IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	1 March 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, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for the first enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 60 days, which will end on **25 May 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 35 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]

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

GRANTED
5 MAR 2024

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

5 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JONATHAN T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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 5 March 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
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40561**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Johnathon T. HAGEN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 16 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (Second) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

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

Accordingly, it is by the court on this 22d day of May, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (Second) is **GRANTED**. Appellant shall file any assignments of error not later than **24 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]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force,	)	No. ACM 40561
Appellant.	)	16 May 2024

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

Pursuant to Rules 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a second enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 30 days, which will end on **24 June 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ). R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings, approved the sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of eight prosecution exhibits, eight defense exhibits, and forty-eight appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is confined.

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

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

Respectfully submitted,

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 16 May 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: samantha.golseth@us.af.mil

20 May 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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.

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 20 May 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	14 June 2024

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

Pursuant to Rules 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a third enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 30 days, which will end on **24 July 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ). R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings, approved the sentence in its entirety, and gt Hagen's requests to defer his reduction in grade, confinement, and automatic Convening Authority Decision on Action.

GRANTED
18 JUN 2024

SSgt Hagen's record of trial consists of eight prosecution exhibits, eight defense exhibits, and forty-eight appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is confined.

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

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

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Office: (240) 612-4770
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17 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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 17 June 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force,	)	No. ACM 40561
Appellant.	)	12 July 2024

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

Pursuant to Rules 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a fourth enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 30 days, which will end on **23 August 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 168 days have elapsed. On the date requested, 210 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ). R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. authority took no action on the findings, approved the sentence in its entirety, and Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

GRANTED

16 JULY 2024

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

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

SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.

Undersigned counsel also provides the following information: undersigned counsel currently represents 29 clients and is presently assigned 17 cases pending initial brief before this Court. Ten cases currently have priority over the present case:

1. *United States v. Goodwater*, No. ACM 40304 (f rev) – The appellant raised four issues in his initial brief. The government's answer is due on 15 July 2024. Undersigned counsel anticipates needing to draft and file a reply brief by 22 July 2024.
2. *United States v. George*, No. ACM 40397 – Due not later than 1 August 2024, before the United States Court of Appeals for the Armed Forces (CAAF), undersigned counsel will file a petition and supplemental brief. Undersigned counsel needs time to draft the appellant's supplemental brief.
3. *United States v. Trovatore*, No. ACM 40505 – The record of trial consists of 12 prosecution exhibits, 2 appellate exhibits, and 2 court exhibits. The transcript is 175 pages. The appellant is not confined. His case was docketed before this Court on 8

August 2023. Undersigned counsel is reviewing the record of trial and anticipates filing any assignments of error on or before 2 August 2024.

4. *United States v. Donley*, No. ACM 40350 – Due not later than 5 August 2024, before the CAAF, undersigned counsel will file a petition and supplemental brief. Undersigned counsel needs time to draft the appellant's supplemental brief.
5. *United States v. Simmons*, No. ACM 40462 (f rev) – The record of trial consists of 5 prosecution exhibits, 5 defense exhibits, and 9 appellate exhibits. The transcript is 104 pages. The appellant is not confined. His case was re-docketed before this Court on 15 August 2023, after this Court *sua sponte* remanded his record for completion. Undersigned counsel anticipates filing the appellant's brief by or before 9 August 2024.
6. *United States v. Benoit, Jr.*, No. ACM 40508 – The record of trial consists of 11 prosecution exhibits, 12 defense exhibits, 58 appellate exhibits, and 2 court exhibits. The transcript is 678 pages. The appellant is not confined. His case was docketed before this Court on 15 August 2023. Undersigned counsel anticipates filing the appellant's brief by or before 8 September 2024 (accounting for undersigned counsel's approved OCONUS leave from 11-16 August 2024).
7. *United States v. Cole*, No. ACM 40189 (rem) – The appellant's case was remanded to this Court by the CAAF to reassess the sentence or to order a rehearing on the sentence. Undersigned counsel anticipates filing the appellant's brief by or before 26 August 2024.
8. *United States v. Gubicza*, No. ACM 40464 – Due not later than 26 August 2024, before the CAAF, undersigned counsel will file a petition and supplemental brief.

Undersigned counsel needs time to draft the appellant's supplemental brief and anticipates she may request a 20-day extension from CAAF until 15 September 2024.

9. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. The appellant is confined.

10. *United States v. Bio*, No. ACM 24006 – The record of trial consists of 3 prosecution exhibits, 17 defense exhibits, and 4 appellate exhibits. The transcript is 132 pages. The appellant is not confined. Given the minimal size and uncomplicated nature of this case, undersigned counsel has prioritized it over SSgt Hagen's case anticipating it will not significantly delay undersigned counsel's review of SSgt Hagen's case.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 July 2024.

