdays"
    - The email contains the birthdates of both MSgt NC's and Appellant's children, including their own son, whose birth year is listed as 2016 (Pros. Ex. 2, Slide 92.)

- 7 January 2020: Screenshot showing 11 emails sent from "applejacks" to "luckymango" with subject lines "Young girls 1" to "Young girls 11" (Pros. Ex. 2, Slide 94.)

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

ARGUMENT

I.

APPELLANT'S CONVICTIONS 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[3]

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

[3] Because Appellant's offenses occurred prior to 1 January 2021, the prior factual sufficiency review standards under Article 66 apply.

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).

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).

Analysis

The panel at Appellant's court-martial correctly found her guilty of each specification and charge, and there is no credible basis in the record for this Court to disturb Appellant's just verdict and sentence. Here, the United States presented the panel with ample evidence to convince them of Appellant's guilt beyond a reasonable doubt. This Honorable Court should equally be convinced and affirm Appellant's convictions.

- ***Specification 1 of Charge I – Extramarital Sexual Conduct***

In this specification, Appellant was charged with engaging in extramarital sexual conduct, to wit: genital to genital sexual intercourse, with MSgt NC on divers occasions between on or about 1 May 2019 and on or about 15 January 2020. (Charge Sheet.) In her brief,

Appellant claims the evidence only showed Appellant and MSgt NC were physically co-located during the charged timeframe from 13-19 May 2019 and that there was no evidence the couple engaged in genital to genital sexual intercourse during that time. (App. Br. at 5.) Appellant also claims there was no evidence that the conduct was service discrediting. (Id.)

Appellant is wrong as the evidence of Appellant's adulterous affair with MSgt NC is clear. To start, as Appellant concedes, Appellant and MSgt NC were both in the same area between 13-19 May 2019. (*See* Pros. Ex. 6.) Then, on 23 May 2019, Appellant sent Appellant an email saying that she "just got home to Italy," and complained that "we can't do the hard spanking or rough slap" before she comes home because she bruises too easy. (Pros. Ex. 2, Slide 3.) Appellant also stated, "I am still trying to come up with a believable story." (Id.) Appellant ended the email by stating, "I am going to need you to come back to bed, cuddle up, and sleep with me every night. I slept so well in DC with [sic] curled up with you. But I don't sleep well without you that's for sure." (Id.) The email was signed, "Love [Appellant's first name]." (Id.) The same day, 23 May 2019, Appellant sent MSgt NC an email with the subject line "my bruised ass" that included a photograph of her bruised buttocks. (Id. at Slide 4.)

Two days later, on 25 May 2019, Appellant sent MSgt NC an email with the subject line "Early morning kisses" that contains photographs of Appellant and MSgt NC lying down under bed sheets. Neither appear to be wearing a shirt. (Id. at Slide 5.) Another email with the subject line "Sexiest man alive" included another photograph of MSgt NC without a shirt. (Id. at Slide 6.) Yet another email sent by Appellant on 25 May 2019 had a subject line "I love our sex adventures" included a conversation between the couple about having sex in various public places. (Id. at Slides 7-9.)

Two days after that, on 27 May 2019, MSgt NC sent Appellant an email stating, "I miss us fucking too." (Id. at Slide 13.) On 1 June 2019, Appellant wrote to MSgt NC that she was "think[ing] about fucking you . . . ." (Id. at Slide 15.) On 4 June 2019, MSgt NC wrote to Appellant, "You and I fuck like pornstars *every time*." (Id. at Slide 17.) (emphasis added.) Other emails in Prosecution Exhibit 2 repeatedly talk about the two wanting and needing to have sex with each other. (*See*, for example, Id. at Slides 19, 32, 50.)

Notably, on May 2019, while the couple were both TDY in Arlington, Virginia in May 2019, is the date when the "applejacks" and "luckymango" emails accounts were created. As shown, these accounts were used to further the couple's adulterous relationship by continually sending each other sexual conversations, explicit photographs and videos, and stories about the couple having sex with each other and with others, including minors. As Appellant herself wrote, "I can't wait to fill this new email up" with the couple's "memories." (Id. at Slide 2.)

Here, the evidence clearly shows Appellant and MSgt NC had genital-to-genital sexual intercourse during their TDY together in May 2019. Appellant's bruised buttocks, along with their discussion of having sex in multiple locations, having sex like pornstars "every time," as well as pictures of them in bed wearing no clothes and Appellant's statement of "sle[eping] so well in DC . . . curled up with you" confirm their actions. Circumstantial evidence further shows Appellant and MSgt NC engaged in genital-to-genital sexual intercourse including the couple's trip to Thailand in January 2019 (in which Appellant refers to the trip as the couple's honeymoon), Appellant's TDY to MSgt NC's duty station in April 2019, and the host of emails throughout 2019 and 2020 where Appellant and MSgt NC discuss having sex with each other, including one video showing Appellant inserting a cucumber into MSgt NC's anus. (Id. at Slide 44-45.)

Appellant's contention that there was "[n]o evidence of actual genital to genital sexual activity during this timeframe in Virginia" is not supported by the record. (App. Br. at 5.) As shown, the panel received ample evidence that genital to genital sexual intercourse took place on divers occasions during the charged timeframe.

Regarding the terminal element, the military judge provided an in-depth instruction regarding the meaning of "service discrediting" conduct. (R. at 1438-40.) At trial, the military judge discussed instructions with the parties, including "the elements of Specification 1 of Charge I with definitions. (R. at 1418.) The defense did not object to any instructions related to the terminal element of Specification 1 of Charge I. Further, the military judge's instructions matched those provided in the Military Judge's Benchbook. *See* Dep't. of the Army, Pam. 27-9, Legal Services: *Military Judges' Benchbook*, para. 3a-66-1.

Yet now, Appellant, for the first time, complains about the military judge's instructions. Notably, Appellant does not raise a separate issue related to the military judge's instructions. This is likely because Appellant realizes that she affirmatively waived this issue at trial by not objecting to the military judge's instruction at trial. *See* United States v. Davis, 79 M.J. 329, 331-32 (C.A.A.F. 2020); *see also* United States v. Cunningham, 83 M.J 367, 374 (C.A.A.F. 2023) (at the conclusion of sentencing arguments, the trial defense counsel answered "no" when the military judge asked if either party had any objections; CAAF held the response constituted an express waiver as the response "did not just fail to object," but "affirmatively declined to object."); United States v. Kitchen, ACM 40155, 2023 CCA LEXIS 58 (A.F. Ct. Crim. App. 3 February 2023) (relying on Davis, this Court did not pierce the waiver where the military judge involved counsel in drafting and tailoring instructions, the military judge solicited objections to and requests for additional instructions, defense counsel did not offer additional instructions,

and, when asked by the military judge, counsel did not object to the final instructions provided to the members).

Seeing her instruction issue waived, Appellant now attempts to shoehorn her newfound complaints about the military judge's instructions under her factual and legal sufficiency claim. But there was no error in the military judge's instructions and the record shows the Government's evidence proved beyond a reasonable doubt that Appellant's extramarital affair with MSgt NC was of a nature to being discredit upon the armed forces.

To start, the entire premise of Appellant's argument in based on a flawed view of the law, particularly our superior Court's recent decision in United States v. Wells, __ M.J. __, 2024 CAAF LEXIS 552 (C.A.A.F. 24 September 2024). Appellant does correctly cite to Wells and its quote of the definition of "discredit," which means to "injure the reputation of the armed forces and includes extramarital conduct that has a tendency, because of its open or notorious nature, to bring the Service into disrepute, make it subject to public ridicule, or lower it in public esteem." (App. Br. at 6.)[4]

However, Appellant fails to note the standard and focus of Clause 2 offenses, as specifically addressed in Wells. There, in affirming its prior decision in United States v. Phillips, 70 M.J. 161, 165-66 (C.A.A.F. 2011), the Wells Court stated, "The focus of clause 2 is on the 'nature' of the conduct, *whether the accused's conduct would tend to bring discredit on the armed forces if known by the public*." Wells, at *7 (*quoting* Phillips, 70 M.J. at 165-66) (emphasis in original). In discussing Phillips, the Wells Court continued, "We further explained that the government need not prove anyone was aware of an accused's conduct or 'to

[4] Notably, in his instructions, the military judge provided the same definition. (*See* R. at 1438.)

specifically articulate how the conduct is service discrediting.'" Id. (*quoting* Phillips, 70 M.J. at 166.) Instead, the Phillips Court stated the government must "introduce sufficient evidence of the accused's allegedly service discrediting conduct to support a conviction." Id. (*quoting* Phillips, 70 M.J. at 166.) Ultimately, in Phillips, our superior Court concluded a rational trier of fact could have found the accused's possession of child pornography to be service discrediting "had the public known of it." Id. (*quoting* Phillips, 70 M.J. at 166.) Indeed, as held by Phillips, "evidence that the public was actually aware of the conduct is not necessarily required." Phillips, 70 M.J. at 163.

Here, Appellant's conduct with MSgt NC would tend to bring discredit on the armed forces if known by the public. To start, extramarital sexual conduct in the charged timeframe occurred while Appellant and MSgt NC were both on military TDY orders to the same location. Further, in the aftermath of their TDY, Appellant sent MSgt NC a picture of her bruised buttocks, said she was having trouble with coming up with a believable story (presumably to tell her spouse about her bruised buttocks), and then discussed having sex with MSgt NC in an open and notorious fashion, including having sex in front of an open window, in the parking lot of a restaurant, and in a hot tub. Even if no one saw them having sexual intercourse, Appellant's conduct with MSgt NC would have tended to discredit the armed forces if the public had seen those acts, especially considering it occurred while both participants had traveled halfway across the world on military orders only to engage in their elicit and adulterous affair in the very hotel paid for by tax payers via per diem and lodging funds. Furthermore, the multitude of emails between the two discussing the details of their sexual intercourse provides ample evidence tending to bring discredit on the armed forces if known by the public.

When weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced beyond a reasonable doubt that the evidence is factually sufficient to sustain Appellant's conviction for extramarital sexual conduct. The panel correctly found Appellant guilty of this offense, and the United States is confident on this record that this Court will reach the same conclusion.

The same holds true for Appellant's legal sufficiency claim. Here, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

- ***Specification 2 of Charge I – Indecent Language to MSgt NC to wit: Sexual Fantasies Involving Children***

In Specification 2 of Charge I, Appellant was charged with communicating indecent language to MSgt NC in the form of written sexual fantasies involving children. (Charge Sheet.) Evidence proving this specification included the text conversation attached to the 16 November 2019 email from Appellant to MSgt NC. This is the text conversation where Appellant and MSgt NC discuss bringing a babysitter on a trip with them that is not over 16 and how the two will "fuck her," "spank[] her," drug her, spit on and lick her anus, sodomize her with a hair brush, and force her to perform oral sex on MSgt NC. (Pros. Ex. 2, Slides 85-88.)

Without question, Appellant's chats are not only grossly offensive to modesty, decency, and propriety because of their disgusting nature, but they are also grossly offensive because of their clear tendency to incite lustful thoughts in both Appellant and MSgt NC. Still, Appellant challenges her conviction on a factual sufficiency basis by arguing her and MSgt NC's conduct

was "private, sexual conduct protected by Lawrence and Marcum" and her supposed "private consensual sexual activity" did not "involve any aggravating circumstances." (App. Br. at 8-10.) She claims the military judge should have instructed on these supposed "aggravating circumstances" requirement and that there is a "lack of aggravating circumstances" in this case. Here again, Appellant displays a fundamental misunderstanding of the law.

Under the sufficiency of a conviction umbrella, Appellant's claim appears to more of legal sufficiency question vice a factual one considering her arguments, but either way her claim fails.[5] First, it is well settled that specifications alleging communication of indecent language do not violate the First Amendment right to freedom of speech simply because the writings were private communications between consenting adults. *See, e.g.*, United States v. Gill, 40 M.J. 835, 837 (A.F.C.M.R. 1994) (*citing* United States v. Moore, 38 M.J. 490, 492-93 (C.M.A. 1994)). Second, obscene language--that is, language which contains a depiction or description of sexual conduct in a patently offensive way--is, by definition, not constitutionally protected. Miller v. California, 413 U.S. 15, 24-25 (1973). Freedom of speech "does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245-46 (2002).

Hence, the fact that Appellant was conversing with MSgt NC does not it bring her words within the realm of constitutionally protected speech.[6] Rather, these facts further demonstrate

[5] It also implies the military judge erred in instructing the members, which is a newfound argument that was never raised at trial and, thus, affirmatively waived. Appellant's implied contention that the military judge erred in his instructions is addressed further below.

[6] Indeed, the Government seriously doubts that the Founding Fathers of our nation who wrote the charter of our liberties had in mind the protection of the type of conduct committed by Appellant when they penned the First Amendment.

her guilt and categorically place her deplorable conduct well outside the protections of the First Amendment.

To support her argument that her communications about raping a girl under 16 years of age were protected speech, Appellant cites to Lawrence v. Texas, 539 U.S. 558 (2003). Yet, Lawrence dealt with conduct, not speech. In Lawrence, the Supreme Court held, with some exceptions, there is a constitutionally protected liberty interest in the act of sodomy between consenting adults. Id. at 578. While the Supreme Court recognized a liberty interest in the act of sodomy between consenting adults, it did not enlarge the liberty interest to include obscene speech.

The same holds true in United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004), the seminal case from our Superior Court addressing the Supreme Court's Lawrence opinion. Like Lawrence, Marcum dealt with a physical act rather than obscene language.

Furthermore, Appellant's contention that her conversation with MSgt NC was a private conversation between two consenting adults is flawed. Our superior court in United States v. Meakin, 78 M.J. 396, 401 (C.A.A.F. 2019), dismissed this very argument. There, an appellant transmitted obscene messages from his home computer to anonymous third-parties via online instant messages and emails, but then argued the messages were analogous to having a private discussion within the seclusion of his home. Meakin, 78 M.J. at 402.

CAAF disagreed. CAAF first stated that any zone of privacy does not extend beyond the confines of one's home. Meakin, 78 M.J. at 402 (*citing* United States v. Bowersox, 72 M.J. 71, 76 (C.A.A.F. 2013) ("'The Court has consistently rejected constitutional protection for obscene material outside the home.'") (*quoting* United States v. Orito, 413 U.S. 139 (1973)). CAAF then noted that the messages in Meakin were "both transported and distributed via the internet" and

that the "Supreme Court has consistently rejected the idea that 'the right to possess obscene material in the privacy of the home . . . creates a correlative right to receive it, transport it, or distribute it.'" Meakin, 78 M.J. at 402 (*citing* Orito, 413 U.S. at 141). CAAF further highlighted that "such transmissions constitute 'travel' in interstate commerce." Meakin, 78 M.J. at 402 (*citing* United States v. Pierce, 70 M.J. 391, 395 (C.A.A.F. 2011) ("Every court to address the issue agrees with the unremarkable proposition that the Internet is a means of interstate commerce."). CAAF also noted that the "Supreme Court has consistently declined to extend First Amendment protection where obscenity is physically taken outside of the home, even where it is intended for private, noncommercial purposes." Meakin, 78 M.J. at 402 (*citing* United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 376, 91 S. Ct. 1400, 28 L. Ed. 2d 822 (1971)).

Here, Appellant's conversation with MSgt NC was not an act and was not anything private between two consenting adults. Yet, even if this Court did view Appellant's "sexting" as conduct rather than speech, her indecent language still does not fall under the protections of Lawrence and Marcum. In Marcum, our superior Court devised the following three-part test to determine whether the liberty interest identified in Lawrence rendered a servicemember's conviction unconstitutional:

> First, was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? Second, did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in Lawrence? Third, are there additional factors relevant solely in the military environment that affect the nature and reach of the Lawrence liberty interest?

Marcum, 60 M.J. at 206-07. While Appellant must pass all three prongs, she fails all of them. This brief, however, will address just the first two.

In applying the first Marcum prong, Appellant's conduct with MSgt NC did not involve the private sexual acts of consenting adults, but instead involved a conversation between Appellant and MSgt NC about performing sexually explicit acts on a girl 16 years of age or younger. In fact, Appellant's statements discuss a 12-year-old girl. Here, Appellant and MSgt NC were discussing and planning to perform sexual acts on a child in the presence of each other – even going as far to say that the two adults would do with the girl while the other continued to perform sexual acts on her. Nothing about Appellant's communications with MSgt NC involved private sexual acts between just Appellant and MSgt NC. Therefore, these acts are not within a liberty interest that protects private, consensual sexual conduct.

In looking at the second prong of Marcum, it is clear Appellant's conduct falls outside the analysis in Lawrence. Cases involving minors, persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused, and public conduct or prostitution were specifically listed by Justice Kennedy as conduct that falls outside of the liberty interest in Lawrence. 539 U.S. at 577. Here, the communications from Appellant centered squarely on the sexual abuse of a 16-year-old or younger ("12 yo") girl that was not only a minor but also a person "who might be injured or coerced or who are situated in relationships where consent might not easily be refused." Indeed, Appellant spoke about the child "crying," getting spanked, drugging her, making her "sore," and "stretch[ing]" her vagina. Because the entire premise of Appellant's and MSgt NC's conversations focused on the sexual abuse of a child, the communication clearly fails the second prong and falls outside the purview of Lawrence and Marcum.

Here, Appellant's communications with MSgt NC do not fall under the purview of Lawrence as the communications were clearly speech, not sexual acts addressed in both

Lawrence and Marcum. Yet, even if Appellant's communications were viewed as *acts*, Appellant's indecent language within her communications with MSgt NC still fall outside the Lawrence protections. Accordingly, Appellant's claims must fail.

Finally, as to Appellant's argument about "aggravating circumstances," again those circumstances are only necessary when "private consensual sexual activity" is involved. *See* United States v. Goings, 72 M.J. 202, 205 (C.A.A.F. 2013). As shown above, that is not the case here.

Moreover, Appellant misstates a portion of the military judge's ruling[7] and bases her entire argument on this flawed understanding. In the "Law" section of the ruling, the military judge stated, "The aggravating circumstances upheld as sufficient to make otherwise private consensual activity punishable as indecent conduct has included open and notorious sexual activity, sexual activity involving animals, and sexual activity resulting in injury." (App. Ex. XVIII at 4.) (citations omitted.) Yet, as written in her brief, Appellant intimates that these are the *only* aggravating circumstances when she states that the military judge "listed the aggravating circumstances sufficient to make conduct punishable as indecent conduct," and then later states that "none of these aggravating factors were included in [the military judge's] instructions to the members." (App. Br. at 8-9.) Appellant then concludes, "Given the lack of aggravating circumstances, this Court should not be convinced of [Appellant's] guilt beyond a reasonable doubt." (App. Br. at 9-10.)

Here, the list the military judge provided was not an exhaustive list. Yet, even if it were, and the Going standard of involving aggravating circumstances were in play, the indecent

[7] As Appellant notes, she moved the trial judge to dismiss various specifications for failure to state an offense. (App. Ex. VII.)

language in this case involved discussion of a sexual activity that would result in injury – namely, as explained above, the sexual abuse of a minor. Thus, even under Appellant's flawed view of the law, her conviction would still stand.

Finally, as with Specification 1 above, Appellant, for the first time, complains about the military judge's instructions. Again, Appellant notably does not raise a separate issue related to the military judge's instructions, again likely because Appellant realizes that she affirmatively waived this issue at trial by not objecting to the military judge's instruction at trial. *See* Davis, 79 M.J. at 331-32; *see also* Cunningham, 83 M.J at 374; Kitchen, ACM 40155, 2023 CCA LEXIS 58. Here again, Appellant affirmatively waived any issue with the military judge's instructions on this specification by not objecting at trial.

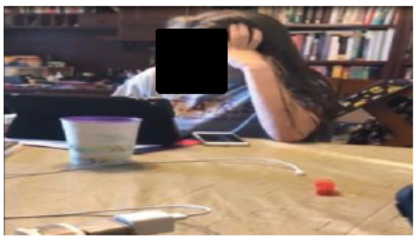
Yet, even if she had, it would have been for naught as the conduct that requires "aggravating circumstances" are private, consensual acts. Here, Appellant's wholly indecent conversation with MSgt NC was not a constitutionally protected private *act* between two consenting adults, but instead was indecent speech transmitted via electronic devices that involved two adults planning to rape, sodomize, drug, and brutalize a girl who was less than 16 years old. Appellant's abhorrent speech is not protected by the Constitution, Lawrence or Marcum, and required no aggravating circumstance for a proper conviction.

When weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced beyond a reasonable doubt that the evidence is factually sufficient to sustain Appellant's conviction. The panel correctly found Appellant guilty of this offense, and the United States is confident on this record that this Court will reach the same conclusion.

- ***Specification 3 of Charge I – Indecent Conduct by Recording Herself Masturbating in Front of a Child and Sending the Recording to MSgt NC***

In Specification 3, Appellant is charged with recording herself masturbating in front of her own child and then sending the recording to MSgt NC. (Charge Sheet.) In her brief, Appellant does not challenge the fact that she recorded the video, that she transmitted the recording to MSgt NC, or that this conduct was indecent. (*See* App. Br. at 10.) Instead, her sole contention on this specification is that the conviction is not factually sufficient because her act of filming this video of her masturbating was not actually done "in front of" her child daughter. (Id.) Appellant is again wrong.

First, Appellant admits she was masturbating below the table she was sitting at with her daughter. (App. Br. at 10.) Second, the recording shows just how close Appellant was to her daughter while she engaged in her salacious act, as highlighted here:



(*See* App. Ex. LXXXI.)[8] Here, common sense shows Appellant's act was done "in front of" her daughter. Appellant was sitting at the same table as her daughter, directly in front of and across from her, and within inches of her body.

Moreover, our superior Court in United States v. Schmidt, 82 M.J. 68 (C.A.A.F. 2022), noted that Merriam-Webster's Unabridged Online Dictionary defined "presence" as "the state of

[8] While Prosecution Exhibit 4 is sealed, this screenshot from the recording at issue was included in the Government's closing argument slides at Appellate Exhibit LXXXI and was not sealed. Though not obscured in either Prosecution Exhibit 4 or Appellate Exhibit LXXXI, the face of Appellant's daughter has been obscured here for privacy purposes.

being in one place and not elsewhere[,] the condition of being within sight or call, at hand, or in a place being thought of[, or] the state of being *in front of* or in the same place as someone or something." Schmidt, 82 M.J. at 76, fn 4. Thus, contrary to Appellant's claim here that "'in front of' raises its own question of proximity" separate from the phrase "in the presence of,"[9] "in the presence of" and "in front of" are essentially one and the same. Thus, for the same reasons more fully detailed below regarding the Specification of Charge II, this specification is also factually sufficient.

- ***Specification 4 of Charge I – Appellant Recording Herself Defecating on the Floor of an Aviano Air Base Facility***

In Specification 4, Appellant is charged with recording herself defecating on the floor of an Aviano Air Base facility and that her conduct was of a nature to bring discredit upon the armed forces. In her brief, Appellant does not dispute that she made the recording or that she defecated on the floor of an Aviano Air Base facility. Instead, as with her Specification 1 of Charge I claim above, she argues the Government did not show her conduct was of a nature to bring discredit upon the armed forces. (App. Br. at 10.)

In doing so, however, Appellant renews her same flawed argument from earlier. Again, she misinterprets Wells and argues that "no member of the public was ever aware that it occurred." (Id.) Appellant highlights the fact that she "cleaned up the floor" afterwards and that the recording was never shared with anyone besides MSgt NC.

But again, Appellant fails to note the standard and focus of Clause 2 offenses, as specifically addressed in Wells. Again, "The focus of clause 2 is on the 'nature' of the conduct, *whether the accused's conduct would tend to bring discredit on the armed forces if*

[9] *See* App. Br. at 10.

known by the public." Wells, at *7 (*quoting* Phillips, 70 M.J. at 165-66) (emphasis in original). The question here is whether a rational trier of fact could have found Appellant's defecating on the floor of an Air Force base facility and filming it to be service discrediting "had the public known of it." Id. (*quoting* Phillips, 70 M.J. at 166.)

In Phillips, our superior Court determined that based on the facts of that case, there was sufficient evidence for a rational finder of fact to determine that someone who possesses child pornography, had specifically sought it out, and had viewed it on multiple occasions, had engaged in conduct that might tend to discredit the service if the public were to know about it. Id. at 166-167.

Here, as in Specification 1 above, the answer is the same as there is sufficient evidence for a rational finder of act to determine that someone who set up a camera in an Air Force base facility, pulled down their pants, specifically positioned their rear end to be centered on the camera's shot, and then defecated on the floor of that Air Force base facility while filming it, had engaged in conduct that might tend to discredit the service *if the public were to know about it*. While Appellant continues to argue her flawed view of the law, *actual* knowledge by the public is not required to fulfill the terminal element of this specification.

When weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced beyond a reasonable doubt that the evidence is factually sufficient to sustain Appellant's conviction. The panel correctly found Appellant guilty of this offense, and the United States is confident on this record that this Court will reach the same conclusion.

- ***Specifications 5 and 6 of Charge I – Possession and Distribution of Child Pornography***

In Specifications 5 and 6 of Charge I, Appellant is charged with possessing and distributing child pornography. (Charge Sheet.) In her brief, Appellant claims her convictions are not factually sufficient because the "Government failed to prove beyond a reasonable doubt that [Appellant] was operating the 'applejacks' email account when it was used to send CSAM material to the 'luckymango' account." (App. Br. at 11.) Notably, Appellant makes no argument that the images sent were not child pornography – just that she is not the one who sent them.

Appellant is wrong. All evidence points directly to Appellant as the person who had sole use of the "applejacks" account. To start, both the "applejacks" and "luckymango" accounts were made when Appellant and MSgt NC were TDY together in Arlington, Virginia on 16 May 2019. On that date, Appellant, from the "applejacks" account, sent MSgt NC an email on the "luckymango" account saying that she "can't wait to fill this new email up" with memories of them. (Pros. Ex. 2, Slide 2.) Though not signed by Appellant with her name, she describes MSgt NC as "the sexiest man," making it clear she sent that email.

Indeed, Appellant would fill that email account with "memories" of the couple. She would also make it clear she was the sole user of that account. For example, on 23 May 2019, she sent an email using her actual first name. (Id., Slide 3.) The same day, she sent an email containing a picture of her bruised buttocks. On 28 May 2019, she sent an email to MSgt NC that was obviously written by her because it referenced her female anatomy. (Id., Slide 13.) On 1 June and 2 June 2019, she again sent MSgt NC emails referencing her female anatomy. (Id., Slides 15-16.) On 4 June 2019, she sent an email from "applejacks" telling MSgt NC she needed

his "pornstar cock." (Id., Slide 19.) On 5 June 2019, Appellant sent an email from the "applejacks" account asking MSgt NC to send the video of him "rubbing [his] dick." (Id., Slide 21.) From that account on the same day, she also sent MSgt NC a video of herself masturbating. (Id., Slides 25-26.)

On 8 June 2019, Appellant sent MSgt NC an email with a fantasy about MSgt NC having sex with a 16-year-old. The email references "your cock" and other references to MSgt NC that make it clear Appellant was the writer. (Id., Slide 31.) Also in June 2019, from the "applejacks" account, Appellant sent Tiger Kingdom an email requesting pictures. (Id., Slide 39.) The email uses Appellant's actual first and last name.

In July 2019, Appellant sent an email from the "applejacks" account to the same account that contained videos of MSgt NC masturbating in his office. The emails clearly come from Appellant as the email had the subject line "Cumming for *me* in *his* office." (Id., Slide 48.) (emphasis added.) On 8 July 2019, Appellant sent an email to MSgt NC from the "applejacks" account that said she was "fingering myself" and that "I wish it was your dick inside me right now." (Id., Slide 50.) On 12 July 2019, Appellant sent MSgt NC pictures of her exposed breasts from the "applejacks" account. (Id., Slides 52-54.) She also sent a video of herself defecating on the floor of an Aviano Air Base facility using the "applejacks" account. (Id., Slides 61-63.)

Emails throughout August, September, October, November, and December continued to show Appellant as the sole user of the account, including her sending pictures of her exposed breasts and an email with the subject line "Come fuck this ass." (Id. at Slides 82, 84, 89-90.) In October 2019, after Appellant arrived in Afghanistan, SA JR said emails from Appellant in the "applejacks" account referenced her arrival, setting up internet services, and included a picture of her computer screen. (R. at 1110-11.)

These emails show Appellant, and only Appellant, had complete control of the "applejacks" account from its creation until the end of 2019. The emails contained in Prosecution Exhibit 2 show "Jane Doe" from the "applejacks" account was Appellant and the John Doe from the "luckymango" account was MSgt NC. After creating the account in Arlington, Virginia, PO1 IA said someone in Italy logged in and changed the "applejacks" account password shortly after creation. (R. at 1362.) Appellant, not MSgt NC, was located in Italy. Further, PO1 IA said the "applejacks" account was accessed from Italy from May to October 2019 and from Afghanistan beginning in October 2019, all of which were where only Appellant was located. (R. at 1305-07.)

In contrast, PO1 IA said the "applejacks" account was never logging into from an IP address in Korea. (R. at 1311.) There are zero implications that MSgt NC had access or used the "applejacks" account at any point.[10]

Her complete control would continue into January 2020 up until Yahoo deactivated the account on 7 January 2020.

Ms. JK, the Yahoo investigator, testified that the IP address range used for the "applejacks" account were consistent from the last login on 7 January 2020 going back in time to December 2019, which to her indicated the "same user logging on to the account." In the days leading up to 7 January 2020 and the "young girls" emails, Ms. JK said she found "images of [Appellant] and other personal conversations and messages." (R. at 953.)

[10] While there were no implications that MSgt NC had ever accessed the "applejacks" account, there was evidence that Appellant accessed the "luckymango" account as the IP log for that account showed logins from Italy and Afghanistan, places where only Appellant was located. (R. at 1313-16.)

As to the day itself – 7 January 2020, Ms. JK was asked if the login data and the range of IP addresses were consistent with a single user being logged into the account on 7 January 2020. Ms. JK responded, "Yes." (R. at 971.)

The child pornography at issue was sent on 7 January 2020. Yahoo deactivated the account the same day. Less than eight hours after the account was deactivated, Appellant (not MSgt NC) called Yahoo, identified herself by name, said she was calling from Afghanistan, and complained about being unable to log in. (Pros. Ex 1; R. at 895-97.) When asked when she last accessed the account, Appellant responded, "Earlier, well, let me, I'm in Afghanistan, probably I don't know, 6 hours ago. Maybe 8 hours ago." (Pros. Ex. 1; R. at 640.) Appellant would call Yahoo again 17 hours later, state she was "sitting in the middle of Afghanistan," and make a newfound claim that her account had been hacked. (R. at 899.)

Considering the consistent IP addresses on the account, Ms. JK did not believe the account showed any signs of hacking, but instead showed signs of the "same user logging on to the account." (R. at 977.)

PO1 IA testimony further confirmed Appellant as the sender of the "young girls" emails. PO1 IA testified that the naming conventions for the file names of the CSAM material attached to emails sent by the "applejacks" account matched the file naming convention of a picture Appellant took of herself in Afghanistan. (R. at 1322.) PO1 IA also agreed that the forensic data for the last email that was sent from the "applejacks" account before the child sex abuse material was sent, the last email sent from the "applejacks" account before it was shut down, and all the emails including CSAM that was sent between these two emails all matched. (R. at 1323.) Indeed, when asked his opinion, PO1 IA stated, "my belief is most likely the sole user was [Appellant]." 9R. at 1371.)

Here, the overwhelming evidence shows Appellant has sole access and control of the "applejacks" account and that she both possessed and distributed child pornography on 7 January 2020 when she sent those eleven "young girls" emails to MSgt NC. There is no indication throughout the course of the "applejacks" account's existence that MSgt NC ever had access to the account. In contrast, all IP logins point to Appellant. The substance of emails, pictures, and videos all point to Appellant. The forensic data of emails before and after the "young girls" emails all match the forensic data of the "young girls" emails, which all point to Appellant.

Perhaps most fatal to Appellant though are her own words where, in her own call to Yahoo, she admitted to logging into the "applejacks" account six to eight hours before her call – which is approximately the same time Yahoo deactivated the account due to the transmission of the child pornography.

Here, Appellant admitted she was logged into the account in the same timeframe when the child pornography was sent and admitted to trying to log into the account hours later. Adding this admission in with Ms. JK's testimony that the IP addresses logging into the account on 7 January were consistent with a single user being logged into the account on that day, the overwhelming evidence shows Appellant, and only Appellant, accessed the "applejacks" account on 7 January 2020 and that Appellant, and only Appellant, sent the eleven emails containing child pornography.

Still, Appellant claims fault by claiming she was not the "sole user" of the "applejacks" account. Appellant first argues this is true because the account was created from MSgt NC's hotel room in Arlington, Virginia. Of course, the evidence overwhelmingly shows Appellant was with MSgt NC when those email accounts were created. Further, just because the "applejacks" email was created from MSgt NC's hotel does not mean he had access to the

account at any point, but especially not eight months later. As detailed above, there is nothing to indicate MSgt NC ever sent an email or accessed the "applejacks" account at all. Further, Appellant fails to mention that after the "applejacks" account was created in Arlington, Virginia, the password for the account was later changed by someone logging in from Italy – which was Appellant herself. Thus, the evidence shows Appellant, and only Appellant, changed the password to the account well after she and Appellant were together in Virginia. Considering these and the other circumstances listed above, Appellant's argument that MSgt NC sent the child pornography based on the fact that the account was created in MSgt NC's hotel room eight months prior to the distribution of the child pornography is unpersuasive.

Appellant next argues that investigators found that the "applejacks," "luckymango" and "nakedgator" accounts were all accessed by the same browser session in June 2019. (App. Br. at 11-12, *citing* R. at 886.) However, Appellant fails to note PO1 IA's testimony that the "applejacks" account was never accessed from Korea, MSgt NC's location, but that both the "luckymango" and "applejacks" accounts were accessed by Appellant in Italy and Afghanistan. Thus, when these accounts were all accessed in June 2019, that access was done by Appellant, not MSgt NC. Indeed, this fact hurts Appellant's case rather than helps it.

Appellant next discusses VPNs and how two different IP addresses where logging into the "applejacks" account in the time leading up to 7 January 2020, namely 193.56.116.47 and 193.56.116.29. (App. Br. at 12; *see also* Pros. Ex. 11.) Appellant argues these different IP addresses logged into both the "applejacks" and "luckymango" accounts from 15 December 2019 to 7 January 2020 and argues this "establishes that both [Appellant] and [MSgt NC] had access to both accounts and regularly logged into both." (App. Br. at 13.)

Appellant's contention, however, is at odds with the testimonies of both Ms. JK and PO1 IA. As noted above, Ms. JK said the IP address ranges used for the "applejacks" account from 15 December 2019 until 7 January 2020 were consistent and indicated the "same user logging on to the account." (R. at 977.)

Further, as detailed above, PO1 IA testified that Appellant regularly logged into the "luckymango" account while there was no indication that MSgt NC ever logged into the "applejacks" account. Considering this regularity, especially when added with Ms. JK's testimony that the login activity for the "applejacks" account was from the "same user," the far more likely probability is that Appellant was logging into both the accounts from the 193.56.116 IP addresses.

Notably, while only 193.56.116 IP addresses were used to access the "applejacks" account from 15 December 2019 until 7 January 2020, the "luckymango" account was accessed by the 193.56.116 addresses as well as a whole host of additional IP addresses, including those beginning with 180.70.34, 173.239.198, 211.36.141, 211.36.147, 180.70.34, 104.143.92, 117.111.10, 104.37.31, 46.244.28, 45.56.146, and 104.194.220. (Compare Pros. Ex. 11 to Pros. Ex. 12.) Considering the numerous and wide-ranging IP addresses accessing the "luckymango" account, these records show that the "luckymango" account was being accessed by multiple people, namely Appellant and MSgt NC, while the "applejacks" account was only being accessed by one person – Appellant.

Next, Appellant claims that since CSAM was found on MSgt NC's iPhone, MSgt NC was "the one with the interest in this material" and that he was the "one who frequently used the term 'young girl' in his fantasies and messages." (App. Br. at 13.) In making this argument, Appellant seemingly forgets about a host of evidence against her. First, Appellant very much

expressed an "interest" in young girls based on her conversation with MSgt NC where she talked about "fucking," "spanking," and sodomizing a 12-year-old girl. (*See* Pros. Ex. 2, Slides 85-87.) In that very exchange, Appellant states that she wants to "[f]inger her tight *young* [p]ussy." (Id., Slide 87.) The evidence more than shows Appellant had a penchant for "young girls" and an interest in the material she sent MSgt NC.

Moreover, Appellant seemingly forgets that the file naming conventions for the child pornography sent from the "applejacks" account did not match the naming conventions of CSAM found on MSgt NCs iPhone. In contrast, however, PO1 IA testified that the naming conventions for the file names of the CSAM material attached to emails sent by the "applejacks" account matched the file naming convention of a picture Appellant took of herself in Afghanistan. (R. at 1322.) Thus, the evidence shows the pictures came from Appellant, not from MSgt NC.

Finally, Appellant argues it was MSgt NC who sent the images because the "state" of the two email accounts showed "an awareness by MSgt [NC] that he needed to hide his steps," and sending the images through the "applejacks" account would "give himself plausible deniability." (App. Br. at 13-14.) Again, however, Appellant forgets the evidence showing she was interested in hiding her activities as well. During his testimony, SA JR highlighted that Appellant and MSgt NC talked within their emails about deleting messages and concealing their conversations. (R. at 1162.) SA JR stated, "There's also an email when [Appellant] was in Afghanistan about, she, she said the cloud somehow restored a whole bunch of photos and messages and things like that, and she's hesitant to send any new ones until she could re-delete them. So there's more evidence that stuff had been deleted." (Id.) Moreover, an email from Appellant to MSgt NC talked about using WhatsApp to chat when the two are at work and that MSgt NC "can delete it

before you leave work." (Pros. Ex. 2, Slide 46.) Here, Appellant was just as concerned about deleting, hiding and deleting messages between her and MSgt NC as MSgt NC was.

Furthermore, the idea that MSgt NC would send himself child pornography images that, according to Appellant's story, he already possessed makes little sense. Indeed, if Appellant was trying to "hide his steps," he would have simply not sent any email containing child pornography at all since, per Appellant's theory, he already possessed the images. Moreover, if he truly had access to the "applejacks" account and was trying to "hide his steps" in terms of not having anything elicit associated with the "luckymango" account, he would have emailed the images from the "applejacks" account to the "applejack" account, therein leaving his own "luckymango" account completely out of the fray. But that is not what happened. Instead, the much more plausible story is that both Appellant and MSgt NC were interested in sex with minors, Appellant sought out the pictures, wanted to share them with MSgt NC, and sent them to MSgt NC from the "applejacks" account to the "luckymango" account.[11]

Here, all evidence shows Appellant user of the "applejacks" account. The email content itself all points to Appellant. The password change completed by Appellant in June 2019 points to Appellant. The name "Jane Doe" points to Appellant. The IP address logins all point to Appellant. The forensic data of the emails before the "young girls" emails, the "young girls" emails themselves, and the emails after the "young girls" emails all match and all point to Appellant. And Appellant's own words point directly back to Appellant as she admitted to accessing the account in the same timeframe when the child pornography was sent.

[11] Blaming MSgt NC is not the first time Appellant tried to blame her acts on others. As Capt JM testified, she initially blamed "Army folks who I let borrow my phone" for sending the child pornography. (R. at 1000.)

When weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this Court should be convinced beyond a reasonable doubt that the evidence is factually sufficient to sustain Appellant's convictions for possessing and distributing child pornography. The panel correctly found Appellant guilty of these offenses, and the United States is confident on this record that this Court will reach the same conclusion.

- ***The Specification of Charge II – Lewd Act Upon a Child by Engaging in Indecent Conduct to Wit: Appellant Recording Herself Masturbating in Front of a Child***

In the Specification of Charge II, Appellant is charged with recording herself masturbating in front of her own child in violation of Article 120b. (Charge Sheet.) In her brief, Appellant does not challenge the fact that she recorded the video, or that this conduct was indecent. (*See* App. Br. at 14-16.) Instead, Appellant claims legally insufficiency and asks this Court to overturn its previous decision and binding precedent in United States v. Cabuhat, 83 M.J. 755 (A.F. Ct. Crim. App. 2023).

In making this argument, Appellant simply renews the same argument she raised both within her failed motion to dismiss for failure to state an offense and R.C.M. 917 motion to dismiss at trial. In denying Appellant's motion to dismiss for failure to state an offense, the military judge noted that our sister court, the Navy-Marine Corps Court of Appeals, had recently held in United States v. Tabor, 82 M.J. 637 (N.M. Ct. Crim. App. 2022) (en banc), *rev. denied*, 83 M.J. 64 (C.A.A.F. 2022), that "[t]here is no requirement, either explicitly or implicitly in the statute, that the child victim be aware of the accused's lewd act."[12] (App. Ex. XVIII at 4, *citing* Tabor, 82 M.J. at 653.) The military judge held that "the victim need not have awareness of the

[12] Cabuhat was not yet decided at the time of Appellant's trial.

act for the act to have been done in the presence of the victim." (Id. at 6.) Appellant notably does not raise a separate issue claiming error on this ruling.

Appellant's R.C.M. 917 motion was, as the military judge noted, essentially a "second bite at the apple" on the military judge's previous ruling. (R. at 1389.) There, Appellant raised no new arguments. The military judge denied the motion citing his analysis contained in his original ruling at Appellate Exhibit XXVIII. (R. at 1415.) Again, Appellant does not raise a separate issue claiming error on this ruling.

Instead, Appellant invites this Court to overturn its opinion in Cabuhat. (App. Br. at 10.) This Court should decline the invitation based on Appellnt's unpersuasive arguments. First, Appellant argues this Court should overturn Cabuhat because that case involved a guilty plea. However, this Court's analysis of the statutory construction of Article 120b, UCMJ, was accomplished de novo and had no bearing on whether the case involved a guilty plea or not. *See* Cabuhat, 83 M.J. at 765. Once this Court determined in a de novo review its holding on the statutory construction of Article 120b, UCMJ, it then applied that holding to the guilty plea present in that case. However, this Court's holding that Article 120b(h)(5)(D), UCMJ, does not require the child to be "aware" of an accused's conduct was not based in any way on the pleas of that case and was not pigeon-holed to apply to only guilty plea cases. Appellant's claim is unpersuasive on this point.

Appellant also urges this Court to adopt Judge Sparks' analysis in Schmidt. (App. Br. at 15.) Judge Sparks was the only judge in Schmidt who found awareness was required. Schmidt, 82 M.J. at 74. However, this Court, in Cabuhat, was more persuaded by Chief Judge Ohlson and Senior Judge Erdmann in their concurring judgment, who found it "clear . . . that Congress did not intend the meaning of the phrase 'in the presence of' in Article 120b(h)(5)(D) to include any

element of 'awareness,'" but instead, for purposes of this article, "the phrase simply means that one person is in the immediate vicinity of another person." Cabuhat, 83 M.J. at 769 (*quoting* Schmidt, 82 M.J. at 78). This Court further adopted Chief Judge Ohlson's view that, "In my view, the plain language of the statute only requires an accused who is intentionally engaging in a lewd act to be aware of the child's *presence*; it does *not* require the child victim to be *aware* of the accused's lewd act." Cabuhat, 83 M.J. at 769 (*quoting* Schmidt, 82 M.J. at 74).

A glaring omission in Appellant's brief is any discussion of our sister Court's opinion in Tabor or this Court's adoption of that opinion in Cabuhat. Indeed, this Court in Cabuhat adopted the view of our sister Court in Tabor, who "focused on statutory construction" and concluded "[t]here is no requirement, either explicitly or implicitly in the statute, that the child victim be aware of the accused's lewd act." Cabuhat, 83 M.J. at 769 (*quoting* Tabor, 82 M.J. at 653). This Court agreed with Tabor that the plain meaning of "any indecent conduct, intentionally done with or in the presence of a child" contained in Article 120b(h)(5)(D), UCMJ, does not require the child to be "aware" of an accused's conduct. Cabuhat, 83 M.J at 769. Notably, our superior Court denied review in both Cabuhat and Tabor. *See* United States v. Cabuhat, 2024 CAAF LEXIS 62 (C.A.A.F. 30 January 2024); United States v. Tabor, 83 M.J. 64 (C.A.A.F. 2022).

Again, Appellant does not discuss Tabor or the fact that our superior Court denied review of both Tabor and Cabuhat. She likewise fails to specifically address why either this Court or the Tabor court erred in its published decisions. Appellant additionally fails to engage in any discussion regarding statutory construction or explain why Chief Judge Ohlson and Judge Erdmann were incorrect in their concurring judgment in Schmidt. Considering Appellant's lack of analysis on these points, this Court should decline Appellant's invitation to take the drastic

step of overturning its published decision in Cabuhat, as well as to split from our sister Court's concurring view on this issue.

Here, the record shows the specification is legally sufficient and that a reasonable factfinder could have found all the essential elements beyond a reasonable doubt. In drawing every reasonable inference from the evidence in the record of trial in favor of the prosecution, the Court should deny Appellant's claim.

II.

THE MILITARY JUDGE DID NOT ERR BY ADMITTING EMAILS FROM APPELLANT'S "APPLEJACKS" EMAIL ACCOUNT.

Additional Facts

At trial, Appellant moved to suppress "any and all data, information, and evidence seized from [Appellant's] email account, applejack69612@yahoo.com," arguing that the evidence was "seized either in the absence of a valid search warrant, or was seized in disregard of a warrant utilized in a separate investigation." (App. Ex. III.) The motion stemmed from a warrant AFOSI obtained during the initial investigation involving MSgt NC.

- *Agent Testimony and the Search Authorization*

During the motion hearing, SA EP testified that the allegations against Appellant initially came through a NCMEC tip reported by Yahoo. (R. at 23.) Yahoo had found suspected child pornography on either the "applejacks" email account or the "luckymango" email account. (Id.) The email accounts were initially tied to MSgt NC. (R. at 24.) AFOSI interviewed MSgt NC and learned that MSgt NC and Appellant had engaged in an extramarital affair since 2013. (R. at 49, 73.) AFOSI also learned the couple used the "luckymango" and "applejacks" email accounts

to communicate with each other, with MSgt NC using the "luckymango" account and Appellant using the "applejacks" account. (R. at 49-50.)