Respectfully submitted,

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

15 July 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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 15 July 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
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	9 August 2024

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

Pursuant to Rules 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a fifth enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 30 days, which will end on **22 September 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 196 days have elapsed. On the date requested, 240 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he [illegible] viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen [illegible]nand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable [illegible] R. at 816. The convening authority took no action on the findings, approved the

GRANTED
13 AUG 2024

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

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

SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 26 clients and is presently assigned 15 cases pending initial brief before this Court. Four cases currently have priority over the present case:

1. *United States v. Benoit, Jr.*, No. ACM 40508 – The record of trial consists of 11 prosecution exhibits, 12 defense exhibits, 58 appellate exhibits, and 2 court exhibits. The transcript is 678 pages. The appellant is not confined. His case was docketed before this Court on 15 August 2023. Undersigned counsel anticipates filing the appellant's brief by or before 8 September 2024 (accounting for undersigned counsel's approved OCONUS leave from 11-16 August 2024).
2. *United States v. Gubicza*, No. ACM 40464 – Due not later than 26 August 2024, before the CAAF, undersigned counsel will file a petition and supplemental brief.

Undersigned counsel has fully drafted the petition and supplemental brief and is awaiting edits from her leadership before filing.

3. *United States v. Cole*, No. ACM 40189 (rem) – The appellant's case was remanded to this Court by the CAAF to reassess the sentence or to order a rehearing on the sentence. The appellant's brief is currently due on 26 August 2024. Undersigned counsel hopes to file the brief by this date but in an abundance of caution, she is requesting a 30-day enlargement of time. The appellant is not confined.
4. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. The appellant is confined.

In addition to the progress reflected in the above priority list, since requesting SSgt Hagen's fourth enlargement of time, undersigned counsel filed briefs before this Court in *United States v. Goodwater*, No. ACM 40304 (f rev), and *United States v. Trovatore*, No. ACM 40505. She also filed petitions and supplemental briefs before the United States Court of Appeals for the Armed Forces in *United States v. George*, No. ACM 40397, USCA Dkt. No. 24-0206/AF; and *United States v. Donley*, No. ACM 40350, USCA Dkt. No. 24-0209/AF. She further reviewed the records of trial and advised the appellants in *United States v. Simmons*, No. ACM 40462 (f rev), and *United States v. Bio*, No. ACM 24006, before each appellant decided to withdraw from appellate review. She also reviewed one record of trial to advise a servicemember regarding their opportunity to file a direct appeal before this Court.

Finally, as noted above, during the requested enlargement of time undersigned counsel has been authorized leave outside of the Continental United States on 11-16 August 2024.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

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

13 August 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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 13 August 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force,	)	No. ACM 40561
Appellant.	)	10 September 2024

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

Pursuant to Rules 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a sixth enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 30 days, which will end on **22 October 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 228 days have elapsed. On the date requested, 270 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen to dishonorable confinement, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings, approved the

GRANTED
16 SEP 2024

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

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

SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 26 clients and is presently assigned 14 cases pending initial brief before this Court. Four cases currently have priority over the present case:

1. *United States v. Rocha*, No. ACM 40134 (rem) – The appellant's case was remanded to this Court by the CAAF. Undersigned counsel received the Appellee's brief at approximately 2140 hours yesterday, 9 September 2024. Appellant's brief is due next Monday, 16 September 2024.
2. *United States v. Cole*, No. ACM 40189 (rem) – The appellant's case was remanded to this Court by the CAAF to reassess the sentence or to order a rehearing on the sentence. The appellant's brief is currently due on 25 September 2024.

3. *United States v. George*, USCA Dkt. No. 24-0206/AF, No. ACM 40397 – The United States Court of Appeals for the Armed Forces granted review and has ordered briefing on one issue. The appellant's grant brief and the joint appendix are due on 3 October 2024.
4. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. The appellant is confined.

In addition to the progress reflected in the above priority list, since requesting SSgt Hagen's fifth enlargement of time, undersigned counsel completed her review of the record and filed a brief before this Court yesterday in *United States v. Benoit Jr.*, No. ACM 40508. She also filed a petition and supplemental brief before the United States Court of Appeals for the Armed Forces in *United States v. Gubicza*, USCA Dkt. No. 24-0219/AF, No. ACM 40464. She also was on leave outside of the Continental United States on 11-16 August 2024.

During the requested enlargement of time, undersigned counsel will be (1) attending a Joint Appellate Advocacy Training at Fort Belvoir, Virginia, on 26-27 September 2024; (2) preparing for and participating as a moot judge in at least five moot arguments; and (3) on preauthorized leave outside of the local area (over Indigenous Peoples' Day weekend) on 9-14 October 2024.