AFOSI also sought a warrant to obtain email content and subscriber data from Yahoo, including the two accounts mentioned above, as well as a "nakedgators" email account and a "vulgargirl" email account. (R. at 25-26.) The search authorization obtained focused on evidence regarding extramarital affairs and child pornography. (App. Ex. III at Atch 3.)

Once the information was received, SA EP said he reviewed the material "for any evidence of extramarital affairs and possession or distribution of child pornography." (R. at 27.) SA EP said he did not limit the scope of his review of the emails in any way because "due to the nature of this specific allegation of possession of child pornography, we had to be thorough in our search and look at everything in order to not potentially miss images, videos, or statements regarding images and videos of child pornography." (R. at 31.)

While searching for evidence of child pornography, SA EP said he found video recordings of MSgt NC's spouse, which were taken while she slept and appeared to be without her consent. (Id.) SA EP also found videos of Appellant and MSgt NC having sex at various times. (R. at 35.) SA EP testified that he believed his search did not alter the scope of his investigation because video files were something he was already looking at for potential child pornography. (R. at 32.) SA EP then explained why he did not seek an expansion of the search authorization when he found evidence of additional misconduct, stating, "the scope of my search gave me authority to continue searching the same places that I was already searching. So the individual charges that I found — I was not specifically looking for those. Those were identified in locations that I was already searching within the scope of the authority that I had." (R. at 90.)

SA EP said coming across the videos of indecent conduct did not change the nature of his search in the emails. (Id.)

SA EP said he received approximately 500 emails form Yahoo and the scope of the search authorization, which was focused on finding evidence of child pornography and extramarital affairs, allowed him to review all of them. (R. at 91.)

- *The Military Judge's Rulings*

The military judge initially denied, in part, and granted, in part, Appellant's motion. (App. Ex. XXV.) The miliary judge found no "reckless disregard for the truth" by AFOSI agents in obtaining the search authorization. (Id. at 16.) The military judge also found probable cause existed to search the "applejacks" email account for evidence of child pornography and extramarital sexual conduct. (Id. at 17.) Further, the military judge found the search authorization was not fatality deficient as it related to Appellant and had sufficient particularity. (Id. at 17-18.)

However, the military judge held that the search authorization was limited to only evidence of child pornography and extramarital sexual conduct "and there was no basis to search for any others." (ID. at 19.) While the military judge said SA EP's approach to viewing the evidence was "not unreasonable" and that the search authorization allowed SA EP to search all emails obtained from Yahoo, the military judge held SA EP "went beyond the scope of the search authorization when he conducted a general search by opening and viewing videos and emails related to suspicions of indecent/lewd acts and indecent language." (Id.) The military judge further held that once SA EP "noticed evidence of non-specified crimes in the search authorization, his decision to continue the examination – by opening other attachments – without seeking expansion was objectively unreasonable." (Id.)

Still, the military judge found SA EP "did not act with the specific intent to deprive [Appellant] of her rights," and did not find SA EP's actions were done with "an intent to ignore the limits of the search authorization maliciously." (Id.)

As to the issue of inevitable discovery, the military judge held that the "facts in this case indicate OSI agents were not interested in obtaining additional search authorizations," adding that SA EP acknowledged that seeking additional authorizations would have been "preferred", but did not do so "despite the ease in which obtaining an expanded search authorization may have occurred." (Id. at 20.) The military judge further noted that SA EP admitted the search of videos and emails of indecent/lewd conduct and indecent language were outside the scope of the authorization, adding, "SA [EP's] concessions prevent this Court from concluding he, or any other agent, would have sought or obtained an expanded search authorization." (Id.) The military judge did not review the issue under the Good Faith Exception. (Id.)

Ultimately, the military judge did not suppress evidence from the "applejacks" account related to child pornography or extramarital sexual conduct. However, the military judge did suppress evidence involving indecent/lewd conduct and indecent language. Finally, the military judge left his ruling open to reconsideration if "supported with new evidence or law." (Id. at 21.)

The Government moved for reconsideration arguing (1) SA EP did not exceed the scope of the search authorization; (2) the contents of the emails, even if outside the scope, were in plain view; and (3) even assuming an unlawful search, suppression was not warranted because there was no "gross negligence" and SA EP was not acting deliberating to violate Appellant's Fourth Amendment rights. (App. Ex. XV.)

The military judge granted the Government's reconsideration motion and determined no evidence would be suppressed. (App. Ex. XVII.) In doing so, the military judge made the following findings of fact:

- SA EP began his review of the "applejacks" email account starting with the first email in the account, sent on 16 May 2019, and proceeded chronologically;

- "During his review – pursuant to the search authorization – SA [EP] was looking for evidence of extra-marital sexual conduct . . ., as well as possession and distribution of CP [child pornography];"

- "CP may not be readily apparent in digital data. Files containing CP can be mistitled to obscure the present of CP."

- SA EP "did not limit the scope" of his review of all emails "so as not to miss evidence related to CP; the focus of his review remained CP and determining the identity of the users of the account;"

- SA EP reviewed content, including videos, that he knew to be separate crimes, distinct from the ones delineated in the search authorization;

- SA EP did not seek expansion of the search authorization because he "believed the scope of his authorization allowed him to search within the previously delineated parameters," because "the focus of the search remained the same and did not alter the scope of the search;"

- SA EP "believed he was lawfully acting with the scope of the authorization;"

- "While evidence of indecent/lewd acts was outside the scope of materials in the search authorization, SA [EP] was searching inside the scope of the search authorization when he discovered evidence of indecent/lewd acts and indecent language;"

- "All the emails contained information that was probative of either the identity of the user of the account, extra-marital sexual conduct, and CP;"

- "SA [EP's] conduct in reviewing the applejacks account was not executed with deliberate, reckless, or grossly negligent disregard for [Appellant's] Fourth Amendment rights;" and

- "Sometime later, OSI obtained a search authorization for [Appellant's house in Italy."

(Id. at 1-5.)

The military judge again found no "reckless disregard for the truth" by AFOSI agents in obtaining the search authorization, that probable cause existed to search the "applejacks" email account for evidence of child pornography and extramarital sexual conduct, and that the search authorization had sufficient particularity. (Id. at 17-19.)

The military judge further held that SA EP was "entitled to rely on the search authorization in conducting his review, and to search all emails specified as part of the lawful execution of the authorization." The military judge continued, "The law does not require SA [EP] to turn a blind eye to additional evidence of criminality merely because he inadvertently discovered it during his review." (Id. at 20.)

The military judge then held that SA EP was "searching inside the scope of the search authorization" when he discovered evidence of indecent/lewd acts and indecent language, and that this was "the essence of 'plain view'." (Id.) The military judge found SA EP was lawfully at the location where he saw the evidence since he was entitled to search all emails and because SA EP had reasonable grounds to review each email. For instance, the military judge held it reasonable for SA EP to look at each video to determine if it related in any way to extramarital sexual conduct. Likewise, the military judge held it reasonable for SA EP to read the fantasy stories to ensure that had no "real-world implications" related to the possession or distribution of child pornography.

The military judge held that SA EP's testimony showed the "contraband or incriminating nature of the indecent/lewd acts and indecent language evidence was immediately apparent," and "confirmed this evidence was in plain view." (Id. at 21.) Further, the military judge held SA EP thought he was within the scope of the search authorization when he saw the messages related to indecent/lewd acts and indecent language. (Id.) The military judge further held the search authorization was not overbroad and that SA EP's actions were reasonable under the circumstances. The judge also found that SA EP "did not act deliberately, recklessly, or with gross negligence, to deprive [Appellant] of her rights." (Id. at 22.)

As to the Good Faith Exception, which was not discussed by the military judge in his original ruling, the military judge found SA EP "objectively and reasonably relied on the military judge's probable cause determination," and found that there were no circumstances evidence where the exception would not apply. (Id.)

Finally, as it related to Mil. R. Evid. 311(d)(5)(A), the military judge found the deterrence of future unlawful searches or seizures was not appreciable, or that such deterrence outweighed the costs to the justice system in excluding the evidence. While the military judge said it would have been a "better practice" for SA EP to expand the search authorization, SA EP "did not act with the degree of recklessness or gross negligence to deprive [Appellant] of her rights or that would trigger the exclusionary rule." (Id. at 23.)

Standard of Review

This Court reviews a military judge's ruling on a motion to suppress for an abuse of discretion, viewing the evidence in the light most favorable to the party prevailing below. United States v. Keefauver, 74 M.J. 230, 233 (C.A.A.F. 2015) (internal quotation marks and

citations omitted). More specifically, this Court reviews the military judge's findings of fact for clear error and his conclusions of law de novo. Id.

Law

Searches conducted pursuant either to a warrant or to authorization based on probable cause are presumed reasonable. United States v. Hoffmann, 75 M.J. 120, 123-24 (C.A.A.F. 2016) (internal quotation marks and citations omitted).

A warrant must "particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const. Amend. IV. "When dealing with search warrants for computers, there must be specificity in the scope of the warrant, which, in turn, mandates specificity in the process of conducting the search…if [practitioners] come across evidence of a different crime, [they must] stop their search and seek a new authorization." United States v. Osorio, 66 M.J. 632, 637 (A.F. Ct. Crim. App. 2008). Traditionally, "it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant—subject of course to the general Fourth Amendment protection 'against unreasonable searches and seizures.'" Dalia v. United States, 441 U.S. 238, 257 (1979). Courts have consistently found that warrants for digital media may impliedly authorize law enforcement searches of the computer's contents and files to determine if those contents fall within the scope of the warrant, even if not specifically articulated. *See* United States v. Williams, 592 F.3d 511, 521-22 (4th Cir. Va. 2010) (*cert. denied* by Williams v. United States, 562 U.S. 1044 (2010)) (a review of all files is justified to determine if they fall within the scope of the warrant because "the owner of a computer, who is engaged in criminal conduct on that computer, will not label his files to indicate their criminality."); United States v. Hill, 459 F.3d 966, 978 (9th Cir. 2006) ("There is no way to know what is in a file without examining its contents…").

The Supreme Court has held that when officers are acting in "good faith" reliance on a search warrant that is later held to be invalid, suppression of the evidence is not warranted. United States v. Leon, 468 U.S. 897 (1984). The military has recognized this exception: The good faith exception applies only when law enforcement "reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith is to be determined using the objective standard." Mil. R. Evid. 311(c)(3)(C).

"Under certain circumstances the police may seize evidence in plain view without a warrant." Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). Police may seize evidence in plain view during a lawful search if (1) the seizing officer "is lawfully present at the place from which the evidence can be plainly viewed;" (2) the officer has "a lawful right of access to the object itself;" and (3) "the object's incriminating character [is] … immediately apparent." United States v. Legg, 18 F.3d 240, 242 (4th Cir. 1994) (*quoting* Horton v. California, 496 U.S. 128, 136-37 (1990)). Although "inadvertence is a characteristic of most legitimate 'plain view' seizures, it is not a necessary condition." Horton, 496 U.S. at 130. The plain view doctrine "is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost." Illinois v. Andreas, 463 U.S. 765, 771 (1983). Military courts have also recognized this exception. Law enforcement officials conducting a lawful search may seize items in plain view if they "are acting within the scope of their authority, and …they have probable cause to believe the item is contraband or evidence of a crime." United States v. Fogg, 52 M.J. 144, 149 (C.A.A.F. 1999). "Property or evidence…may be seized for use in evidence by [any criminal investigator] if the person while in the course of otherwise lawful activity observes in a reasonable fashion property or evidence that the person has probable cause to seize." Mil. R. Evid. 316(c)(5)(C).

"'Suppression is not an automatic consequence of a Fourth Amendment violation,' but turns on the applicability of specific exceptions as well as the gravity of government overreach and the deterrent effect of applying the rule." United States v. Wicks, 73 M.J. 93, 103 (C.A.A.F. 2014) (*citing* United States v. Herring, 555 U.S. 135, 137 (2009)). When applying the exclusionary rule, the Court must consider whether police conduct is deliberate, reckless, or grossly negligent or when it will deter recurring or systemic negligence as opposed to isolated or attenuated acts of negligence, which do not warrant the rule's application. Herring, 555 U.S. at 144.

Another exception to the exclusionary rule is "inevitable discovery." "Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if such unlawful search or seizure had not been made." Mil. R. Evid. 311(c)(2).

Analysis

The military judge did not abuse his discretion when he admitted emails found within the "applejacks" email account. AFOSI had a valid authorization to search and seize *all* emails in the "applejacks" account. The search authorization, in accordance with Horton, was based on a showing of probable cause, supported by affidavit, and described the items to be seized – namely all the emails in the "applejacks" account. Inherent in that authorization was the authority to search all the emails from that account.[13]

Additionally, courts have consistently held that opening digital files on electronic media is within the authorized scope of searching computers because the criminality of a file is

[13] Notably, in his issue, Appellant does not claim that the search authorization either lacked probable cause or was overly broad.

oftentimes not readily apparent from the file name. *See* Williams, 592 F.3d at 521-22. The military judge in this case held as much in his findings of fact, stating, "CP may not be readily apparent in digital data. Files containing CP can be mistitled to obscure the present of CP." (App. Ex. XVII at 1-2.) Thus, the email-by-email review by SA EP in this case was authorized and, as the military judge held, reasonable considering the circumstance.

As SA EP testified and the military judge found as fact, SA EP's primary focus was on finding evidence of child pornography, extramarital sexual conduct, and the identity of the user of the "applejacks" account. Additionally, as SA EP testified and found as fact by the military judge, SA EP believed at all times that he was acting and searching with the scope of the authorization because he was searching for child pornography and extra-martial sexual conduct evidence, even though he found evidence of indecent/lewd acts and indecent language during the course of that search. Finally, the military judge found as fact that SA EP's conduct in reviewing the applejacks account was not executed with deliberate, reckless, or grossly negligent disregard for Appellant's Fourth Amendment rights. (Id. at 5.)

Considering these circumstances, the military judge correctly found the plain view and good faith exceptions applied in Appellant's case. In his ruling on the application of the plain view doctrine, the military judge properly found that the agent was executing a valid search when he first discovered evidence of indecent/lewd acts and indecent language. Thus, he was "lawfully present at the place from which the evidence can be plainly viewed." *See* Horton, 496 U.S. at 136-37. Additionally, SA EP had a "lawful right of access to the object itself," namely to search all of the "applejacks" emails. To this point, the military judge notably held that it was reasonable for SA EP to be searching each and every one of the emails in the "applejacks" account because of the nature of the offenses at issue – namely child pornography and

extramarital sexual conduct – and provided examples in his ruling on why searching each and every email was pertinent.

Finally, as found by the military judge, the emails showing indecent/lewd acts and indecent language were "immediately apparent." *See* Id. A simple viewing of the emails contained within Prosecution Exhibit 2 and media found in Prosecution Exhibit 4 confirm this fact for this Honorable Court. As each of the three factors from Horton are met in this case, the military judge did not err in finding the plain view exception applied in this case. Moreover, as found by the military judge, SA EP was acting within the scope of the authority (i.e., searching for child pornography and extramarital sexual conduct evidence) when he found these emails. As SA EP was thus involved in otherwise lawful activity when the images were found, the plain view doctrine applies. *See* Fogg, 52 M.J. 149; Mil. R. Evid 316(c)(5)(C).

The military judge also correctly found the good faith exception applied in this case. Here, as found by the military judge, SA EP in good faith relied on the search authorization issued to him while searching the "applejacks" emails. Indeed, as found as fact by the military judge, SA EP believed he was lawfully acting with the scope of the search authorization when he found the emails containing indecent/lewd conduct and indecent language. Moreover, in accordance with Leon and Mil. R. Evid. 311, the SA EP's good faith belief was objectively reasonable. Even after the investigator found the first piece of evidence that was lewd/indecent, SA EP still had an authorization and a duty to locate evidence of child pornography and extramarital sexual conduct. After first discovering evidence of lewd/indecent conduct or language, SA EP may have suspected there was additional evidence of this conduct, but that does not negate the fact that SA EP still needed to search for the evidence of child pornography and extramarital sexual conduct. There is no evidence that SA EP continued opening emails, images,

and videos for the sole purpose of discovering more suspected lewd/indecent conduct and indecent language.

Finally, though not discussed by the military judge in his reconsideration ruling, the application of the inevitable discovery exception would have also been properly applied in this case. Here, the investigation into Appellant was in its opening stages and, as noted by the military judge in his findings of fact, investigators later searched Appellant's house in Italy after obtaining a search authorization. Considering the ongoing nature of the investigation into Appellant's conduct and AFOSI obtaining a search authorization involving Appellant after SA EP's search of these emails, this Court should be convinced that SA EP would have had the ability to present the initial evidence of lewd/indecent conduct and indecent language to a military judge for an expansion of the original search authorization, and this Court should be satisfied that a military judge would have granted that expansion considering the content of the discovered emails.

Still, however, Appellant claims error. First, she attempts to compare her case to Osorio. Yet, this case is starkly different from Osorio. To start, AFOSI did not have a valid search authority to begin with in Osorio. 66 M.J. at 634. There, AFOSI mistakenly initially requested search and seizure authority from the military magistrate for property located in an off-base residence. Id. After seizing the evidence and realizing their mistake, AFOSI agents requested search and seizure authority from an off-base magistrate and it was granted. Id. However, as Appellant correctly notes in her brief, the magistrate only granted very narrow authority for files from a party occurring on one date: 12 February 2005. Id. at 636.

Nonetheless, the AFOSI agent began opening files at random, including files not from the one authorized date, to make sure the files were not "contraband." Id. at 635. The agent

continued opening thumbnail images and then continued to search "to see if the pictures were saved to the computer or just stored in temporary internet files." Id. After searching for 20-30 minutes, the agent informed other AFOSI agents about photos discovered that depicted nude minors. Id.

The facts of this case are vastly different. First, as opposed to the highly restrictive search authorization in Osorio that limited the authorized search to one party on one date, the search authorization here authorized AFOSI to search *all* emails in the "applejacks" account. Second, as opposed to the agent in Osorio who was opening files randomly that were outside of the one date allowed by the search authorization, SA EP in this case opened all emails, which was specifically allowed by the search authorization. Finally, the agent in Osorio expressly stated she was looking for "contraband," which was also outside the stated purpose of the search authorization. Here, however, SA EP testified, and the military judge found as fact, that SA EP was never specifically looking for evidence of lewd/indecent conduct and indecent language (which is analogous to the "contraband" in Osorio), but instead at all times was looking for evidence of the stated purpose in the search authorization – namely evidence of child pornography and extramarital sexual conduct.[14]

In Osorio, this court found the agent *intentionally* exceeded the warrant's scope and the agent's search was specifically for evidence outside the scope of the warrant. Here, there was no intentional exceeding of the warrant's scope and SA EP was never intentionally looking for

[14] To this point, even after initially finding evidence of lewd/indecent conduct and indecent language, SA EP testified that he did not, thereafter, begin looking specifically for similar evidence. Instead, SA EP testified, and the military judge found as fact, that SA EP continued to focus his review on child pornography, extramarital sexual conduct, and determining the identify of the "applejacks" user.

anything outside the scope of the warrant – which was child pornography and extramarital sexual conduct. Appellant's reliance on Osorio is misplaced in this instance.

Next, Appellant claims the good faith exception should not apply in this case because she claims SA EP "testified that he knew that he was required to obtain a new search authorization upon finding evidence of offenses not contemplated by the scope of the existing one." (App. Br. at 21, *citing* R.73-74.) Appellant here misinterprets SA EP's testimony on this point. In the pages cited by Appellant, SA EP was asked by Appellant's counsel, "And you'd agree with me that if you saw evidence — because I believe this is on trial counsel's direct examination as well — but if you're going — if — as you're reviewing — conducting this evidence review from the beginning of the creation of the account chronologically, and you found evidence of additional misconduct that you may — that you would have to stop and obtain an expansion of the search authorization *to continue to search for additional misconduct*. Is that correct?" (R. at 73-74.) (emphasis added.) SA EP answered this question by stating, "Yes."

The issue here is that SA EP had previously testified that, even after finding the initial evidence of lewd/indecent conduct and indecent language, he never began specifically searching for this *additional misconduct*. Indeed, if SA EP had began searching specifically for evidence of lewd/indecent conduct and indecent language, he would certainly have needed to get a new search authorization to properly conduct that search. This Court made that clear in Osorio.

However, as SA EP testified and as was found as fact by the military judge, SA EP never began specifically searching for this additional misconduct. Instead, SA EP simply continued search for evidence that was the subject of the search authorization - namely evidence of child pornography and extramarital sexual conduct. With regard to the additional misconduct, SA EP said, "I was not specifically looking for those." (R. at 90.) Instead, SA EP said the focus of his

search remained on evidence specifically mentioned in the search authorization and that finding evidence of the additional misconduct did not alter the scope of his investigation. (Id.) Specifically, SA EP said the additional misconduct was "identified in locations that I was already searching within the scope of the authority that I had," and that he was "still searching within the scope of my original authority." (Id.) SA EP confirmed that at that point he was still looking for "possession of the child photography and any evidence corroborating extramarital conduct – sexual conduct," as well as evidence as to the owner of the "applejacks" account. (R at 92.)

Here, as opposed to the intimation made by Appellant in her brief, SA EP was never looking specifically for evidence of additional misconduct, but instead remained at all times looking solely for the subject of the search authorization. Thus, SA EP was (1) not required to obtain additional search authorization; and (2) remained within the confines of the search authorization when he found the evidence of additional misconduct. As such, as the miliary judge properly found in his ruling, the good faith exception rightly applied in this case.

Finally, Appellant claims the "exclusionary rule should appl[y] in this case" because SA EP "knew what the right thing to do was" but "did not do it." (App. Br. at 21, *citing* R. at 74.) Again though, Appellant misconstrues SA EP's testimony and wholly omits SA EP's reasoning for not obtaining additional search authorization. Appellant also omits the fact that the military judge adopted SA EP's reasoning *as fact* in his ruling.

Here, as the military judge found as fact, SA EP believed he was acting lawfully within the scope of the search authorization and also did not act with a deliberate, reckless, or grossly negligent disregard for Appellant's Fourth Amendment rights. Appellant's contention here that SA EP knew what the "right thing to do was" and "did not do it" is simply not supported by the facts of this case. Appellant's contention that SA EP "exceed[ed] the scope of the authorization"

or intentionally "search[ed] for any evidence of criminal activity" is likewise unsupported by the record. (*See* App. Br. at 22.) Here, SA EP's conduct was not deliberate, reckless, or grossly negligent. Moreover, there is no indication that excluding this evidence in this instance would somehow deter recurring or systemic negligence, especially since not such negligence took place in this case. Thus, application of the exclusionary rule is not warranted in this case. *See* Herring, 555 U.S. at 144.

In all, the military judge did not abuse his discretion when he found both the plain view and good faith exceptions applied in this case. Further, while not mentioned by the military judge in his ruling, the inevitable discovery doctrine applies in this case as well. Using any of those three theories, suppression of the email evidence in this case is not warranted and the military judge did not abuse his discretion in denying Appellant's suppression motion. Accordingly, this Court should deny Appellant's claim.