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 September 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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12 September 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 Panel No. 2

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

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

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 12 September 2024.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	8 October 2024

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

Pursuant to Rules 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a seventh enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 30 days, which will end on **21 November 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 256 days have elapsed. On the date requested, 300 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable d[illegible] R. at 816. The convening authority took no action on the findings, approved the

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

GRANTED
10 Oct 2024

sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

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

SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 26 clients and is presently assigned 13 cases pending initial brief before this Court. Four cases currently have priority over the present case:

1. *United States v. Benoit, Jr.*, No. ACM 40508 – The Government's answer brief is due tomorrow, 9 October 2024. Undersigned counsel will be on leave outside the local area from 9-14 October 2024. Undersigned counsel will request a brief enlargement of time to allow her to reply on behalf of the appellant when she returns from leave.
2. *United States v. Cole*, No. ACM 40189 (rem) – The Government's answer brief is due on 24 October 2024. Undersigned counsel will evaluate whether to file a reply brief after reviewing the Government's answer brief.

3. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1627 pages. The appellant is confined. His case was docketed before this Court on 14 December 2023. Undersigned counsel has begun identifying potential issues and now anticipates beginning her full review in between and after the above listed priorities.
4. *United States v. George, Jr.*, USCA Dkt. No. 24-0206/AF, No. ACM 40397 – The Government's answer brief is due to the U.S. Court of Appeals for the Armed Forces (CAAF) on 7 November 2024. Once filed, undersigned counsel must prioritize the appellant's reply brief.

Since requesting SSgt Hagen's sixth enlargement of time, undersigned counsel completed a grant brief at the CAAF in *United States v. George*, USCA Dkt. No. 24-0206/AF, No. ACM 40397; and briefs before this Court in *United States v. Rocha*, No. ACM 40134 (rem), and *United States v. Cole*, No. ACM 40189 (rem). So far, during the third enlargement of time, undersigned counsel also attended a Joint Appellate Advocacy Training at Fort Belvoir, Virginia, on 26-27 September 2024; and prepared for and participated as a moot judge in three moot arguments. During the remainder of the current enlargement of time, undersigned counsel will be on preauthorized leave outside of the local area (over Indigenous Peoples' Day weekend) on 9-14 October 2024.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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10 October 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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]
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 10 October 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force,	)	No. ACM 40561
Appellant.	)	12 November 2024

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

Pursuant to Rules 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for an eighth enlargement of time to file his assignments of error. SSgt Hagen requests an enlargement for a period of 30 days, which will end on **21 December 2024**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 291 days have elapsed. On the date requested, 330 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. The military judge sentenced Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings,

GRANTED
13 NOV 2024

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

approved the sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

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

SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 25 clients and is presently assigned 12 cases pending initial brief before this Court. Three cases currently have priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined. His case was docketed before this Court on 14 December 2023. Undersigned counsel has begun identifying potential issues but anticipates her review being delayed, from 14 November until 11 December 2024, when she must prioritize replying to the Government's brief and preparing for oral argument in *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF.

2. *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF – The Government's answer brief is due on 14 November 2024 (extended from 7 November 2024 due to a request by the Government). Once filed, undersigned counsel must prioritize the appellant's reply brief which is expected to be due on 24 November 2024. Following the submission of appellant's reply brief, undersigned counsel will need to prepare for oral argument which is scheduled at the U.S. Court of Appeals for the Armed Forces (CAAF) on 10 December 2024. Moreover, during this time, undersigned counsel will be out of the office on the Thanksgiving holiday on 28 November 2024 and will be volunteering from approximately 0700 until 1700 on 29 November, 30 November, and 1 December 2024.
3. *United States v. Dawson*, No. ACM 24041 – The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. The appellant is not confined. Undersigned counsel has prioritized the review of this case above SSgt Hagen's because it was docketed on 4 October 2023, months earlier than SSgt Hagen's case was docketed. This Court and undersigned counsel received the verbatim transcript on 9 August 2024.

In addition to the above-listed priorities, undersigned counsel anticipates filing CAAF petitions and supplements in three cases and has begun drafting filings: *United States v. Manzano-Tarin*, No. ACM S32734 (f rev); *United States v. Johnson*, No. ACM 40291 (f rev); and *United States v. Matthew*, No. ACM 39796 (reh).

Since requesting SSgt Hagen's seventh enlargement of time, undersigned counsel completed a brief in *United States v. Benoit*, *Jr.*, No. ACM 40508, and substantive motion opposition in *In re Alton*, Misc. Dkt. No. 2024-12. Undersigned counsel was also on leave from

9-14 and 30 October 2024. She further prepared for and participated as a moot judge in 4 moot arguments (equaling 12+ hours), attended 1 argument, and completed 6 peer reviews (reviewing 14 issues). She also participated in a half-day in-person appellate training and three hours of virtual training.