III.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING THE CHALLENGE FOR CAUSE AGAINST LT COL RM AND CAPT JS.

Standard of Review

The standard of review for a military judge's decision whether to grant a challenge for cause is whether he clearly abused his broad discretion in not applying the liberal-grant mandate. United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 1997); United States v. Dinatale, 44 M.J. 325, 327 (C.A.A.F. 1996); United States v. McLaren, 38 M.J. 112, 119 (C.M.A. 1993); United States v. Ruiz, 46 M.J. 503, 509 (A.F. Ct. Crim. App. 1997). In United States v. Tippit, 9 M.J. 106 (C.M.A. 1980), our superior Court stated:

> The reviewing court need not engage in minute dissection of responses by members to artful, sometimes ambiguous, inquiries from counsel. Unless it is apparent to [the court] from the record of the *voir dire* that a court member has a closed mind about the case he is to try, denial by the military judge of a challenge for cause should not be reversed.

Tippit, 9 M.J. at 108. The abuse of discretion standard is a strict one. It involves more than a difference of opinion. The challenged action must be found to be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be invalidated on appeal. United States v. Travers, 25 M.J. 61 (C.M.A. 1987).

This Court reviews rulings on challenges for actual bias for an abuse of discretion. United States v. Hennis, 79 M.J. 370, 384 (C.A.A.F. 2020) (*citing* United States v. Nash, 71 M.J. 83, 88–89 (C.A.A.F. 2012)). Indeed, this Court must give the "military judge great deference when deciding whether actual bias exists because it is a question of fact, and the judge has observed the demeanor of the challenged member." United States v. Napolitano, 53 M.J. 162, 166 (C.A.A.F. 2000).

This Court reviews rulings on challenges for implied bias "pursuant to a standard that is less deferential than abuse of discretion, but more deferential than de novo review." United States v. Peters, 74 M.J. 31, 33 (C.A.A.F. 2015) (*quoting* United States v. Moreno, 63 M.J. 129, 134 (C.A.A.F. 2006); Napoleon, 46 M.J. at 283) (internal quotation marks omitted). "The focus is on the perception or appearance of fairness of the military justice system." United States v. Dale, 42 M.J. 384, 386 (C.A.A.F. 1995). Therefore, implied bias is reviewed under an objective standard. United States v. Daulton, 45 M.J. 212, 219 (C.A.A.F. 1996). Even so, "[t]he burden of maintaining the challenge belongs to the challenging party." Dinatale, 44 M.J. at 328; R.C.M. 912(f)(3). Although it is not required for a military judge to place his or her implied bias

analysis on the record, doing so is highly favored and warrants increased deference from appellate courts. United States v. Dockery, 76 M.J. 91, 96 (C.A.A.F. 2017).

Law

"An accused enjoys the right to an impartial and unbiased panel." Nash, 71 M.J. at 88. A court member "shall be excused" when that member "should not sit … in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). "A military judge's determinations on the issue of member bias, actual or implied, are based on the 'totality of the circumstances.'" United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (*citing* United States v. Strand, 59 M.J. 455, 456 (C.A.A.F. 2004)). Courts generally recognize two forms of bias that subject a juror to a challenge for cause: actual bias and implied bias. United States v. Wood, 299 U.S. 123, 133 (1936).

Actual bias is defined as "bias in fact." Hennis, 79 M.J. at 384 (*quoting* Wood, 299 U.S. at 133. "Actual bias is personal bias which will not yield to the military judge's instructions and the evidence presented at trial." Hennis, 79 M.J. at 384 (*citing* Nash, 71 M.J. at 88). "Because a challenge based on actual bias involves judgements regarding credibility, and because 'the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire,' a military judge's ruling on actual bias is afforded great discretion." United States v. Clay, 64 M.J. 274, 276 (C.A.A.F. 2007) (*quoting* Daulton, 45 M.J. at 217).

Implied bias, on the other hand, is "bias conclusively presumed as [a] matter of law." Hennis, 79 M.J. at 385 (*citing* Wood, 299 U.S. at 133). "Implied bias exists when most people in the same position as the court member would be prejudiced." United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008). It is evaluated objectively under the totality of the circumstances and "'through the eyes of the public,' reviewing 'the perception or appearance of fairness of the

military justice system.'" Id. (*quoting* United States v. Townsend, 65 M.J. 460, 463 (C.A.A.F. 2008)). Where a military judge "recognizes his duty to liberally grant defense challenges, and places his reasoning on the record, instances in which the military judge's exercise of discretion will be reversed will indeed be rare." Clay, 64 M.J. at 277.

". . . [I]f after weighing the arguments for the implied bias challenge the military judge finds it is a close question, the challenge should be granted." Peters, 74 M.J. at 34. Although a military judge is not expected to provide dissertations on his or her decision on implied bias, the military judge does have to apply the right law. Id. "Incantation of the legal test without analysis is rarely sufficient in a close case." Id. A military judge will be afforded less deference if an analysis of the implied bias challenge on the record is not provided." Id.

Additional Facts

- *Lt Col RM*

During individual voir dire, Lt Col RM referred to the Staff Judge Advocate, Lt Col BW, as "a friend." (R. at 396.) When asked to describe the friendship, Lt Col RM said, "We've gone out to dinner [a] couple of times, met each other socially in London and in the local area." (Id.) Lt Col RM also stated he had worked with Lt Col BW and Maj RH, the trial counsel, on "several cases at my squadron," including an unprofessional relationship case that ended in non-judicial punishment, and a case involving an airman accused of sexual assault. (Id.) Lt Col RM said he "worked quite a bit with [Maj RH]" on the sexual assault case. (R. at 398.) Lt Col RM later stated he had met in person with Maj RH a total of three times. (R. at 404.)

Lt Col RM was then asked the following:

> You said you worked closely with [Maj RH]. Anything about that experience, having worked closely with her, and your relationship with the [Lt Col BW], do you feel like that that would cause you to

> view them view their side the government side the prosecution side with a little more credibility than you would perhaps the defense side, because of your relationships, your working relationships, and your personal relationships with [Maj RH] and [Lt Col BW] or do you feel like you'd be, I guess more bias to that side.

(R. at 399.) Lt Col RM replied, "No, sir." When the military judge asked why, Lt Col RM replied, "I think you know they're professionals. We were acting in [sic] professional relationship there in terms of the both those cases you know I would assume that both sides would have the same level of professionalism and expertise." (Id.)

Lt Col RM agreed that he had relied on Maj RH's advice and professionalism, but highlighted that he was a tenant on the wing, had his own judge advocate, and "used recommendations from both [Maj RH] and then also our tenant wing JAG." (R. at 404.) When asked if he weighted Maj RH's opinion or recommendation over his own tenant wing judge advocate, Lt Col RM said, "No." (R. at 405.) As to Lt Col BW, Lt Col RM said he would feel comfortable asking for legal advice as a friend from Lt Col BW, but told the military judge that he had never reached out to Lt Col BW outside of a professional context. (Id.)

As to any specialized knowledge of digital devices or applications, Lt Col RM said, "I'm aware of probably a higher level of capability on applications and mobile technology both at an unclass and classified level." (R. at 400.) When asked to clarify, Lt Col RM said, "I'm saying that I'm aware of capabilities on a, you know, digital capabilities we have with cell phones as well as metadata and other types of information that we can use on cell phones. At a higher, higher level than most people." (Id.)

When asked if he would be able to set aside any specialized knowledge that he might have and listen to the evidence and the digital forensics expert testimony in the case without influence of his own knowledge, Lt Col RM replied, "Yes." (R. at 401.) When asked why he

was confident about being impartial despite his specialized knowledge, Lt Col RM said, "Well, my focus is primarily on military uses of these things, I'm assuming we're not going to go to that level here, so I'm confident that what we're talking about at this level will be different than what I've experienced." (R. at 401.) When the district trial counsel said, "Apples and oranges sort of thing," Lt Col RM replied, "Yes." (Id.)

When both trial and defense counsel had completed their questions, the military judge asked Lt Col RM if he would base his decision only on the evidence presented at trial rather than his personal experience. Lt Col RM answered, "Yes." (R. at 406.) When asked if he believed he could give Appellant a full, fair and impartial hearing, Lt Col RM answered, "Yes." (Id.)

- *Capt JS*

During group voir dire, Capt JS answered "yes" to a question asking if she had a family member or close friend who had been negatively affected in some way by intimate partner infidelity. During individual voir dire, the military judge asked for further elaboration, to which Capt JS explained:

> My best friend. She was, has a lot of trauma related to a situation that happened with her. She was recently married and then they were doing long distance thing. And she found out her spouse had been cheating on her quite a lot. And then I knew both of them. So I was stuck in the middle of it for a little while, so it impacted me a little bit, but obviously not as much as her.
> .

(R. at 490.) Capt JS said it happened about a year prior. Capt JS said the roommate of the husband suspected something and that she and the roommate confronted the husband and he "came clean about most of it." (R. at 491.)

When asked if she could decide Appellant's case in a fair and impartial way, despite her experiences, Capt JS answered, "I can." (R. at 492.) The military judge's and Capt JS's discussion continued as follows:

> MJ: Well, let me decide. How did you feel about the situation regarding your friend and I guess her then husband. What were, what was the feeling that you were left with, I guess because of the husband's actions?
>
> Capt JS: I was uncomfortable just because by default I was kind of in the middle, being closer, close to him physically in location and then being her best friend, and she had a lot of feelings come up recently that she was like, I think something's going on. And so then I was always on guard a little bit and I'd even asked him a couple of times previously, if there was something going on because it was, it wasn't fair to her or to him really.
>
> MJ: Just made you feel uncomfortable.
>
> Capt JS: (nods head up and down for yes)

(R. at 493.) When asked if Capt JS was still helping her friend "work through" the situation and if it was "still kind of ongoing," Capt JS replied, "Not really, no. I mean she's met somebody new. She's still working through stuff I know that, but it's not the topic of conversation anymore." (R. at 497.) Capt JS said she had not talked to her friend about how it was impacting her since October, which was three months prior to the voir dire session that occurred on 23 January 2023. (R. at 498-99.)

- *Member Challenges*

Appellant challenged Lt Col RM for cause due to implied bias. (R at 508.) Appellant's primary concern at trial with Lt Col RM was because he had said he may have a conflict if the case were to go through Saturday of that week. (Id.) The second concern for the defense was Lt Col RM's "specialized knowledge of the computer or the devices." (R. at 509-10.) Finally, the

defense raised concerns about Lt Col RM's interaction with Maj RH, arguing that he had previously relied extensively, and worked extensively with her, and with Lt Col BW, arguing that he had a personal relationship with him. (R. at 510-11.)

The military judge denied the challenge as follows:

> I have considered the challenge for calls on the basis of both actual and implied bias and the mandate to liberally grant defense challenges of defense counsel did not raise the issue of actual bias in this case, but actual bias exists when a specific members bias is such that it will not yield for the evidence presented and the judge's instructions. Implied bias, I've read the standard definition for that, and it applies equally here as well. The question comes down to with regard to implied bias with an objective public observer has substantial doubt about the fairness of the accused court martial panel, where a court room member remains on the panel, who in this case has worked with one of the trial counsel and is, I guess slightly more than professional acquaintances with the SJA. However, I've determined that implied bias does not exist here. And the reason for that is a couple of things.
>
> There's some cases, United States versus Hamilton, 41 M.J. 32 where it states that professional relationships is not per say [sic], a basis for challenge, and in that case the member provided assurances of impartiality which this [Lt Col RM] did. United States versus Peter, 74 M.J. 31 C.A.A.F. (2014) there's no per se rule of disqualification where a member knows or has worked with trial counsel or defense counsel. So with that, applying sort of those baseline legal principles to [Lt Col RM's] relationship, beginning with [Maj RH]. They met in person three times, primarily by email. He did rely on her advice and professionalism as you would expect in a commander sort of seeking advice from a legal professional. The court has no concerns with regard to his childcare issue. He was matter of fact, not concerned with his words. His wife could make other arrangements, so that's not an issue.
>
> For the court that rises to the level of implied bias with the with regard to [Lt Col BW], again, the court understands that this is a small base. At a small base in which the Staff Judge Advocate interacts with commanders, that's certainly understandable and not a prohibition to obviously develop personal relationships with commanders. [Lt Col RM] said he they've gone at dinner a few times and calling professionally as you would expect, being the staff

> Judge Advocate, seek out his advice. So it sounds like they, coworkers or, colleagues, that have developed a friendly relationship that in and of itself doesn't rise to the level of implied bias, especially when you consider as trial counsel points out, [Maj RH] is not rated by [Lt Col BW] and it would not rise to the level of implied bias and the difference here, just so the court is clear, the difference here as opposed to [a separate excused member] are the other issues that we discussed with [the excused member]. But there's no evidence here that [Lt Col RM] sought out any kind of advice on what it means to be a member or how the court martial process works or sought out information on the public website. I know its public website, but again with [the excused member], it's not just the one thing in isolation, it's all the things that anyway, for those reasons, the challenge for cause is denied.

(R. at 514-15.)

Appellant challenged Capt JS for actual and implied bias, specifically "with regards to her actions on extramarital sexual [sic]." (R. at 515.) The defense believed there was actual bias because Capt JS "took it upon herself to go seek out and interview the husband," and that Capt JS "was the shoulder to cry on and was caught in the middle of it." (R. at 516.)

The military judge denied the challenge as follows:

> I have consider[ed] the challenge for cause on the basis, but actual [and] implied bias in the mandate to liberally grant defense challenges. Actual bias, the definition that I read applies equally here. Actual bias does not exist here because the member was clear that she could follow my instructions. She said that she can be fair and impartial. That much was clear.
>
> With regard to implied bias, so actual bias does not exist in this case. With regard to implied bias, the question comes down to would an objective public observer have substantial doubt as the fairness of the accused court martial panel, where a court member remains on the panel who in this case was friends with both a military member who was being cheated on, and friends with the husband who was doing the cheating. The court finds implied bias does not exist here because it was a situation this panel member, appear to act, not out of moral disdain for adultery, or extramarital or sexual conduct, but rather to protect her best friend from a spouse who was cheating on her a lot, as was her words.

> She confronted the husband, sat him down and apparently got an answer that again I believe that was more out of loyalty to her friend as opposed to a moral disdain again for adultery. As trial counsel pointed out in their last conversation in October, they talked about it for it's a relatively short time as to the time that they were together in October and that was in part apparently because this members question was, "Are you ready to move on with another relationship? May have lasted 20 minutes to find out if she was OK".
>
> . . .
>
> For those reasons, the challenge for cause is denied

(R. at 519-20.)

Notably, the military judge granted an implied bias defense challenge to a separate member, Lt Col AB, in part because (1) after being selected as a potential member, Lt Col AB went to the SJA, Lt Col BW, asking for advice about being a court member and Lt Col BW gave her advice on the court-martial process and the proceedings; (2) Lt Col AB went on a legal office outing when other wing staff agencies were not initially invited; and (3) Lt Col AB referred to Maj RH by her first name. (R. at 507-08.)

Appellant later employed his preemptory challenge on a separate panel member, and did not use it on either Lt Col RM or Capt JS. (R. at 522.)

Analysis

The military judge, in ruling on the challenges for both Lt Col RM and Capt JS, analyzed the challenges on the basis of both actual and implied bias and the mandate to liberally grant defense challenges and placed that analysis on the record. (R. at 514-15, 519-20.)[15] Thus, for his rulings, the military judge should be given "great deference" on actual bias, "increased

[15] The military judge also employed this analysis in other member challenges as well. *See* R. at 506.

deference" on implied bias, and, because the military judge recognized his duty to liberally grant defense challenges and placed his reasoning on the record, a reversal of her exercise of discretion should "indeed be rare." *See* Napolitano, 53 M.J. at 166; Dockery, 76 M.J. at 96; Clay, 64 M.J. at 277.

Still, Appellant claims error because he first believes the military judge did not address implied bias in his rulings for either Lt Col RM or Capt JS. (App. Br. at 25.) For Lt Col RM, Appellant claims the military judge did not address how any of the factors addressed in his ruling, particularly Lt Col RM's assurances of impartiality, the fact that Lt Col RM did not seek advice on being a member from the SJA, and the lack of a *per se* rule of disqualification for professional relationships, would affect the public's perception of the fairness of the trial. (Id.)

Appellant is wrong. Aside from mentioning implied bias six separate times in his three-paragraph ruling, the military judge detailed the "objective public observer" standard and then explained why Lt Col RM's contacts with the SJA and trial counsel did not rise to a level to question the fairness of the trial. Specifically, the military judge explained that Lt Col RM's contacts with Maj RH were what "you would expect in a commander" seeking advice from a legal professional and also highlighted the small number of times they had met, which was three times. (R. at 514-15.) As to the SJA, the military judge explained that, considering it was a small base, it was "certainly understandable why an SJA would develop personal relationships with commanders."

Notably, the military judge had previously granted an implied bias challenge on Lt Col AB and then, in his ruling here, explained the reasons why Lt Col AB's situation merited an implied bias challenge and why, conversely, the challenge against Lt Col RM did not.

Appellant's claim that the military judge did not apply the implied bias standard in his ruling on Lt Col RM is incorrect.

The same goes for the military judge's ruling involving Capt JS. Here again, the military judge referenced implied bias and its test multiple times in his ruling and highlighted that implied bias did not exist because Capt JS had made it clear she did not have a moral disdain for adultery, or extramarital sexual conduct, which, when read in context, went to show that an objective public observer would not have substantial doubt as the fairness of the accused court martial panel when it came to the subject of adultery. Here, the military judge correctly articulated his implied bias analysis for both denials and, contrary to Appellant's assertions, should receive the heighted deference for doing so.

Next, Appellant simply restates the same bases for excusal she provided the military judge at trial without providing any further argument or analysis as to why the military judge erred in denying his requests. For Lt Col RM, Appellant simply rehashes the (1) "personal friendship with the Staff Judge Advocate;" (2) the "working relationship with the trial counsel;" and (3) Lt Col RM's "high-knowledge of the technical subject matter at issue in this case," before declaring that with "all three concerns, the liberal grant mandate required he be excused from this court-martial." (App. Br. at 26.) Appellant notably provides no further argument as to why his conclusory statement holds true.

As noted by the military judge in his ruling, there is no per se disqualification in circumstances where a member of a panel knows or has worked with trial counsel or defense counsel. *See* United States v. Hamilton, 41 M.J. 22, 25 (C.M.A. 1994). Instead, the Court must look to the relationships between counsel and the member. In Hamilton, our superior Court dealt with a case where the court member regularly relied on the trial counsel for advice, and, as soon

as they were summoned as a court member, sought the trial counsel's input on panel service. Id. The court member also spoke with the trial counsel the night before trial on a separate matter, but ended the conversation by saying, "see you tomorrow." Finally, the trial counsel, in arguing for the member to stay on the panel, "relied upon his personal knowledge of [the members] character." Id.

Here, Lt Col RM's and Maj RH's relationship was quite different as the two only conversed in person three times and had no discussions involving this case. Furthermore, Lt Col RM said that he did not hold Maj RH's advice or recommendations any higher than the advice he received from his wing judge advocate, which again shows he did not hold Maj RH in a higher light than other attorneys with whom he interacted. As opposed to the relationship between the panel member and the trial counsel in Hamilton, any relationship here did not go "beyond what would be perceived as fair to an appellant in the context of a typical court-martial." Hamilton, 41 M.J. at 36.

As to the personal relationship between Lt Col RM and Lt Col BW (the SJA), Lt Col RM stated the interaction was limited to going out to dinner a "couple of times," including one that was duty related. (R. at 396.) Moreover, Lt Col RM stated that he had never reached out to Lt Col BW on anything outside of a professional context and had never reached out to him with regard to Appellant's case or his service as a panel member.

Notably, with regard to both the SJA and Maj RH, Lt Col RM stated that he would assume that "both sides" (meaning the government and defense) would have the same level of professionalism and expertise. (R. at 399.) There simply is no actual or implied bias here from Lt Col RM regarding either Lt Col BW or Maj RH.

As to Lt Col RM's IT knowledge, Lt Col RM himself stated, "I'm not the expert in this field," and that "a lot has changed since I've looked at any of that stuff." (R. at 403.) Lt Col RM also said he would on go "off of the testimony alone" and that if any court member asked him about his prior knowledge, he would "tell them to go back to the court." (R. at 404.) Finally, Lt Col RM also agreed that his IT knowledge, as compared to the digital forensics in play in Appellant's court-martial, were an "apples and oranges sort of thing," and also agreed that he would be able to set aside any specialized knowledge that he might have and listen to the evidence and the digital forensics expert testimony in the case without influence of his own knowledge. (R. at 401.)

Overall, any reasonable, disinterested observer would have come to the exact same conclusion as the military judge with regards to the challenge of Lt Col RM. Even Appellant's trial defense counsel did not think Lt Col RM's answers so egregious as to warrant the exercise of a peremptory challenge against him, choosing instead to challenge another member. Therefore, even under an objective standard, Appellant's claim of error provides no basis for relief from this Court. The military judge's decision not to grant the challenge for cause was not an error, and this Court should not disturb it.

The same holds true for Capt JS. Again, Appellant simply rehashes the same failed arguments she provided the military judge at trial to strike Capt JS, namely that Capt JS's experiences with her best friend and the best friend's husband's extramarital affairs would cause the public to "have concerns about her ability to fairly judge a situation that involved a similar allegation." (App. Br. at 26.)

Yet, Capt JS's responses call for no such concern. To start, Capt JS agreed that she could decide Appellant's case in a fair and impartial way. (R. at 492.) Further, Capt JS stated that the

whole situation between her best friend and the husband just made her feel uncomfortable because she was stuck in the middle of the situation, not, as the military judge aptly highlighted, because of any moral or otherwise strong beliefs against adultery or those who commit it. (R. at 493.) Most importantly, Capt JS stated the entire situation was essentially over, adding that her friend had met someone new and the topic had not even been discussed between Capt JS and her best friend for over three months. (R. at 497-99.)

Here, Capt JS demeanor and answers to the military judge's questions show she was willing to follow the military judge's instructions, apply the law to the specific facts of the case in order to determine whether or not the beyond-a-reasonable-doubt standard was met, and decide Appellant's case in a fair and impartial fashion.

In all, the military judge did not abuse his "great discretion" in denying Appellant's challenges based on actual bias. Likewise, considering the lengthy rationale placed on the record by the military judge on both actual and implied bias for both Lt Col RM and Capt JS, this case is not the "rare" instance when the military judge's discretion should be reversed. Accordingly, this Court should deny Appellant's claim.

IV.

NONE OF APPELLANT'S SPECIFICATIONS WERE AN UNREASONABLE MULTIPLICATION OF CHARGES.

Standard of Review

A military judge's denial of relief for claims of unreasonable multiplication of charges is reviewed for an abuse of discretion. United States v. Campbell, 71 M.J. 19, 22 (C.A.A.F. 2012) (citations omitted). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal

principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citation omitted). "The abuse of discretion standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" United States v. McElhaney, 54 M.J. 120, 130 (C.A.A.F. 2000) (citations omitted).

Law

R.C.M. 307(c)(4) summarizes the principle of unreasonable multiplication of charges as: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." This Court considers the following non-exhaustive factors in determining whether specifications are unreasonably multiplied:

> (1) Did the [appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?;
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?;
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?;
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?;
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001) (citation and internal quotation marks omitted).

Additional Facts

As detailed above, Specification 3 of Charge I alleged Appellant, on or about 5 June 2019, in Italy, committed indecent conduct, in violation of Article 134, by recording herself

masturbating in front of a child and sending that recording to MSgt NC, and that the conduct was of a nature to bring discredit upon the armed forces. (Charge Sheet.) The Specification of Charge II, in violation of Article 120b, alleged Appellant, on or about 5 June 2019, in Italy, committed a lewd act upon a child who had not attained the age of 16 years, by engaging in indecent conduct by "recording herself masturbating in front of a child, intentionally done in the presence of the child, which conduct amounted to a form of immorality relations to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations." (Id.)

Specification 6 of Charge I alleged Appellant, between on or about 6 January 2020 and on or about 8 January 2020, knowingly and wrongfully possessed child pornography. Specification 7 of Charge I alleged Appellant, between on or about 6 January 2020 and on or about 8 January 2020, knowingly and wrongfully distributed child pornography. (Id.)

At trial, Appellant moved to the trial court to dismiss Specification 3 of Charge and the Specification of Charge II on the basis of multiplicity and unreasonable multiplication of charges. (App. Ex. I.) Appellant did not raise a similar motion related to Specifications 6 and 7 of Charge I.

The military judge denied Appellant's motion. (App. Ex. XIX.) With regard to unreasonable multiplication of charges,[16] the military judge properly analyzed each of the Quiroz factors, first noting that Appellant made a timely objection. (Id. at 6.) As to whether each charge and specification were aimed at distinctly separate acts, the military judge found this factor weighed in the Government's favor by holding that the "act of recording oneself

[16] As Appellant claims no error with the military judge denying his motion related to issues of multiplicity, that portion of the military judge's ruling is not addressed in this brief.

masturbating in front of a minor is a separate and distinct act from taking that recording[,] attaching it to an email and transmitting the recording to another person." The military judge held "the specifications in question arise from two separate acts." (Id.)

The military judge further held the number of charges and specifications did not misrepresent or exaggerate Appellant's criminality, stating, "Here, additional steps were required from the criminal act captured in the specification of Charge II to the criminal act captured in Specification 3 of Charge I." (Id.) The military judge noted the specification of Charge II was limited only to Appellant recording herself masturbating in front of a child, where Specification 3 of Charge I involved the additional steps of attaching that recording to an email and distributing it to another military member. The military judge further noted the Government was "also required to prove different and distinct elements for each offense." (Id.)

As to the fourth factor, while the punitive exposure for Appellant increased based on the two specifications, "the specifications are drafted in a manner to accurately capture the extent of [Appellant's] criminal misconduct, and to separate and delineate the misconduct which was, or was not, committed by [Appellant]." (Id. at 6-7.) Finally, the military judge found "no evidence of prosecutorial overreach or abuse" because the Government "charged the offenses in separate specifications in an attempt to capture the nature of [Appellant's] criminal conduct appropriately and accurately." (Id. at 7.)

Notably, during oral argument on this motion, the government trial counsel highlighted that Appellant was "also charged with possession and distribution of child pornography," but that the "defense is not asking that these specifications be dismissed or are multiplicious," adding that the "possession of child pornography and distributing that CP to another member are two criminal acts." (R. at 180.)

Appellant's trial defense counsel affirmatively and specifically agreed by stating the following:

> The only additional piece that I would provide for, Your Honor, is sure the court is aware for purposes of the individual photos of child pornography, it's very clear that throughout the congressional intent and looking at the case law each individual image of child pornography as laid out by Congress and the intent of the statutes that criminalize conduct — it's the material at issue in child pornography. Each individual piece of material as the law has worn [sic] out as a violation of the law.
>
> The reason it is separate and apart from here — why each individual photo for purposes of multiplicity are not at issue or whether the sending — *the possessing and distributing of the same image is not multiplicity* is because it is very clear through congressional intent and case law that *those two acts are very different because of the materials at issue*. Because of what we are trying to criminalize is the material itself.

(R. at 182-83.) (emphasis added.)

Analysis

The military judge did not abuse his discretion in finding Specification 3 of Charge I and the Specification of Charge II were not an unreasonable multiplication of charges. Further, Appellant waived her ability to raise an issue to this Court as to whether Specifications 6 and 7 of Charge I are an unreasonable multiplication of charges when she willfully and specifically did not raise the issue at trial. Thus, this Court should deny Appellant's claims.

- *Specification 3 of Charge I and the Specification of Charge II*

As the military judge properly found at trial, a clear and plain reading of Specification 3 of Charge I and the Specification of Charge II show the two offenses charged are complete and separate offenses and are not an unreasonable multiplication of charges. The Specification of Charge II, which focuses on an offense committed against Appellant's young daughter, involves

only the making of the recording, an offense which was complete once Appellant stopped recording herself masturbating in the presence of her daughter. As noted by the trial counsel during the motion argument, the *actus reus* of this specification was Appellant "masturbating in front of her own daughter and making a recording of it." (R. at 179.)

Specification 3 of Charge I, however, focuses on Appellant's additional misconduct of taking that recording of her masturbating in front of her young daughter, and then attaching it to an email, and ultimately sending that email to MSgt NC. As the trial counsel argued during motion practice, the *actus reus* of this specification was "the separate and distinct act of taking that recording, pulling up her email address, attached that recording to the email, typing [MSgt NC's] address, and clicking send."[17] (Id.)

These are two distinct criminal transactions and two separate offenses, charged under different UCMJ articles that have different and distinct elements. Here, the second and third Quiroz factors weigh heavily in the Government's favor. As to the fourth factor, Appellant ended up facing no additional punitive exposure because the military judge merged the two specifications for sentencing. Finally, considering the reasons expressed by the trial counsel on why the Government charged the two separate offenses in the fashion it did, there is no indication of prosecutorial overreach or abuse. Thus, four of the five Quiroz factors weigh

[17] In closing argument, the trial counsel would highlight the differences again, stating, "Now I want to draw the distinction here between Specification 3 of Charge I where we've charged indecent conduct. So in specification 3 of [C]harge I the government's charged indecent conduct for [Appellant] recording this video of her masturbating in front of her daughter, her child. And sending it to [MSgt NC], recording it and sending it, is what's been charged as the indecent conduct. The act of masturbating in front of her child while recording it is charged in Charge II on your flyer there. So masturbating in the presence of a child is a crime, is a lewd act upon the child. And the government has charged that crime separate and apart from the crime of recording herself and then sending it to [MSgt NC]." (R. at 1465-66.)

heavily in the Government's favor, proving all the more why the military judge did not abuse his discretion in denying Appellant's motion.

In her brief, Appellant simply renews the same unpersuasive arguments she provided to the military judge at trial. She again claims the "two specifications were clearly aimed at one criminal act." (App. Br. at 29.) Yet, as the trial counsel explained to the military judge at trial, the two offenses were separate and distinct and involved very different criminal acts. The Specification of Charge II involved the making of the video itself, while Specification 3 of Charge I involved then taking that video and transmitting it to MSgt NC. As opposed to Appellant's claim, these are not "clearly . . . one criminal act." (*See* App. Br. at 29.)

Here, Appellant's criminality spanned two offenses – first making the video, and then taking the additional step of sharing that video over the internet to another military member. The way in which the Government charged these two distinct offenses did not "exaggerate[]" Appellant's criminality, as Appellant argues, but instead properly captured her multiple offenses related to this illicit video properly and accurately. Simply put, Appellant's acts were not "substantially one transaction," but instead were two separate criminal acts. *See* R.C.M. 307(c)(4). Accordingly, this Court should deny Appellant's claim related to these two specifications.

As to Specifications 6 and 7 of Charge I, this Court should not even entertain Appellant's newfound claims as she waived this issue by not raising it at trial. First, while Appellant raised an unreasonable multiplication of charges issue related to the two specifications mentioned above, she never raised a similar motion or issue related to Specifications 6 and 7 of Charge I. Then, during oral argument on the motion Appellant did bring, Appellant's counsel specifically

agreed that "possessing and distributing of the same image is not multiplicity" and that "two acts are very different." (R. at 182-83.)

Per R.C.M. 905(b)(2), defenses or objections based on defects in the charges and specifications must be raised before a plea is entered. A failure to raise such a motion "forfeits the defenses or objections absent an affirmative waiver." *See* R.C.M. 905(e)(1).

Determining whether an accused has waived an issue is reviewed de novo. United States v. King, 83 M.J. 115, 120 (C.A.A.F. 2023) (citation omitted). "In making waiver determinations, [this Court] look[s] to the record to see if the statements signify that there was a 'purposeful decision' at play." United States v. Gutierrez, 64 M.J. 374, 377 (C.A.A.F. 2007) (*quoting* United States v. Smith, 50 M.J. 451, 456 (C.A.A.F. 1999)).

Here, Appellant's counsel showed there was a clear "purposeful decision" in not raising an unreasonable multiplication of charges motion involving Specifications 6 ad 7 of Charge I. First, Appellant raised an unreasonable multiplication of charges motion at trial, but specifically did not include anything related to Specifications 6 and 7 of Charge I. Then, during oral argument regarding that motion, and in direct response to the Government trial counsel highlighting that the defense had not raised a similar motion related to the possession and distribution of child pornography, Appellant's counsel acknowledged not bringing a motion related to those offenses while also specifically conceding that "possessing and distributing of the same image is not multiplicity" and that "two acts are very different." (R. at 182-83.)

These acts show a clear "purposeful decision" in not raising this issue, in the form of a motion, at trial by Appellant and her counsel. Thus, this Court should view these "purposeful" acts as an affirmative waiver and decline to review Appellant's claim.

Yet, even if this Court decided to either pierce waiver or determines the claim was merely forfeited, the outcome remains the same as Appellant has failed to show any plain error in this case. In order to prevail under a plain error analysis, an appellant must demonstrate that: "(1) there was an error; (2) it was clear or obvious; and (3) the error materially prejudiced a substantial right of the accused." Id. (*quoting* United States v. Fletcher, 62 M.J. 175, 184 (C.A.A.F. 2005). For prejudice, the test is whether there was "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." Voorhees, 79 M.J. at 9 (*quoting* United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017)).

To start, as already noted multiple times, Appellant's own counsel conceded the two offenses are "very different" and did not include the offenses in the unreasonable multiplication of charges motion that was raised. Notably, Appellant has not raised any ineffective assistance of counsel claims against her counsel for not raising this issue at trial. Appellant's decision before this Court in not bringing an ineffective claim should highlight even further for this Court why the military judge did not commit plain error – if her counsel did not fall below the reasonable standards of representing Appellant by not raising the issue, it follows that the military judge likewise did not commit a clear or obvious error in not *sua sponte* raising the issue and dismissing one of the specifications.

Next, Appellant mistakenly believes she committed only "one single act" when she both possessed and then distributed child pornography. (*See* App. Br. at 30.) Here, by simply being able to distribute the child pornography images, the evidence showed Appellant possessed the images in some fashion. However, instead of merely possessing the images, Appellant then took the additional step of creating an email message, inputting MSgt NC's "luckymango" email address, attaching an image of child pornography to the email, and then pressing send on that

email. Appellant then repeated this procedure *10 more times* as she would eventually send 11 total emails. This was no "one single act" or "only the one act" as Appellant claims in her brief.

Next, Appellant attempts to compare her case to that of United States v. Williams, 74 M.J. 572, 575-76 (A.F. Ct. Crim. App. 2014). (*See* App. Br. at 30.) However, Williams involved a set of circumstances where an appellant downloaded child pornography from a peer-to-peer file sharing program, and all the images he downloaded were maintained in a single default folder on his computer. The appellant's distribution of child pornography consisted solely of allowing those images to remain in the default folder under conditions permitting others to access them. Essentially, this Court found the appellant in that case took no additional steps in distributing the child pornography after the appellant possessed them. Notably, however, in finding the appellant's possession of the images multiplicious with his receipt and distribution of them, this Court suggested that the outcome may well have been different had additional or affirmative steps separated the appellant's possession from the receipt and distribution of contraband images.

Here, Appellant took those "additional" and "affirmative" steps by creating an email message, inputting MSgt NC's "luckymango" email address, attaching an image of child pornography to the email, then pressing send on that email, and then repeating that process 10 more times. *See* United States v. Escobar, ACM 38721, 2016 CCA LEXIS 199, *16 (A.F. Ct. Crim. App. 24 March 2016) (finding additional or affirmative steps existing when an appellant came to possess the child pornography by downloading it from websites and by receiving it electronically from others, and then went beyond maintaining these depictions on his hard drive by intentionally uploading the six images in question to a website). The unique set of circumstances giving rise to the Williams holding is simply not in play in Appellant's case.

Next, a review of the Quiroz factors shows all five factors favor the Government. First, Appellant failed to raise the issue at trial. Second, as shown above, each specification was aimed at distinctly separate criminal acts. Third, the two specifications, which were aimed at distinctly separate criminal acts, did not exaggerate or misrepresent Appellant's criminality. Fourth, Appellant faced no increased punitive exposure. While Appellant was sentenced to 24 months for possession (Specification 6) and 28 months for distribution (Specification 7), if the military judge had dismissed one of the specifications, Appellant acknowledges in her brief that Specification 6 should have been the specification to dismiss.[18] Notably, this specification carried the lesser punishment. Further, the military judge's confinement sentence for each offense ran concurrently. Thus, whether or not the military judge dismissed Specification 6, Appellant's punitive exposure was not increased. And fifth, Appellant has failed to show any overreach by the Government. Even if the military judge had *sua sponte* raised this issue on behalf of Appellant, a Quiroz analysis would have quickly disposed of the issue and provided Appellant no relief.

Finally, Appellant's brief is confusing in its requested relief. On the one hand, Appellant claims the *sua sponte* "failure of the Military Judge to dismiss Specification 6 of Charge I as an unreasonable multiplication of charges was error." (App. Br. at 30.) Yet, then, Appellant prays for this Court to dismiss Specification 7 of Charge I, not Specification 6. (Id. at 31.) Here, even Appellant seems confused as to what supposed error took place in this case.

[18] Appellant's brief states, "The failure of the Military Judge to dismiss Specification 6 of Charge I as an unreasonable multiplication of charges was error." (App. Br. at 30.)

Appellant's confusion aside, however, the record shows the military judge committed no error, let alone plain error, in not *sua sponte* finding that Specifications 6 and 7 were an unreasonable multiplication of charges. Accordingly, Appellant's claim must fail.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT'S MOTION TO DISQUALIFY GOVERNMENT COUNSEL AND LIMIT THE GOVERNMENT EXPERT'S TESTIMONY.

Standard of Review

This Court reviews a judge's decision on whether the prosecution or a witness was indirectly tainted by immunized testimony for an abuse of discretion. United States v. Morrissette, 70 M.J. 431, 442 (C.A.A.F. 2012).

However, whether the Government has shown, by a preponderance of the evidence, that it has based Appellant's prosecution on sources independent of the immunized statements is a preliminary question of fact. United States v. Vela, 71 M.J. 283, 289 (C.A.A.F. 2012) (*citing* Morrissette, 70 M.J. at 439; United States v. Mapes, 59 M.J. 60, 67 (C.A.A.F. 2003)). This court "will not overturn a military judge's resolution of this question unless it is clearly erroneous or is unsupported by the evidence." Morrissette, 70 M.J. at 439. In reviewing for clear error, this Court "must ask 'whether, on the entire evidence, [we are] left with the definite and firm conviction that a mistake has been committed.'" Vela, 71 M.J. at 289 (*quoting* Easley v. Cromartie, 532 U.S. 234, 242 (2001)) (citation and quotation marks omitted).

Law

The Fifth Amendment's privilege against self-incrimination provides that no person shall be compelled in any criminal case to be a witness against himself." Mapes, 59 M.J. at 65.

"[I]mmunity from the use of compelled testimony and evidence derived therefrom is coextensive with the scope of the privilege" and "is sufficient to compel testimony over a claim of the privilege." United States v. Kastigar, 406 U.S. 441, 452-53 (1972). The government may prosecute an immunized witness where it can demonstrate that it has made neither direct nor indirect use of the testimony. Morrissette, 70 M.J. at 438. The government must affirmatively prove by a preponderance of the evidence that its evidence "is derived from a legitimate source wholly independent of the compelled testimony." Kastigar, 406 U.S. at 460. The grant of immunity must leave the witness and the government in "substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity." Id. at 457 (*quoting* Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964)).

The factors to be considered in deciding whether the Government's evidence against Appellant was obtained from a source wholly independent of her immunized testimony are as follows:

1. Did the accused's immunized statement reveal anything "which was not already known to the Government by virtue of [the accused's] own pretrial statement"?

2. Was the investigation against the accused completed prior to the immunized statement?

3. Had "the decision to prosecute" accused been made prior to the immunized statement? and,

4. Did the trial counsel who had been exposed to the immunized testimony participate in the prosecution?

Mapes, 59 M.J. at 67 (*citing* United States v. England, 33 M.J. 37, 38-39 (C.M.A. 1991)).

Additional Facts

On 24 June 2022, PO1 IA completed a forensic report on MSgt NC's cellular phone. (Pros. Ex. 13.) Page six of that report referenced a photograph found on MSgt NC's phone, and stating, "This picture appears visually identical to one that was seen in an email that was provided by the Yahoo warrant return that was sent to user *applejacks69612@yahoo.com* to itself on 7 Jan 2020 at 1307:48 UTC with the subject line *He took his other kids snowboarding*. The email account *applejacks69612@yahoo.com* is believed to belong to [Appellant]." (Pros. Ex. 13.) Page 7 of the report states that MSgt NC "may have also had access to the account *applejacks69612@yahoo.com*." (Id.) The file name for the picture in question was "IMG_1153.JPG." (Id.)

On 8 September 2022 and 14 September 2022, Appellant participated in an immunized interview with the United States v. MSgt NC trial team and later testified at MSgt NC's court-martial in February 2023.

At Appellant's trial, the Government sought to introduce testimony via PO1 IA on how WhatsApp changed an image's file name when it was sent through the application. Prosecution Exhibit 14 is a printout of the *He took his other kids snowboarding* email sent by the "applejacks" account that is referenced in PO1 IA's forensic report. The email shows the same picture as that found on Appellant's phone. However, the file name of the photograph was now "e3ebf705-2e85=4df4-96a9-cb5cb9687cbd.JPG," not "IMG_1153.JPG" as it was titled on MSgt NC's iPhone. (Pros. Ex. 14.)

As the Government attempted to introduce this evidence, Appellant's counsel raised a "potential Kastigar issue." (R. at 1193.) Appellant's counsel argued PO1 IA's report indicated an opinion from PO1 IA that MSgt NC may have had access to the "applejacks" email account.

(R. at 1193-94.) Appellant's counsel stated that at MSgt NC's trial, Appellant testified that MSgt NC had sent the photo to her via WhatsApp and that she then sent the photo to herself using the "applejacks" email account. (R. at 1194.) Appellant's counsel claimed that after hearing Appellant's testimony, PO1 IA then changed his opinion from the original report and now believed MSgt NC did not have access to the "applejacks" email account, but instead believed MSgt NC sent the photograph to Appellant through WhatsApp and that Appellant emailed herself the photo through the "applejacks" account.

Appellant's counsel also proferred that, during a pretrial immunized interview, Appellant specifically told the MSgt NC trial team that the photograph at issue was sent to her by MSgt NC via WhatsApp. (R. at 1260.) Appellant's counsel argued that this knowledge then prompted the MSgt NC trial team to ask PO1 IA to do additional research on file naming. (R. at 1259.)

In testimony outside the presence of the members, PO1 IA stated that he did not hear Appellant's immunized testimony and was never made aware of the substance of her testimony. (R. at 1200.) After filing his initial report in August 2022, PO1 IA said that he received some additional questions in September 2022 about differentiation between image file names. Specifically, PO1 IA was asked how WhatsApp changed a file name when it was sent from one device to another.

PO1 IA said he was asked to do the additional research around 16 September 2022 by MSgt NC's prosecution team. (R. at 1207.) Notably, PO1 IA said the MSgt NC prosecution team did not specifically mention a particular photograph or his forensic report at all. (R. at 1212.) Instead, PO1 IA said the team asked generally "how does the processing of these images work," "[w]hy are we seeing file names one way vice another way," and "[i]nstead of like normal conditional IMG_ we would see with iPhones, why are we seeing as image.jpg or this

long string of characters?" (Id.) When asked if he knew why the prosecution team was asking him these questions, PO1 IA said, "Oh, no, sir, not at all." (R. at 1215.)

When asked by the military judge if he had changed his initial opinion contained in the report, PO1 IA answered as follows:

> So my original opinion is in the report, Sir, that because of seeing the same file in both locations is possible that [MSgt NC] may have had access to the Applejacks account, however, in September after doing some more research and some more testing, found that whenever an image is sent to WhatsApp, WhatsApp changes the file name and then we saw the same pattern for file name being sent in the email 'he took a letter his snowboarding'. So it was in the same format that WhatsApp provides not from the camera from the iPhone.

(R. at 1203.) PO1 IA added that based on his research, "Since the file name was different from when, they see on the device for how it's set via WhatsApp. I personally don't believe it was the same device that sent the file in the email." (R. at 1204.) In other words, PO1 IA no longer believed MSgt NC's device sent the photo using the "applejacks" email account. PO1 IA said that if the photo had been sent from MSgt NC's device, it would have retained the file name as it was saved in MSgt NC's image gallery on his iPhone, not the much longer file name that was present in the email sent by the "applejacks" account.

When asked directly, "Is it your testimony, then, that had, the changing of your opinion had nothing to do with [Appellant's] testimony in that trial," PO1 IA replied, "Correct." (R. at 1206.)

Later, during a formal Kastigar hearing, PO1 IA said he was not present during any trial counsel interviews in the MSgt NC case and was never briefed on the contents of those interviews. (R. at 1229.) PO1 IA said that the lead trial counsel for the MSgt NC case, Maj JL

approached him and "wanted to understand why, when we normally see file names behave in one manner when the file is sent from a device why are we seeing a different way of this occurring?" (R. at 1230.) PO1 IA said he thought these questions were based on Maj JL's experience and expertise. (R. at 1231.)

PO1 IA said that the only thing that changed based on his additional research was that he no longer believed that the file attached to the email sent from the "applejacks" account was sent from MSgt NC's iPhone. (R. at 1232.)

The military judge, in denying Appellant's motion, found the following as fact:

- During interviews with Appellant, the MSgt NC prosecution team "did not learn anything significant that they did not already know from the evidence that was previously discovered during the investigation;"

- PO1 IA was not present at any prosecution interviews in the MSgt NC case other than his own and was walled off from all aspects relating to anything that the MSgt NC prosecution team learned from Appellant;

- PO1 IA was "never directed to conduct additional searches based off statements of any pretrial interviews to include [Appellant];"

- Maj JL, the lead counsel for the MSgt NC case "has an interest and reputation for being proficient in digital forensic issues;

- During interviews with the MSgt NC trial team, PO1 IA was asked "how the application WhatsApp processes images," "learned WhatsApp changes the file name when emailed," and discovered that when an image is sent from one WhatsApp account to another WhatsApp account using an iPhone, WhatsApp will assign the image a new naming convention;"

- PO1 IA's "discovery caused him to change his opinion," and he now believed MSgt NC sent the image to Appellant via WhatsApp;

- During that same interview, Maj JL had many questions related to forensic artifacts;

- Prior to MSgt NC's court-martial, PO1 IA met again with the MSgt NC prosecution team again and discussed the WhatsApp file naming issue

(R. at 1279-81.)

The military judge then cited England, Kastigar, Mapes, and Morrisette, before holding that the Government had "met its heavy burden" in showing that PO1 IA's change in opinion was "derived from legitimate and independent" sources. (R. at 1282.) The military judge noted that the MSgt NC prosecution team "did not learn anything significant that they did not already know from the evidence that was previously discovered during the investigation" and that the Government was in possession of the evidence, namely the photo from MSgt NC's phone and the "applejacks" email that contained the same photo, "well prior to [Appellant's] interview." (Id.) The military judge reasoned, "So naturally, when together with [PO1 IA,] [Maj JL] had many computer questions of him," which were "necessitated by the data as well as [Maj JL's] interest in computer forensics." (Id.) The military judge also highlighted that PO1 IA was "walled off from all aspects related to anything [Maj JL] learned from [Appellant]," and that PO1 IA was "never directed to conduct additional searches based off statements of any pretrial interviews to include [Appellant]." (R. at 1283.) The military judge ultimately held, "The government did not make direct or indirect use of the immunized statements," and that the trial counsel "will remain on the case." (Id.)

Analysis

As noted by our superior Court, whether the Government met its preponderance of the evidence burden to show Appellant's prosecution was based on sources independent of the immunized statements is a preliminary question of fact that can only be overturned if the military

judge's decision was "clearly erroneous or is unsupported by the evidence." Morrissette, 70 M.J. at 439. Here, the military judge's ruling was neither.

Each of the military judge's findings in his ruling are fully supported by the facts. First, the Government already had evidence that the same photograph had two different files name – one on MSgt NC's iPhone and the other on the email attachment sent from the "applejacks" account – well before the Government interviewed Appellant in September 2022. PO1 IA's July report specifically mentioned both the photo from MSgt NC's iPhone and the email (including the email's subject line). Thus, the evidence itself was already known to the Government.

Second, PO1 IA, who did the additional research into the filing name changes, was walled off from anything related to Appellant in the lead up to MSgt NC's trial – he was not a part of any interviews and was never told anything about those interviews.

Third, when Maj JL approached PO1 IA about doing the additional research, Maj JL (1) did not ask PO1 IA specifically about the photograph in question; (2) did not mention anything Appellant had supposedly told Maj JL; (3) did not mention PO1 IA's July 2022 forensic report; or (4) intimate anything related to changing PO1 IA's opinion on anything. Instead, Maj JL simply asked PO1 IA generalized questions about the naming structures of photos and if (and if so, how) WhatsApp changed file names when those files were sent through that application. Furthermore, the record shows Maj JL was already known in the forensic community for having and interest and reputation for being proficient as it related to digital forensic issues, and asked PO1 IA during the interview multiple other unrelated forensic-based questions.

Each of the findings of fact found by the military judge in his ruling are fully supported by the evidence, are not clearly erroneous, and easily meet the preponderance of evidence burden held by the Government. As such, Appellant's claim fails.

A review of the England/Mapes factors further confirms the Government met its burden. First, Appellant's supposed statement during her immunized interview that Appellant sent her the picture via WhatsApp and that she then sent herself the picture via the "applejacks" app did not reveal anything that was not already known to the Government. Again, the Government already knew the photograph came from MSgt NC's phone and knew that at some point its file name had changed by the time the same photograph was attached to the email sent from "applejacks" to "applejacks."

While the Government did not yet know "why" the file name had changed by the time Maj JL interviewed Appellant, the Government already knew MSgt NC and Appellant communicated extensively through WhatsApp, independent of anything Appellant may have told Maj JL. Considering this, as well as Maj JL's known penchant and interest in these issues, asking the Government's digital forensics expert (1) why the file name would change from MSgt NC's iPhone to its eventual attachment to an email from the "applejacks" account and (2) if WhatsApp would cause such a file name change, was a natural progression in Maj JL's consultation with PO1 IA regardless of any statements made by Appellant.

Furthermore, the matter at issue – how or why a photograph's file name gets changed when sent through WhatsApp – was never discussed with Appellant by anyone and Appellant has never intimated she even knows that WhatsApp changes file names for attachments, let alone has the requisite knowledge to explain how or why that happens.

As to the second and third England/Mapes factor, the investigation into Appellant had been completed and the decision to prosecute Appellant had been made long before Appellant spoke with Maj JL in September 2022. In fact, charges for Appellant's court-martial had long been preferred (which occurred on 1 March 2022) and referred to a general court-martial (which

occurred on 13 May 2022) by the time Maj JL and Appellant spoke. While Maj JL, the prosecutor against MSgt NC, did ask additional questions to PO1 IA regarding the file name changes, MSgt NC's case was also already preferred, referred, and about to have a motion hearing when Maj JL spoke to PO1 IA about his questions.[19]

This is certainly not case where an ongoing investigation "had reached an impasse" and the only way to prosecute MSgt NC was to immunize Appellant. *See* Mapes, 59 M.J. at 68. Likewise, this is not a case were the only way to prosecute Appellant was to allegedly use her immunized testimony or statements in MSgt NC's case against her in her own case. In contrast, in both MSgt NC's and Appellant's cases, charges had already been preferred and referred, and both cases were rapidly proceeding to trial irrespective of Appellant's immunized testimony.[20]

Finally, the district trial counsel in this case, Maj MM, was not exposed to any immunized testimony. When Appellant's counsel first raised the Kastigar issue, Maj MM stated, "First of all, the immunized testimony that Defense Counsel just provided to everyone here in the court room, I had zero knowledge of that immunized testimony, until just this moment." (R. at 1195.) Appellant's counsel also concurred that Maj MM had no knowledge of the testimony. (Id.) The record also shows Maj MM had no knowledge of anything related to Maj JL's interview with Appellant in September 2022.

While Maj MM did have a copy of PO1 IA's testimony from MSgt NC's trial, that testimony, as shown above, was also not impacted by any immunized statements from Appellant. PO1 IA testified at Appellant's trial that he knew nothing about Appellant's testimony at MSgt

[19] Notably, Appellant concedes the third factor outright in his brief. (App. Br. at 36.)

[20] While Appellant's court-martial did not begin on its merits until May 2023, a motion hearing took place in October 2022.

NC's trial, nor did he know anything about Appellant's interview statements to Maj JL. Thus, Maj MM could not have been "exposed to immunized testimony" by reading PO1 IA's testimony because (1) PO1 IA's testimony was not immunized testimony and (2) PO1 IA's testimony itself was not "exposed to immunized testimony." In other words, since PO1 IA's testimony was not tainted, Maj MM's review of PO1 IA's untainted testimony did not taint him either.

Based on the record as detailed above, Appellant has failed to show the military judge's ruling is clearly erroneous or unsupported by the record. Thus, Appellant's request for relief on this issue should be denied.

VI.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, AIR FORCE INSTRUCTION REQUIRED THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT TO ANNOTATE APPELLANT'S CRIMINAL INDEXING. FINALLY, 18 U.S.C. § 922 IS CONSTITUIONAL AS APPLIED TO APPELLANT.

Additional Facts

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

Standard of Review

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

Law and Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he or she has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to her. (App. Br. at 38.) Appellant asserts that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. Const. Amend. II, the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022). Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review.

- ***This Court lacks jurisdiction to determine whether Appellant should be criminally indexed in accordance with 18 U.S.C. § 922.***

This Court recently held in its published opinion in United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the criminal indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at 681. Our superior Court also recently held in United States v. Williams, 2004 CAAF LEXIS 501, __ M.J. __, at *12-15 (C.A.A.F. 5 September 2024),

that service courts of criminal appeal have no authority to act upon the portion of the STR results that references the firearms prohibition.

- ***The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.***

Even if this Court has jurisdiction to review this issue, Appellant was found guilty of multiple offenses punishable by imprisonment for a term exceeding one year. Thus, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the first indorsement to the STR and EOJ. *See* Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022, paras. 29.30, 29.32.

- ***The Firearm Prohibition in the Gun Control Act of 1968 is Constitutional as Applied to Appellant and Her Convictions are Crimes of Violence.***

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. But as the Supreme Court has repeatedly emphasized, "the right secured by the Second Amendment is not unlimited." District of Columbia v. Heller, 554 U.S. 570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion). "[T]he right was *never* thought to sweep indiscriminately." United States v. Rahimi, 602 U.S. _, 144 S. Ct. 1889, 1897, Docket No. 22-915, 2024 U.S. LEXIS 2714 (21 June 2024) (slip op.). The history of firearms regulation reflects "a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons," Barrett v. United States, 423 U.S. 212, 220 (1976), and "an intent to impose a firearms disability on *any* felon based on the fact of conviction." Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added). Firearms prohibitions for felons are "presumptively lawful." Rahimi, 144 S. Ct. at 1902 (citing Heller, 554 U.S. at 626). Because

Appellant has been convicted by a general court-martial of serious crimes, application of 18 U.S.C. 922(g) to her is constitutional.

Appellant's argument presumes, incorrectly, that her crimes were not violent offenses or a "crime of violence." (App. Grostefon Br. at 2.) But child pornography is a "crime of violence." The Federal Bail Reform Act, 18 U.S.C. § 3156(a)(4)(C), defines the term "crime of violence" to include Distribution of Child Pornography; that is, a felony under Chapter 110 of the U.S. Code, including 18 U.S.C. § 2252A. Also, 18 U.S.C. § 3142, which governs the detention or release of a defendant pending trial in Federal court, puts those charged with child pornography crimes squarely in the same class of dangerousness as those accused of drug trafficking, firearms offenses, and terrorism. *See* Section 3142(e)(3)(E) (establishing statutory presumption of danger to the community). Even if this Court considers Appellant not to be a physically violent offender, Appellant is a danger to our society nonetheless. *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) ("[The] use of children as … subjects of pornographic materials is very harmful to both the children and the society as a whole."). Given this nation's historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and Appellant is not entitled to relief.

Because Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review, the Court should deny the assignment of error.

VII.[21]

THE MILITARY JUDGE DID NOT ERR IN ADMITTING 404(b) EVIDENCE.

Standard of Review

A military judge's ruling under Mil. R. Evid. 404(b) and Mil. R. Evid. 403 will not be disturbed except for a clear abuse of discretion. United States v. Moore, 78 M.J. 868, 873 (A.F. Ct. Crim. App. 2019) (*citing* United States v. Morrison, 52 M.J. 117, 122 (C.A.A.F. 1999). "A military judge abuses his discretion when: (1) the findings of fact upon which he predicates his ruling are not supported by the evidence of record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts is clearly unreasonable." Moore, 78 M.J. at 873 (*citing* United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010); United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)).

Law

As it related to Mil. R. Evid 404(b), this Court stated in Moore, "Mil. R. Evid. 404(b) provides that evidence of a crime, wrong, or other act by a person is not admissible as evidence of the person's character in order to show the person acted in conformity with that character on a particular occasion and cannot be used to show predisposition toward crime or criminal character. However, such evidence may be admissible for another purpose, including to show, inter alia, motive, intent, plan, absence of mistake, or lack of accident." Moore, 78 M.J. at 873, *citing* Mil. R. Evid. 404(b)(2); United States v. Staton, 69 M.J. 228, 230 (C.A.A.F. 2010). This Court also noted that the "list of potential purposes in Mil. R. Evid. 404(b)(2) 'is illustrative, not

[21] This issue is raised in the appendix pursuant to Grostefon.

exhaustive.'" Moore, 78 M.J. at 873, *citing* United States v. Ferguson, 28 M.J. 104, 108 (C.M.A. 1989).

This Court applies a three-part test to review the admissibility of evidence under Mil. R. Evid. 404(b):

> 1. Does the evidence reasonably support a finding by the factfinder that Appellant committed other crimes, wrongs, or acts?
>
> 2. Does the evidence of the other act make a fact of consequence to the instant offense more or less probable?
>
> 3. Is the probative value of the evidence of the other act substantially outweighed by the danger of unfair prejudice under Mil. R. Evid. 403?

United States v. Reynolds, 29 M.J. 105, 109 (C.A.A.F. 1989).

When a military judge conducts a proper balancing test under Mil. R. Evid. 403, the ruling will not be overturned unless there is a "clear abuse of discretion." United States v. Manns, 54 M.J. 164, 166 (C.A.A.F. 2000). The military judge normally has "enormous leeway" in balancing the probative value of the evidence against the danger of unfair prejudice, confusion of the issues, or undue waste of time. *See, e.g.*, United States v. Baldwin, 54 M.J. 551, 557 (A.F. Ct. Crim. App. 2000) (Young, C.J., concurring) (*citing* Stephen A. Saltzburg et al., Military Rules of Evidence Manual 490 (4th ed. 1999)).

Additional Facts

Prior to trial, the Government provided the defense Mil. R. Evid. 404(b) notice of 31 "crimes, wrongs, or other acts of [Appellant]" it intended to present at Appellant's trial. (App. Ex. X, Atch 1.) The "crimes, wrongs, or other acts" listed in the Government's notice were all contained within various emails sent between the "applejacks" and "luckymango" accounts. Appellant submitted a motion in limine regarding Mil. R. Evid. 404(b) evidence. (App. Ex. X.)

The Government responded and provided the military judge a listing of approximately 68 emails it intended to introduce as evidence of the 31 "crimes, wrongs, or other acts" referenced in its Mil. R. Evid. 404(b) notice. (App. Ex. XII.) Additionally, the Government provided the military judge Appellate Exhibit XIII, which was a disc containing all the emails from the "applejacks" account, including contraband material. (R. at 100-01.) The trial counsel told the military judge that the disc at Appellate Exhibit XIII had all of the emails from the "applejacks" account," but that the specific emails listed in Appellate Exhibit XII were the ones "we want you to focus in on." (R. at 99.) The trial counsel further states, "we are asking that you will review the contents of Appellate Exhibit XIII, which is the entirety of this email account." (R. at 154.)

Notably, the Government highlighted multiple emails listed in Appellate Exhibit XII, noting that those emails involved charged misconduct, but also that the Government intended to argue those emails show "bigger theories of beings in our case like a pattern or behavior, motive, and those types of things. (R. at 141.)

The military judge issued a 26-page ruling on the Mil. R. Evid. 404(b) issue.[22] (App. Ex. XX.) The ruling cited the Reynolds test and Mil. R. Evid. 403, and stated he had reviewed "counsel's motions, evidence, and the testimony presented." (App. Ex. XX at 1-2.) In his discussion, the military judge first addressed his concern with the issue of cumulative evidence, even asking "How many emails is necessary to make the point – without presenting potentially cumulative evidence, such that it prejudices the members?" (Id. at 4.)

The military judge then held that any evidence of *res gestae* was allowed. As it related to emails Appellant received from MSgt NC, the military judge allowed the Government to only

[22] Appellant, in his present issue, raises no issue with this ruling.

three of the seven items involving emails received from MSgt NC.[23] The military judge then went through all 31 items the Government sought to introduce as "crimes, wrongs, or other acts" of Appellant, ruling some admissible while others inadmissible. (Id. at 4-26.)

Following the ruling, the defense provided the military judge Appellate Exhibit XXVI, which was an updated copy of Appellate Exhibit XII. Based on conversations between the parties, the Government now only sought to introduce the emails contained in Appellant Exhibit XXVI pursuant to Mil. R. Evid. 404(b). (R. at 268.) Notably, Appellant's defense counsel stated that out of the 68 emails listed in Appellate Exhibit XXVI, "the defense was able to identify 20 some odd e-mails in total that we think falls within the category outlined by the court, that would leave 39, potentially 40 e-mails that the defense does not see how it fits into any category articulated by the court . . . ." (R. at 272-73.) The defense then asked the Court to "preclude the rest of the notice items that do not fall in those categories." (R. at 273.)

While the Government stated that Appellate Exhibit XXVI contained the emails it intended to introduce via Mil. R. Evid. 404(b), the Government stated that it still intended to submit all 911 emails contained in the "applejacks" account either under the military judge's Mil. R. Evid. 404(b) ruling, under a relevance/facts and circumstances theory, or via a voluminous data summary.

Appellant then submitted a Motion for Reconsideration involving Mil. R. Evid. 404(b) evidence (App. Ex. XXX.) The military judge then issued an 85-page ruling in which the military judge spent 76 pages specifically discussing approximately 260 emails, all under a Mil. R. Evid. 404(b) lens complete with references to Reynolds, and Mil. R. Evid. 401, 402, and 403

[23] Of the 31 total "crimes, wrongs, or other acts" the Government sought to argue, seven stemmed from emails receiving by MSgt NC.

throughout. (App. Ex. XXXIII at 8-84.) The military judge granted in part and denied in part the motion, ruling that some emails were admissible while some were not.

The Government then submitted Appellate Exhibit XXXIV, which was a 108-slide document containing emails the government sought to offer. (App. Ex. XXXIV.) Appellant's counsel continued to object regarding the "cumulativeness of the emails when taken collectively." (R. at 338.)

In response, the military judge said, "I'll tell you what we're going to do, I'm going to give you some time [to] pick 20 emails, get with defense" and "roughly pick 20 emails to get with defense that will resolve any cumulative issue." (R. at 338.) The military judge continued, "So what we're going to do is pick 20 emails out of out of this exhibit, appellate [XXXIV], and then that will give us time if we need to take up each one of the 20, we can do that . . . ." (R. at 339.)

After the defense and Government met, Appellant's defense counsel stated the following:

> [W]e've had the opportunity to review all of the slides in the format that the government anticipates, that is their final form. The parties have had an opportunity to cross talk and work through to make sure that we have identified any issues that may have arisen in light of the courts M.R.E. 404(b) ruling, I believe the majority of those issues are settled.

(R. at 526.) The end result of that cross talk was Prosecution Exhibit 2. While Appellant's counsel did raise an authentication issue related to the WhatsApp screenshots in the exhibit, Appellant's counsel raised no further Mil. R. Evid. 404(b) concerns. (R. at 527-29.)

Analysis

As shown above, all emails ultimately contained in Prosecution Exhibit 2 were either *res gestae* evidence, not Mil. R. Evid. 404(b) evidence, or, if they were Mil. R. Evid. 404(b) evidence,

were discussed in either the military judge's initial Mil. R. Evid. 404(b) rule or his reconsideration ruling and were properly analyzed pursuant to Mil. R. Evid. 404(b). Further, Appellant's counsel readily admitted on the record that the defense and Government had cross-talked about the exhibit, had identified any Mil. R. Evid. 404(b) issues and had "settled" the majority of them. As noted above, the lone issue that remained was not even a Mil. R. Evid. 404(b) issue, but instead one related to authentication.

Thus, by the time Prosecution Exhibit 2 was presented to the military judge, there was no further analysis that needed to be done, especially considering the military judge had already conducted a Reynolds analysis on any Mil. R. Evid. 404(b) evidence contained in Prosecution Exhibit 2 in either his original Mil. R. Evid. 404(b) ruling or his reconsideration ruling. Notably, Appellant's brief is silent as to both of these rulings by the military judge.

In doing so, Appellant horribly mischaracterizes the military judge's actions regarding this issue. For one, Appellant seems to intimate the military judge told the parties to "just pick 20" pieces of evidence out of thin air and then admitted them as evidence. (App. Grostefon Br. at ii.) In doing so, Appellant conveniently forgets about the military judge's original 26-page ruling on the Mil. R. Evid. 404(b) issue that discusses various emails or the military judge's 85-page reconsideration ruling in which the military judge spends 76 pages specifically discussing approximately 260 emails. While Appellant seemingly chides the military judge by stating the "military judge recognized how onerous it would be to follow the law and actually apply the

Reynolds test," she fails to recognize the military judge did just that over and over again in this case.[24]

Next, Appellant claims that after telling the parties to pick 20 emails, the military judge then "failed to take up each one of the 20 even though he said he would." (Id.) Yet, Appellant again conveniently fails to note that the military judge provided Appellant's own counsel the opportunity to discuss the contents of Prosecution Exhibit 2, and that, when given that opportunity, Appellant's counsel said all the issues were "settled" saved for an authentication issue unrelated to Mil. R. Evid. 404(b).

Appellant's attempts to disparage the military judge's actions in this case are wholly unsupported by the record and should be dismissed by this Court. Contrary to Appellant's claims that the "military judge should not be given any deference," the military judge's extensive rulings in this case, which continually reference and analyze Reynolds, should be provided their proper deference in showing the military judge did not abuse his discretion in this case.

Appellant's confusion continues on this issue as she claims that the Government "used the emails as propensity evidence to show [Appellant] was associated with [MSgt NC] so she too much be a bad person, a sexual deviant, or a perverted person." (App. Grostefon Br. at iv; *citing* R. at 159.) First, Appellant's cite to the record here is to her own counsel's argument during the initial motion hearing on this issue. Further, Appellant notably fails to reference any instance were the Government ever attempted to use any Mil. R. Evid. 404(b) evidence as propensity evidence – because it did not happen. Here, Appellant's own words and actions in the videos and pictures

[24] In many cases within both his original ruling and reconsideration ruling, the military judge found in favor of Appellant by denying admission of some emails. Appellant fails to note this in her brief as well.

spoke for themselves as it related to, as Appellant readily admits in her brief, her "despicable emails" and "shocking" conduct. (*See* App. Grostefon Br. at iii.)

In sum, the military judge properly reviewed all Mil. R. Evid. 404(b) evidence in this case and Appellant has failed to show any abuse of discretion in the military judge's rulings. Accordingly, Appellant's claim must fail.

VIII.[25]

THE UNITED STATES DID NOT VIOLATE APPELLANT'S RIGHTS IN NOT REQUIRING A UNANIMOUS VERDICT AT APPELLANT'S MILITARY COURT-MARTIAL.

Standard of Review

The adequacy of a military judge's instructions is reviewed de novo. United States v. Dearing, 63 M.J. 478, 482 (C.A.A.F. 2006) (citations omitted). 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 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. 291 (C.A.A.F. 2023), *cert denied*, No 23-437, 144 S. Ct. 1003 (2024). *see also* United States v. Cunningham, 83 M.J. 867 (C.A.A.F. 2023), *cert denied*,

[25] This issue is raised in the appendix pursuant to Grostefon.

No 23-666, 144 S. Ct. 1096 (2024). Accordingly, the military judge did not err in not providing an instruction for a unanimous verdict and Appellant's claim must fail.

IX.[26]

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT'S R.C.M. 917 MOTION.

Standard of Review

The Court reviews a military judge's denial of an R.C.M. 917 motion for an abuse of discretion. *See generally* United States v. Felix, 25 M.J. 509, 512 (A.F.C.M.R. 1987).

Law

R.C.M. 917(a) authorizes the military judge to enter a finding of not guilty "before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected." R.C.M. 917(d) states that a motion for a finding of not guilty "shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution without an evaluation of the credibility of witnesses."

Additional Facts

Prior to trial, in response to a Bill of Particulars, the Government provided notice of what language was at issue in Specification 2 of Charge I, which involves the indecent language Appellant communicated to MSgt NC through emails and text messages. (App. Ex. LXXVI.) The language at issue for this specification are contained in Slides 85 through 87 of Prosecution

[26] This issue is raised in the appendix pursuant to Grostefon.

Exhibit 2 and consists of screenshots of a WhatsApp conversation between Appellant and MSgt NC. (Compare App. Ex. LXXVI to Pros. Ex. 2, Slides 85-87.)

At trial, Appellant moved the military judge for a finding of not guilty pursuant to R.C.M. 917 for this specification. (R. at 1391-97; App. Ex. LXXV.) Appellant argued that the Government must prove that those emails and messages were "made known to [MSgt NC] and that he received it and understood." (R. at 1393.) Appellant's counsel argued that since the Government chose to enter the screenshots of the messages under an "effect on the listener" exception to hearsay, there was no evidence in the record showing MSgt NC received the messages communicated to him. (App. Ex. LXXV; R. at 1395.)

The Government responded that the members can consider the messages as evidence of any matter which is relevant except for the truth of what was actually said by MSgt NC. (R. at 1402-04; App. Ex. LXXVII.) For instance, the members would not be allowed to consider MSgt NC's statement, "This gave me chills" on Slide 85 of Prosecution Exhibit 2 as proof that MSgt NC in fact had "chills" when he read Appellant's words. However, the Government argued, "There is no evidentiary basis within the rule against hearsay to preclude the panel from considering [MSgt NC's] statement for any other purpose for which it is relevant, for example to the fact that he was a participant in the conversation and heard and responded to the statements [Appellant] made." (App. Ex. LXXVII at 2.)

The military judge denied Appellant's motion. The military judge highlighted that MSgt NC's statements were not admitted for the truth, but rather to show the effect on Appellant. The military judge continued as follows:

> The effect of [MSgt NC's] text[s] on [Appellant] was to prompt her to send additional text[s], therefore, contrary to the defense position, the text[s] generally were known to [MSgt NC]. [MSgt NC's]

> text[s] thus prompted a response by [Appellant], i.e. the effect they had on her. Nonetheless, Trial Counsel will not be allowed to argue [MSgt NC's] text statements for their truth, and the members will be instructed accordingly. Thus, there is some evidence when viewed in the light [most] favorable to the prosecution together with all reasonable inferences and applicable presumptions that could reasonably tend to establish every essential element of the offense charged. Therefore the defense motion is denied.

(R. at 1415-16.)

Analysis

Here, contrary to Appellant's assertions, the text messages at issue were not "hearsay with hearsay" and the military judge did not abuse his discretion in denying Appellant's R.C.M. 917 motion. First, as noted by both the trial counsel and the military judge, the messages at issue from MSgt NC were not offered for the truth of the matters asserted in those messages, but instead were offered to show the effect on the listener – that being Appellant.

Because the messages were not offered for the truth of those messages, the members had the ability to use those messages for relevant purposes so long as they were not considered for the truth of the matters asserted in MSgt NC's statements. Thus, the members could use the mere fact that MSgt NC responded to Appellant's messages, irrespective of what MSgt NC actually said in response to those messages, as evidence that MSgt NC received the messages sent by Appellant. The ability of the members to use MSgt NC's messages in this way thus provided them "some evidence when viewed in the light most favorable to the prosecution" that MSgt NC did, in fact, receive Appellant's messages. Thus, the military judge did not abuse his discretion in denying Appellant's motion.

Notably, while Appellant questions the factual sufficiency of Specification 2 of Charge I in Issue I above, she does not call into question whether or not MSgt NC actually received the

messages, nor does she question the fact that Appellant sent the messages and Mgt NC received them. (*See* App. Br. at 8-10.) In fact, Appellant's brief specifically states the messages at issue "w[ere] shared between two consenting adults," that the "emails were kept private," that "both [Appellant] and [MSgt NC] took great pains to keep them secret," and that "[n]o other individuals were aware of the story and it was a purely fictional account shared between two individuals." (App. Br. at 9.)

Here, Appellant readily admits that she and MSgt NC exchanged the messages related to this specification. Furthermore, by willfully, either through her counsel or herself pursuant to Grostefon, not raising either a factual and legal sufficiency issue related to the evidence showing (1) Appellant sent the messages and (2) MSgt NC received the messages, Appellant seemingly concedes those elements are factually and legally sufficient. This concession further shows the military judge did not abuse his discretion by finding the record contained "some evidence when viewed in the light most favorable to the prosecution" that MSgt NC did, in fact, receive Appellant's messages.

Moreover, since Appellant does not contest the factual and legal sufficiency of those elements, this Court is essentially left with a mooted issue. *See* United States v. Lopez, 2013 CCA LEXIS 579, at *9 (N-M. Ct. Crim. App. Jul 30, 2013) (finding a conviction legally and factually sufficient moots the issue of whether the trial court erred in denying a defense motion for a finding of not guilty under R.C.M. 917 for that specification).

Appellant's concessions aside, Appellant's contention in this issue that the Government did not prove that the messages contained in the WhatsApp screenshots in Slides 85-87 of Prosecution Exhibit 2, as well as Slides 8-9, 34-38, and 96-98, were sent by Appellant and MSgt NC is not supported. Some of the messages include photos of Appellant and MSgt NC, while

other messages mention Appellant by name, reference both MSgt NC's and Appellant's children by name, as well as Appellant's and MSgt NC's duty stations (Italy and Korea). A full review of Prosecution Exhibit 2 make it quite clear that Appellant and MSgt NC are the two participants in the conversation.

In sum, the military judge did not abuse his discretion by finding the record contained some evidence, when viewed in the light most favorable to the prosecution together with all reasonable inferences and applicable presumptions, that could reasonably tend to establish every essential element of the offense charged. Thus, Appellant's claim must fail.

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 27 January 2025 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST) TO FILE A REPLY**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK,** United States Air Force *Appellant*	)	No. ACM 40540 27 January 2025

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 her first enlargement of time to file a Reply Brief to the Government's Answer, filed 27 January 2025. The Reply Brief is currently due 3 February 2025. Appellant requests an enlargement of time (EOT) for a period of thirty (30) days, which will end on **5 March 2025**. The record of trial was docketed with this Court on 20 November 2023. From the date of docketing to the present date, 434 days have elapsed. On the date requested, 471 days will have elapsed. **Counsels request a status conference should this Court be inclined to deny this EOT.**

On 3 June 2023, at a general court-martial convened at Ramstein Air Base, Germany, Appellant was found guilty, contrary to her pleas, of one charge and six specifications of Article 134, Uniform Code of Military Justice (UCMJ); and one charge and specification of Article 120b, UCMJ. Entry of Judgment. The military judge sentenced Appellant to a reprimand, reduction to the rank of E-1, 32 months' confinement and a dishonorable discharge. *Id.* The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action. Appellant is currently confined.

The verbatim transcript is 1579 pages long and the record of trial is comprised of 13 volumes containing 19 prosecution exhibits, one defense exhibit, 87 appellate exhibits, and zero court exhibits.

There is good cause to grant this EOT. Both undersigned counsels are in hearings early this week: civilian appellate defense counsel is in a Board of Inquiry (BOI) estimated to be 10-12 hours a day through Wednesday and military appellate defense counsel is in a *Dubay*[1] hearing ordered by this court in *United States v. Sherman,* (ACM 40486).[2] There is also a delay in getting coordination with Appellant on the reply brief given she is currently confined. Military appellate defense counsel sent the Government's Answer received late tonight to the confinement facility for service on Appellant and requested a confidential call with her. The need for the extended EOT (30 days) is due to civilian appellate defense counsel's need to immediately travel to Michigan for a significant family medical emergency of which the time necessary currently looks to be significant. Civilian appellate defense counsel fully intends to turn to the Reply Brief as soon as possible, but currently anticipates a thirty-day EOT is necessary for her to meet her familial emergency medical needs then advise Appellant on the Government's Answer, advise on Appellant's inputs, and coordinate with military appellate defense counsel on the Reply Brief.

This Court previously deny stamped undersigned counsel's EOT 10 the day before the AOE was due—when this Court knew military appellate defense counsel had only reviewed the sealed material in the case at the time. *See* Motion for EOT (Tenth), dated 7 November 2014. The day after this Court's denial and the day the AOE was due, undersigned counsels filed a

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).
[2] Military appellate defense counsel is also attempting to get through the record of trial in *United States v. Soloshenko* (ACM 40581) to file the AOE at the end of next week or the following depending.

motion for reconsideration of EOT 10, but this Court did not rule on it until 19 November 2024. As such, military appellate defense counsel reviewed the lengthy record on an expedited schedule. Military appellate defense counsel regularly works nights, weekends, holidays, family days, and even while on leave. However, such demands are unrealistic and seemingly not applicable to the Government who ultimately is responsible for appellate defense counsel's manning. In fact, Government appellate defense counsel filed a fourteen-day EOT, on 6 January 2025, to file its Answer given:

> Appellant raised nine issues in his Assignments of Error. However, within one assignment of error (Issue I), Appellant raises factual and/or legal sufficiency claims against seven of her convictions (factual sufficiency against Specifications 1, 2, 3, 4, 6, 7 of Charge I and legal sufficiency against Specification 1 of Charge I and the Specification of Charge II). Additionally, Appellant's record of trial spans 13 volumes, including 1,579 pages of transcript and over 100 total exhibits. *Considering* Appellant's factual and legal sufficiency claims against seven of her convictions, as well as claims involving motion rulings and member excusals, *a review of the entire record is required*.

Government Motion for Enlargement of Time, dated 6 January 2025 (emphasis added). Initially, it is telling that the Government asserts that the breadth of the Appellant's AOEs required review of the entire record. The Government essentially concedes it does not normally review the entire record of any appellant on appeal, but it was forced to in this case given the AOEs raised—in an expedited timeline—by undersigned counsels. Yet, the Government opposed undersigned counsel's EOT 10 indicating military appellate defense counsel had not been able to review the record beyond the sealed materials due to other case demands. Of note, undersigned counsels did not oppose the Government's EOT and this Court granted the Government's EOT with no status conference required.

Through no fault of Appellant, undersigned counsels are both in hearings early this week and will be unable to complete their review of the Government's Answer until at least Wednesday

or Thursday. More importantly, civilian appellate defense counsel—lead counsel—must travel to Michigan for a significant family medical emergency anticipated to require a significant amount of time and attention. Due to these demands, an enlargement of time is necessary to allow counsel time to complete a review of the Government's Answer, conduct research, confer with our client, and collaboratively draft a Reply. Due to both undersigned counsels being in court hearings this week and the delay in communicating with Appellant due to her confinement status, she has not yet been apprised of the exact length of time requested. However, Appellant was previously advised of the potential need to request this enlargement of time to coordinate her inputs in the Reply. As such, Appellant provided a limited consent to disclose a confidential communication with counsel wherein she previously consented to requests for enlargements to coordinate with her.

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

Respectfully submitted,

[redacted]

[redacted]

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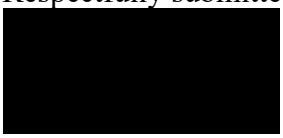
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 27 January 2025.

Respectfully submitted,



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29 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPELAS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) ADRIENNE L. CLARK, USAF, *Appellant.*	))))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40540 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby does not oppose Appellant's Motion for Enlargement of Time to file a Reply Brief in this case.

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

[redacted]
MARY ELLEN PAYNE
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Air Force Appellate Defense Division on 29 January 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**APPELLANT'S REPLY BRIEF**
Appellee	)	**TO APPELLEE'S ANSWER**
	)	
v.	)	Before Panel No. 2
	)	
Master Sergeant (E-7)	)	No. ACM 40540
ADRIENNE L. CLARK	)	
United States Air Force	)	
Appellant	)	

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

COMES NOW, Appellant, Master Sergeant (MSgt) Adrienne L. Clark, by and through her undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this Reply Brief to the Government's Answer, filed 27 January 2025 (hereinafter Govt Ans.). Appellant primarily rests on the arguments contained in her Brief on Behalf of Appellant, filed on 12 December 2024 (hereinafter App. Br.), but provides the following additional arguments in reply to the Government's Answer.

I. THE GUILTY FINDINGS TO SPECIFICATIONS 1, 2, 3, 4, 6, AND 7 OF CHARGE I ARE FACTUALLY INSUFFICIENT. THE GUILTY FINDINGS TO SPECIFICATION 1 OF CHARGE I AND THE SPECIFICATION OF CHARGE II ARE LEGALLY INSUFFICIENT.

This Court may only consider facts and evidence before the factfinder in its review of legal and factual sufficiency. *United States v. Jessie*, 79 M.J. 437, 440 n.6 (C.A.A.F. 2020) (stating a Court of Criminal Appeals (CCA) reviewing legal and factual sufficiency of the evidence is constrained to only consider admitted evidence in the record of trial). Yet, the Government still argued beyond that scope and many times also mischaracterized the facts in evidence before the factfinder and the record at large. MSgt Clark addresses each specification in turn below.

A. Specification 1 of Charge I is Neither Factually nor Legally Sufficient.

The Government made the decision to charge MSgt Clark with engaging in extramarital

sexual conduct on divers occasions between on or about 1 May 2019 and on or about 15 January 2020. (Charge Sheet). The conduct charged was genital-to-genital sexual intercourse. (Charge Sheet). It was, therefore, the Government's burden to prove beyond a reasonable doubt that MSgt Clark and MSgt Casillas engaged in such conduct on more than one occasion during that time frame. Yet, the evidence at trial and the evidence the Government points to in its Answer do nothing to meet its burden.

The Government points to emails discussing spanking. (Govt Ans. at 27). The Government describes undated photos. (Govt Ans. at 27). The Government touts fantasy stories about fictional public sexual encounters. (Govt Ans. at 27). The Government identifies evidence that MSgt Clark and MSgt Casillas spent time together in January and April 2019, outside of the charged timeframe, possibly engaging in sexual activity. Then, the Government concludes, that "the panel received ample evidence that genital-to-genital sexual intercourse took place on divers occasions during the charged timeframe." (Govt Ans. at 29).

This conclusion is simply not supported beyond a reasonable doubt by the evidence introduced at trial. During the charged time frame, MSgt Clark and MSgt Casillas were only physically co-located a mere seven days between 13 and 19 May 2019. (Pros. Ex. 6). Perhaps they engaged in spanking, perhaps they did not. Spanking is not genital-to-genital sexual intercourse. Perhaps they slept in the same bed while in the same location. Sleeping is not genital-to-genital sexual intercourse. Certainly, the fictional stories shared over texting and emails about public sexual conduct cannot prove beyond a reasonable doubt that the two engaged in genital-to-genital sexual intercourse. No evidence was introduced at trial to support that those events actually happened, let alone that the alleged incidents occurred over the seven-day period in May 2019. The Government argument is supported only by assumptions, not evidence. With a fresh, impartial look at the evidence, this Court should not independently find the Government proved beyond a reasonable doubt that genital-to-genital contact occurred during the charged time frame.

The Government charged this conduct as of a nature to bring discredit upon the armed forces. (Charge Sheet). The Government defends the guilty finding by pointing to the "in-depth" instruction provided to the panel by the Military Judge. (Govt Ans. at 29). The instruction listed the full definition of extramarital sexual conduct, including types of intercourse not charged in this offense. (R. 1439). This instruction stated that such conduct may not be service discrediting but may still be prejudicial to good order and discipline, despite the Government charging it only as service discrediting. (R. 1440). The factors listed for the members to determine whether or not the conduct was service discrediting included: 1) the accused and co-actor's marital status, military rank, grade or position; 2) the military status of the accused's spouse or the co-actor's spouse; 3) the impact, if any, of the extramarital sexual conduct on the ability of the accused, the co-actor, or the spouse of either to perform their duties in support of the armed forces; 4) whether the extramarital sexual conduct persisted despite counseling or orders to desist; 5) the impact of the extramarital sexual conduct, if any, on the units or organizations of the accused, the co-actor or the spouse of either of them, such as a detrimental effect on unit or organizational morale, teamwork and efficiency. (R. 1440). Each of these factors appears in the explanation of "conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces" in the Manual for Courts-Martial. Manual for Courts-Martial, 2019 ed., Part IV, para. 99.c.(1).

As the Government notes, the Defense did not object to this instruction at trial. (R. 1418). While, the instructional error is waived, this Court need not repeat the error in its consideration of the factual and legal sufficiency of this guilty finding. This is no attempt to "shoehorn" a complaint about this instructional error into this assigned error, but rather a reminder that the Government chose to limit the theory under which it charged this offense and must be required to meet its burden with only factors supporting that singular theory.

The Government also argues that the Defense's reference to the holding in *United States v. Wells*. __ M.J. __, No. 23-0219, 2024 CAAF LEXIS 552 (C.A.A.F. Sept 24, 2024) was

flawed because the Court in *Wells* noted that the Government need not prove that the public actually became aware of the accused's conduct in order to prove conduct to be of a nature to bring discredit. (Govt Ans. at 30). The Government misunderstands the point. Yes, *Wells* reiterated the longstanding principle that the Government need not prove the public became aware of the conduct, only that the conduct was of a nature to bring discredit to the armed forces should the public become aware. *Wells*, 2024 CAAF LEXIS 552, at *7 (citing *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2011)). However, the Court also stated that in order to meet its standard, the Government cannot rely on the type of offense charged but must show the specific circumstances of this charged conduct would tend to bring discredit to the service. *Id*. An argument that extramarital sexual conduct is of a nature to bring discredit is not enough. The Government must show why, in this instance, the conduct if proven beyond a reasonable doubt is of a nature to bring discredit.

The Government did not meet its burden here. The fact that any conduct, if it was proven to have occurred, happened while the two were on TDY orders does not make it of a nature to discredit the armed forces. Despite the Government's efforts at trial and on appeal, no evidence ever established that the TDY travel was not necessary for the execution of their official military duties. No evidence was presented to show that any extra tax dollar was spent in furtherance of any relationship between the two. Any claim to the contrary is entirely unsupported by facts in evidence or even the record at large. The Manual for Courts-Martial defines service discrediting extramarital sexual conduct as that which has a tendency "because of its open or notorious nature" to bring the service into disrepute, subject it to public ridicule, or lower it in public esteem. Manual for Courts-Martial, 2019 ed., Part IV, para. 99.c.(1). The Manual goes on to say that extramarital conduct that is "private and discreet in nature may not be service discrediting by this standard" but may still be prejudicial to good order and discipline. *Id.* Any potential genital-to-genital sexual conduct between MSgt Clark and MSgt Casillas during the charged time frame was so private and discreet in nature that no one

discovered it until Yahoo became aware of the "applejacks" email in January 2020 and the investigation began.

The Government did not prove genital-to-genital sexual conduct occurred during the charged time period. Even if the Government had met this burden, it did not prove that the conduct was of a nature to bring discredit to the armed forces. This guilty finding fails both factual and legal sufficiency review.

B. Specification 2 of Charge I is not Factually Sufficient.

The Government's argument that the charged conduct in Specification 2 of Charge I falls outside of the protections found in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004), misses the mark. The Government argues that the fictional story shared between MSgt Clark and MSgt Casillas failed to satisfy either of the first two *Marcum* prongs. (Govt Ans. at 35-36). The Government argues that because the stories involve a fictional minor, they involve more than private acts between consenting adults and fall outside of the liberty interest defined in *Lawrence* due to the imagined involvement of a minor.

However, the charged conduct is not actual sexual conduct with a minor; there is no real human being involved in the charged conduct. Rather, it is the creation of the fictional story between MSgt Clark and MSgt Casillas. This conduct—the emails back and forth creating the story without a living child—was entirely the private acts of consenting adults. While the fictional story involved a nonexistent minor, the conduct of creating the fantasy only involved two consenting adults. Without the aggravated circumstances identified in *Lawrence* and *Marcum*, the consensual exchange of sexual fantasies privately and between two adults is protected conduct.

C. Specification 3 of Charge I is not Factually Sufficient.

The Government argues that the definition of "presence" used in *United States v. Schmidt*, 82 M.J. 68 (C.A.A.F. 2022), should govern the Court's review of this specification as "in the presence of" and "in front of" are "essentially one and the same." (Govt Ans. at 39-40).

Yet, they are not the same, even by the standard the Government puts forth. The definition of "presence" includes "the state of being in front of" another but it also includes other states such as "being at hand" or "in the same place as someone or something." *Schmidt*, 82 M.J. at 76 n.4. "Presence" might include "in front of" but they are not the same.

If the Government wanted to charge the specification in a broader manner, it certainly could have. The Government used the phrase "in the presence of" in the Specification of Charge II and could have done the same with Specification 3 of Charge I. It did not, and so it must meet its burden with the terminology it chose to charge.

The picture the Government included in its Answer demonstrates the Defense's point. The child is across a large table from MSgt Clark, looking at her iPad. (Pros. Ex. 2). She is entirely unaware of what MSgt Clark is doing discreetly under the table. (Pros. Ex. 2). This is not a flagrant act done "in front of" her minor daughter. After reviewing the evidence before the factfinder and the language chosen by the Government in crafting this offense, this Court should find that it is not convinced beyond a reasonable doubt that MSgt Clark committed this conduct "in front of" a child.

D. Specification 4 of Charge I is not Factually Sufficient.

The Government points out that it is not required to prove that a member of the public became aware of the charged conduct. (Govt Ans. at 40). Again, the Defense is aware of the state of the law. The Government need not prove the public learned of the conduct but also cannot rely upon simply claiming that filming herself defecating on the floor of a facility is enough to satisfy the terminal element. The circumstances of the charged conduct must be taken into consideration.

Here, MSgt Clark raises the fact that the public never found out about this conduct not to misstate the law, but to establish the steps MSgt Clark took to ensure that her conduct remained private. She was in an empty locker room, at a time when no other personnel entered. She immediately cleaned up after herself and only shared the video with MSgt Casillas. When the

public never found out about the conduct and could not have because MSgt Clark took great pains to keep the conduct private and ensure that no one would learn of it, the conduct is not of a "nature to bring discredit to the armed forces."

E. Specifications 6 and 7 of Charge I are Not Factually Sufficient.

The Government argues that "[a]ll evidence points directly to MSgt Clark as the person who had sole use of the "applejacks" account. (Govt Ans. at 42). It bases this argument on emails from the "applejacks" account that appear to have been sent by MSgt Clark; testimony from Ms. JK, the Yahoo investigator, that the IP address range used for the "applejacks" account was consistent from mid-December 2019 to 7 January 2020; and MSgt Clark's phone calls to the Yahoo. (Govt Ans. at 42-45).

This argument overlooks several key pieces of testimony admitted at trial. First, although MSgt Clark had primary use of the "applejacks" account and sent emails using her name or otherwise identifying herself, this does not prove that she had exclusive control of the account. Second, Ms. JK did testify that the IP address range for the account was consistent, but she also testified that there were two IP addresses within that range that were being used throughout that period. (R. 974). She testified that two different IP addresses, ending in 116.29 and 116.47 were both consistently logged into the "applejacks" account from mid-December 2019 until 7 January 2020. (R. 975). This indicated that the logins were coming from two separate devices over that period. (R. 975). On 7 January 2020, one of those IP addresses, 116.47 was listed as the log in IP but 116.29 was listed as the IP that sent the CSAM emails. Third, MSgt Clark's phone call concerning the time of her last login can hardly be used to ascertain whether she was the only user accessing the "applejacks" account that day. Indeed, the timeline MSgt Clark provided to the Yahoo Customer Service agent concerning her last login would associate her device with the 116.47 address. (Pros. Ex. 5; Pros. Ex. 15 at 1). The CSAM was not sent from the 116.47 IP address, it was sent from 116.29. (R. 1345).

The Government also points to testimony by PO1 IA that the forensic data for the emails

sent before the CSAM, the CSAM emails themselves, and the last email sent on the account all had matching forensic data. (Govt Ans. at 45). However, the Government overlooks further testimony by PO1 IA that this "X mail header" data only tells him that the Yahoo mail application was used on an iOS mobile device to send the email. (R. 1355-58). So, while the X mail header data might have been the same for each of these emails, they would be for any number of users who sent the emails on the Yahoo application from an iPhone. (R. 1358). This does not provide any identification of the number of users sending those emails nor their identities. (R. 1358).

The Government argues that evidence of the password to the "applejacks" account being changed after it was created proves MSgt Clark's sole access. (Govt Ans. at 47). Yet, there is no reason to believe that MSgt Casillas did not have that password as well. The two were in near constant communication and created these accounts to be used together. The IP activity demonstrates that both accounts were consistently being signed into by the same VPN IP address. (R. 1344, 1346). Both individuals clearly had access to both accounts throughout their existence.

The Government discounts MSgt Clark's argument that MSgt Casillas was the individual with a demonstrated ability to obtain CSAM and an interest in possessing it because the file naming conventions for the CSAM sent from the "applejacks" account did not match the naming conventions of CSAM found on MSgt Casillas's phone. (Govt Ans. at 49). MSgt Clark is not arguing that MSgt Casillas possessed the same images sent from the "applejacks" account on his iPhone, but that he possessed CSAM on his iPhone. A search of MSgt Clark's belongings and home uncovered no such images.

Finally, the Government argues that the idea that MSgt Casillas would send himself CSAM images he already possessed makes little sense. (Govt Ans. at 50). The Government overlooks the peril of possessing these images on any type of hard drive or device. If MSgt Casillas had CSAM images that he wanted to access, what better place to keep them than

in an email account. He could delete them off his phone and send them in the "applejacks" account in order to maintain access without the threat of discovery. At the very least, MSgt Casillas's demonstrated interest, demonstrated ability to obtain such images, and access to the "applejacks" account creates a reasonable doubt in MSgt Clark's guilt to Specifications 6 and 7 of Charge I.

F. The Specification of Charge II is Not Legally Sufficient.

Denial of review by a superior court—even by the Supreme Court of the United States (SCOTUS)—"imports no expression of opinion upon the merits of the case." *Teague v. Lane*, 489 U.S. 288, 296 (1989). Thus, the denial of review in *Tabor* and *Cabuhat* by the Court of Appeals for the Armed Forces (CAAF) and *Schmidt* by the SCOTUS does not provide any precedential value. *Id.*; *see United States v. Tabor*, 82 M.J. 637, 648 (N.M. Ct. Crim. App. 2022) (en banc), *rev. denied*, 82 M.J. 64 (C.A.A.F. 2022), *United States v. Cabuhat*, 83 M.J. 755 (A.F. Ct. Crim. App. 2023) (en banc), *rev. denied*, 84 M.J. 275 (C.A.A.F. 2024), and *United States v. Schmidt* [*Schmidt II*], 82 M.J. 68, 74 (C.A.A.F. 2022), *cert. denied*, *Schmidt v. United States*, 143 S. Ct. 214 (2022).

The Government claims that MSgt Clark fails to explain why the concurring opinion in *Schmidt*, 82 M.J. 68, should not be the standard regarding the statutory interpretation of the phrase "in the presence of." (Govt Ans. at 53). However, the concurrence is not binding and if anything demonstrates the law is not settled as to what "in the presence of" means. MSgt Clark agrees with Judge Sparks's opinion in *Schmidt* which tracked the changes in statutes addressing lewd acts with minors. *Schmidt*, 82 M.J. at 74. He determined that the elimination of a physical presence requirement and the expansion to include presence via any communications technology proved the statute was meant to prevent harm to children from exposure to indecent and immoral conduct. *Id.* He further determined this type of harm would only occur if the child was aware of the harmful conduct. *Id*. In this case, the child was not harmed as she was not aware of the conduct MSgt Clark was engaged in under the table.

This guardrail provided by the awareness requirement also serves to avoid over-criminalizing sexual conduct merely because an unaware child may be somewhere nearby. MSgt Clark asks this Court to reconsider the *Cabuhat* ruling as applied to her case.

II. THE SEARCH OF MASTER SERGEANT CLARK'S EMAIL ACCOUNT VIOLATED HER RIGHTS UNDER THE FOURTH AMENDMENT.

The Fourth Amendment protects individuals from warrantless searches. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). Although the law allows law enforcement to seize contraband items it finds in plain view when in a location it is allowed to be, when the search expands beyond what is authorized, the plain view doctrine no longer applies. *United States v. Osorio*, 66 M.J. 632, 635 (A.F. Ct. Crim. App. 2008).

The Government argues that SA EP's discovery of evidence of indecent/lewd acts and indecent language came while he was solely looking for evidence relating to extramarital sexual conduct and child pornography. (Govt Ans. at 63). He testified that before his examination of the emails he knew that MSgt Clark and MSgt Casillas were only in the same geographical location for the first four days of the Yahoo accounts' existences. (R. 58). He testified he knew that if he came across evidence of additional misconduct that fell outside the scope of the authorization that he needed to stop investigating and obtain an additional authorization. (R. 74).

This was not a case where the Special Agent opened an attachment looking for child pornography or extramarital sexual conduct, found a video containing other criminal activity and stopped to seek further authorization to search. In that case, the video would clearly be in plain view and the remainder of the search would be pursuant to a valid authorization as required by the Fourth Amendment. Here, SA EP was looking through hundreds of emails,

continually coming across evidence of offenses outside the scope of the search authorization while continuing his search. He never sought additional authorization, but rather he continued to read every email, whether it contained an attachment or not—to look for evidence of extramarital sexual conduct between two people who were only on the same continent for the first four days of the email accounts' existences. Such an in-depth search of materials that continued to provide evidence of offenses not contemplated by the search authorization strains the limits of the plain view doctrine past their breaking point. Despite the stated focus of the search for evidence of two specific crimes, this became a general search that expanded beyond what was authorized.

A. The Inevitable Discovery Doctrine and Good-Faith Doctrine Do Not Apply.

The Government argues that, although the Military Judge did not address inevitable discovery in his second ruling that it would have applied in this case because investigators later searched MSgt Clark's house in Italy. (Govt Ans. at 66). However, the Military Judge determined in his first ruling that inevitable discovery did not apply and nothing in the facts changed between the first and second ruling to make it applicable. No evidence was introduced that when the Special Agent was conducting his general search of the email account, the Government agents were actively pursuing leads that would have inevitably led to the discovery of the evidence in a lawful manner. *United States v. Dease*, 71 M.J. 116, 122 (C.A.A.F. 2012).

The Government argues that SA EP's admission he should have stopped to obtain an expansion of the search authorization when he discovered additional misconduct is not evidence of bad faith because despite continuing to find evidence of additional misconduct he really was just only looking for evidence of the offenses listed in the authorization. (Govt Ans. at 68). SA EP did not uncover an email or two relating to additional misconduct while combing through hundreds of emails relating to the offenses listed in the authorization—the clear majority of the emails discovered and introduced as evidence at trial related to offenses not contemplated by the search authorization. No other evidence of CSAM was present aside from the 7 January 2020

email that led to the investigation. (Pros. Ex. 2). No direct evidence of extramarital sexual conduct was discovered. (Pros. Ex. 2). Instead, this search became a search for additional misconduct, netting hundreds of emails used at trial to prove other offenses. SA EP knew he should stop and request a new authorization and his failure to do so negates the good faith exception.

B. The Exclusionary Rule Should be Applied in This Case.

The exclusionary rule applies where it results in appreciable deterrence for future Fourth Amendment violations and where the "benefits of deterrence must outweigh the costs." *Herring v. United States*, 555 U.S. 135, 141 (2009). Here, the effect of deterring broad searches for misconduct not contemplated by the search authorization outweighs the cost to the Government of losing the indecent language and indecent conduct findings.

III. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING THE DEFENSE CHALLENGE TO TWO MEMBERS.

The Government argues that the Military Judge's repeated use of the term "implied bias" in his ruling on the Defense challenges to Lt Col RM and Capt JS was enough to grant him this Court's deference on review. (Govt Ans. at 80). However, a mere recitation of the implied bias standard without an explanation of how it fits the facts at hand does not meet the requirements of increased deference laid out in *United States v. Keago*, 84 M.J. 367, 373 (C.A.A.F. 2024).

The Defense challenged Lt Col RM on three bases: 1) his specialized knowledge of computers and devices; 2) his prior "extensive" working relationship with the Trial Counsel on an investigation into a sexual assault allegation; and 3) his personal friendship with the Staff Judge Advocate. (R. 509-12). The Military Judge did not address the first basis at all, and dismissed the second and third summarily. (R. 514-15). In dismissing concerns relating to Lt Col RM's past working relationship with Trial Counsel, the Military Judge cited *United States v. Hamilton*, 41 M.J. 22 (C.A.A.F. 1994) and *United States v. Peters*, 74 M.J. 31 (C.A.A.F.

2015). *Hamilton* stated that a professional relationship was not *per se* disqualifying in an actual bias analysis. *Hamilton*, 41 M.J. at 25. *Peters* agreed that professional relationships do not disqualify a member *per se*, but also stated military judges must explore the relationships to make sure they were not of a type to undermine fairness or the raise the prospect of appearing to do so. *Peters*, 74 M.J. at 35.

The Military Judge here did not follow through on ensuring the relationships between Lt Col RM and the Trial Counsel and Staff Judge Advocate neither undermined fairness nor raised the prospect of appearing to do so. A member of the public knowing Lt Col RM possessed specialized computer knowledge, had a personal friendship with the Staff Judge Advocate, and had worked extensively with the Trial Counsel would certainly not perceive MSgt Clark's trial as fair. At the very least, the confluence of these three bases made the implied bias case a close one, requiring the Military Judge to exercise the liberal grant mandate. *Keago*, 84 M.J. at 374.[1]

Similarly, when addressing the Defense challenge to Capt JS, the Military Judge recited the language of the implied bias standard but then applied the standard for actual bias. (R. 519-20). His analysis did not include any reference to how a member of the public would perceive Capt JS's involvement in the demise of her best friend's marriage due to infidelity. (R. 520). The Government argues that the Military Judge's comments must be "read in context" in order to grasp their connection to the implied bias standard. A military judge must both know and apply the legal standard in order to receive increased deference in his decisions on implied bias challenges for cause. The content of the Military Judge's analysis shows the absence of application of the standard to the facts. Again, with a close case the Military Judge's duty was to excuse the challenged member. His failure to excuse both Lt Col RM and Capt JS was error.

[1] The Government argues, without supporting citation, that "[e]ven Appellant's trial defense counsel did not think Lt Col RM's answers so egregious as to warrant the exercise of a peremptory challenge against him, choosing instead to challenge another member." (Govt Ans. at 83). Attorney decisions regarding the use of a peremptory challenge on another member does not waive a challenge for cause. In fact, the opposite is true. R.C.M. 912(f)(4).

IV. THE GUILTY FINDINGS TO BOTH SPECIFICATION 3 OF CHARGE I AND THE SPECIFICATION OF CHARGE II AND TO BOTH SPECIFICATIONS 6 AND 7 OF CHARGE I WERE UNREASONABLE MULTIPLICATION OF CHARGES.

The Government's argument that Specification 3 of Charge I and Charge II are "complete and separate offenses" ignores several factors, among them the Military Judge's finding that the two specifications arose out of the same transaction. (Govt Ans. at 89). "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4). All five *Quiroz* factors weigh in favor of merging these two specifications for findings just as the Military Judge merged them for sentencing. *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). The Military Judge's failure to do so was an abuse of his discretion.

The Government claims that the Defense's discussion of Specifications 6 and 7 of Charge I during its argument on the motion concerning Specification 3 of Charge I and the Specification of Charge II waived the issue of unreasonable multiplication of charges as to those specifications. The Defense had not moved to merge Specifications 6 and 6 of Charge I and so could not be waiving the issue as the issue was not before the Military Judge. However, if this Court should find this statement waived the issue, MSgt Clark requests this Court "pierce" this waiver and provide her with relief. Article 66(d), UCMJ creates an affirmative obligation for this Court to examine the entire record and determine whether to leave any waiver intact or to correct the error. *United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016). MSgt Clark asks this Court to correct the error and to merge Specifications 6 and 7 of Charge I. The Government had no evidence of possession as separate from distribution. Neither the images emailed from the "applejacks" account nor any other CSAM was ever found in MSgt Clark's possession. There was no evidence of affirmative steps to possess the material before or after the emails were sent. In this case, the possession and distribution were one single act and should be one single finding.

V. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING MASTER SERGEANT CLARK'S MOTION TO DISQUALIFY GOVERNMENT COUNSEL AND TO LIMIT THE GOVERNMENT EXPERT'S TESTIMONY DUE TO THE DERIVATIVE USE OF IMMUNIZED TESTIMONY.

The Government essentially argues that because PO1 IA did not directly hear MSgt Clark's immunized interviews or testimony and was not told the contents of those interviews or testimony, his own investigation into "file naming conventions" at the behest of the Trial Counsel who did hear MSgt Clark's immunized interviews and testimony cannot be a *Kastigar* violation. *See Kastigar v. United States*, 406 U.S. 441 (1972). This argument defies common sense.

On 24 June 2022, PO1 IA was aware of a photo found on MSgt Casillas' iPhone XR. The metadata of the photo showed that it was not taken on the iPhone XR, but on an iPhone X, and that it had been taken in Korea on 1 January 2020. (Pros. Ex. 13 at 6). PO1 IA also knew that this same photo was sent from the "applejacks" account to itself on 7 January 2020, the same day that an email with CSAM material was sent from "applejacks" to "luckymango." (Pros. Ex. 13 at 6). Based upon these facts, PO1 IA determined that MSgt Casillas could have had access to the "applejacks" account on 7 January 2020. (Pros. Ex. 13 at 7). This opinion stood unchallenged from June 2022 until September 2022.

As MSgt Casillas's trial approached, the question of who was accessing the "applejacks" account on 7 January 2020 loomed large. MSgt Clark had been granted immunity in MSgt Casillas's case. (App. Ex. LXII). The Trial Counsel in MSgt Casillas' case called her in for an immunized interview on 8 September 2022. (App. Ex. LXIII, LXVI). In that interview, MSgt Clark was asked about the photo sent from the "applejacks" account to itself on 7 January 2020. (R. 1259). MSgt Clark told the prosecutors that she had received the photo from MSgt Casillas via WhatsApp and that she had then sent it to herself on the "applejacks" account. (R. 1258-59). MSgt Clark was interviewed by the Casillas prosecutors again on 14 September 2022 and then testified in pretrial motion's hearing in MSgt Casillas' case on 15

September 2022. (App. Ex. LXIV, LXVI).

On approximately 16 September 2022, PO1 IA was asked by the prosecutors in MSgt Casillas's case to investigate the file naming conventions of different images sent by the "applejacks" account. (R. 1207). The prosecutors wanted to know why some of the photos had image.jpg file names while others had hexadecimal strings as names. (R. 1198). Although the prosecutors appear not to have directly referred to it, the photo referenced in PO1 IA's 24 June 2022 report had a hexadecimal string file name. (R. 1203). PO1 IA's investigation led him to discover that photos sent through WhatsApp acquire the hexadecimal string file names. (R. 1203). As a result, PO1 IA reevaluated his opinion on whether MSgt Casillas was accessing the "applejacks" account on 7 January 2020. (R. 1204). The Casillas prosecutors asked PO1 IA about this change to his report during his testimony. (R. 1194).

The prosecutors in MSgt Clark's case gained access to PO1 IA's testimony in the trial against MSgt Casillas and so when he testified in her court-martial, they knew to ask about that photo. (R. 1197). The presence of that photo, apparently sent initially through WhatsApp and then from the "applejacks" account to itself on 7 January 2020 was a key piece of evidence used by the Government, both at trial and in the Government's Answer, to establish MSgt Clark's control of the "applejacks" account on the same day that the CSAM material was sent. (R. 1371; Govt Ans. at 45).

Despite the clear path from MSgt Clark's immunized statements to PO1 IA's investigation of file naming conventions, the Military Judge found that the Government had met its "heavy burden" to show that PO1 IA's change in opinion was derived from "legitimate and independent sources." (R. 1282). Yet, the Military Judge did not indicate what those "legitimate and independent sources" were. There were none. While the prosecutors in MSgt Casillas's case may well have a reputation as being knowledgeable in computer forensics, neither his affidavit nor his co-counsel's shed any light on the basis for his request to PO1 IA to investigate the file names of images sent in the "applejacks" account. (App. Ex. LXV, LXVI).

The only logical understanding of the situation is that the prosecutors in MSgt Casillas's case were very interested in who sent the photo from the "applejacks" account on 7 January 2020, the same day that the CSAM was sent from that account. The report from PO1 IA said that it could be MSgt Casillas sending the photo he took of his son in Korea from his phone gallery. The prosecutors had the chance to ask MSgt Clark, and she told them that she'd received it on WhatsApp and had sent it on "applejacks." This led the prosecutors to look more closely at the file names and send PO1 IA to investigate the hexadecimal string file names. They may not have told him that the idea resulted from MSgt Clark's immunized interview or told him anything that she said, but the information leading to this investigation came directly from her immunized statements all the same. Once the prosecutors in MSgt Clark's case heard PO1 IA's testimony concerning his changed opinion in the court-martial of MSgt Casillas, they knew to ask him the same question at MSgt Clark's court-martial. PO1 IA's testimony that MSgt Clark sent the email from the "applejacks" account containing the photo she'd received through WhatsApp on 7 January 2020 and PO1 IA's testimony that in his opinion, MSgt Clark was the sole user of the "applejacks" account was critical to the Government securing guilty findings to Specifications 6 and 7 of Charge I.

The Military Judge's ruling that the Government met its "heavy burden" under the factors laid out in *United States v. England*, 33 M.J. 37, 38-39 (C.M.A.1991), was an abuse of discretion. His finding of a "legitimate and independent source" for the new investigation and his determination that prosecutors learned nothing new from MSgt Clark's interviews are not supported by the evidence in the record. MSgt Clark asks this Court to set aside the findings and sentence in her case and order a rehearing with a conflict-free Government counsel. If the Court disagrees that the Government counsel were tainted, then MSgt Clark asks this Court to find that the guilty findings to Specifications 6 and 7 of Charge I were a result of the indirect use of her immunized statements and set them aside.

Conclusion

WHEREFORE, because of errors prejudicial to the substantial rights of MSgt Clark, she respectfully requests that the Court set aside and dismiss the findings of guilt to all charges and specifications.

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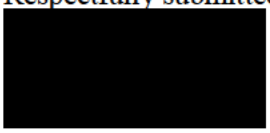
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 5 March 2025.

Respectfully submitted,



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40540**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Adrienne L. CLARK	)	**PANEL CHANGE**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 6th day of May, 2025,

ORDERED:

The record of trial in the above styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**APPELLANT'S OUT OF TIME MOTION FOR ORAL ARGUMENT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **ADRIENNE L. CLARK** United States Air Force *Appellant*	)	No. ACM 40540 6 March 2025

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

COMES NOW, Appellant, Master Sergeant (MSgt) Adrienne L. Clark, by and through her undersigned counsel pursuant to Rules 23.3(a) and 25 of this Honorable Court's Rules of Practice and Procedure and submits this Out of Time (OOT) Motion for Oral Argument on the following issue:

> **V. THE MILITARY JUDGE ABUSED HIS DISCRETION IN DENYING MASTER SERGEANT CLARK'S MOTION TO DISQUALIFY GOVERNMENT COUNSEL AND TO LIMIT THE GOVERNMENT EXPERT'S TESTIMONY DUE TO THE DERIVATIVE USE OF IMMUNIZED TESTIMONY**.

There is good cause for granting this motion out of time. First, civilian appellate defense counsel had emergency family circumstances which led to Appellant filing a motion for an extension of time to file the reply brief, dated 27 January 2025. On 30 January 2025, this Court granted Appellant's motion until 5 March 2025. Those same circumstances delayed counsel in determining whether oral argument would be beneficial in Appellant's case. Additionally, confirmation was needed from Appellant on further retainment of civilian appellate defense counsel for such an oral argument if this motion was granted.

Conclusion

WHEREFORE, Appellant respectfully requests that the Court grant the OOT Motion for Oral Argument.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 6 March 2025.

Respectfully submitted,

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13 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergent (E-5) ADRIENNE L. CLARK, USAF *Appellant*.	))))))))	OPPOSITION TO MOTION FOR ORAL ARGUMENT ACM 40540

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

Pursuant to Rules 23(c), and 23.3(a) of this Court's Rules of Practice and Procedure, the United States opposes Appellant's motion for oral argument.

Appellant has now had two opportunities to plead her case to this Court, first by filing a 58-page Assignments of Error brief on 12 December 2024, and second by filing a 19-page reply brief on 5 March 2025. Now, Appellant has moved this Court for oral argument on one of her nine presented issues. (*See* App. Mot. at 1.)

Issue V involves an immunized testimony and trial counsel disqualification issue that this Honorable Court is well-versed and well-equipped to review without the need for oral argument. In Appellant's two briefs, Appellant spent nearly 11 pages discussing this issue. This, along with the record and the Government's Answer, which includes a 10-plus page response to this issue, speak for themselves and require no further discussion. Further, Appellant provides no justification as to why oral argument is warranted in this case. Instead, Appellant's motion only provides justification as to why her motion for oral argument was filed out of time.[1]

[1] Pursuant to Rule 25 of this Court's Rules, Appellant's motion was due to this Court on 3 February 2025, seven days after the Government filed its Answer to Appellant's original brief on 27 January 2025.

As shown, Appellant has been provided sufficient opportunity to make Appellant's case before this Court in both an initial and a reply brief. Appellant's motion for a now third opportunity to address this Court is unnecessary, especially considering the extensive briefing from both parties already before this Court.[2]

Finally, this case was docketed with this Court on 20 November 2023. Appellant filed her Assignments of Error brief with this Honorable Court on 12 December 2024, 388 days after docketing. Appellant made the instant motion for oral argument on 6 March 2025, 472 days (or over 15 months) after docketing. Considering this Court's obligations under United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006), partaking in any further delay to schedule and conduct an unwarranted oral argument in this case is unnecessary.

All told, this Court has the record of trial and the written submissions from both parties, and Appellant has failed to even attempt to explain why oral argument is necessary for this Court to decide this case. Here, the positions of each party are clear, and this Court should proceed to issue a decision in due course of its deliberations without the further delay of an unjustified oral argument.

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

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[2] Altogether, the two briefs from Appellant and the Government's Answer account for nearly 200 pages of discussion on Appellant's various issues.

MARY ELLEN PAYNE
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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 13 March 2025 via electronic filing.

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