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

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 12 November 2024.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
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13 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 Panel No. 2

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

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

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly 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]
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 13 November 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	3 December 2024

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

Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a ninth enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Hagen requests an enlargement for a period of 30 days, which will end on **20 January 2025**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 312 days have elapsed. On the date requested, 360 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged wrongfully viewed child pornography. Charge Sheet. The military judge sentenced Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings,

GRANTED
5 DEC 2024

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

approved the sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

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

SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 25 clients and is presently assigned 12 cases pending initial brief before this Court. Three cases currently have priority over the present case:

1. *United States v. George, Jr.*, USCA Dkt. No. 24-0206/AF – The appellant's reply brief for a granted issue was filed at the Court of Appeals for the Armed Forces (CAAF) on Monday, 25 November 2024, just prior to the Thanksgiving holiday. This reply brief included researching for and writing an in-depth discussion of precedent discussing grammatical construction and more. As a result, undersigned counsel spent at least 80 hours researching, drafting, and editing this brief. Given the complex discussion, undersigned counsel's preparation for oral argument has also been extremely time intensive. However, over the Thanksgiving holiday, family day, and weekend,

undersigned counsel had minimal time available to work on her preparation (undersigned counsel was previously obligated and competitively selected to volunteer in the White House from approximately 0700 until 1700 on 29 November – 1 December 2024). Undersigned counsel is still preparing for oral argument on 10 December 2024 (she has completed two moot arguments and is preparing for an upcoming third moot argument).

2. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined. His case was docketed before this Court on 14 December 2023. Undersigned counsel has begun identifying potential issues, but her review has been delayed from 14 November until 11 December 2024 when she has needed to prioritize replying to the Government's brief and preparing for oral argument in *United States v. George*, *Jr.*, USCA Dkt. No. 24-0206/AF.
3. *United States v. Dawson*, No. ACM 24041 – The record of trial consists of 13 prosecution exhibits, 9 defense exhibits, 1 court exhibit, and 41 appellate exhibits. The transcript is 761 pages. The appellant is not confined. Undersigned counsel has prioritized the review of this case above SSgt Hagen's because it was docketed on 4 October 2023, months earlier than SSgt Hagen's case was docketed. This Court and undersigned counsel received the verbatim transcript on 9 August 2024.

In addition to the above-listed priorities, undersigned counsel anticipates filing a CAAF supplement in *United States v. Manzano-Tarin*, No. ACM S32734 (f rev) by 12 December 2024. Undersigned counsel also provided three peer reviews and prepared for and acted as a moot judge on two occasions to assist her colleagues with their preparation. Moreover, during this

enlargement, undersigned counsel has needed to attend to personal matters related to her mother's health and current hospitalization.

If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

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

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 December 2024.

Respectfully submitted,

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

5 December 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' PARTIAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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 partial 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 Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

In the request for enlargement of time, Appellant's counsel mentioned having to deal with personal issues related to her mother's hospitalization. The United States believes such issues merit a partial enlargement of time. However, because 360 days will have already elapsed since docketing, this Court should not grant an enlargement for the entire 30 days requested.

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

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

CERTIFICATE OF FILING AND SERVICE

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

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (TENTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force,	)	No. ACM 40561
Appellant.	)	8 January 2025

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

Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a tenth enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Hagen requests an enlargement for a period of 30 days, which will end on **19 February 2025**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 348 days have elapsed. On the date requested, 390 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged wrongfully viewed child pornography. Charge Sheet. The military judge sentenced him to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings,

GRANTED
15 JAN 2025

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

approved the sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

Through no fault of SSgt Hagen, undersigned counsel has been working on other assigned matters and has yet to complete her review of his case. This enlargement of time is necessary to allow undersigned counsel to fully review his case and advise him regarding potential errors. SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 20 clients and is presently assigned 8 cases pending initial brief before this Court. One cases currently has priority over the present case:

1. *United States v. Casillas*, No. ACM 40551 – The record of trial consists of 19 prosecution exhibits, 4 defense exhibits, and 65 appellate exhibits. The transcript is 1,627 pages. The appellant is confined. His case was docketed before this Court on 14 December 2023. Undersigned counsel is drafting the appellant's assignments of error that will be filed by or before 17 January 2025.

In addition to the above-listed priorities, undersigned counsel anticipates filing petitions and supplements in two cases at the U.S. Court of Appeals for the Armed Forces: *United States v.*

Matthew, No. ACM 39796 (reh), due by or before 12 February 2025, and *United States v. Benoit*, No. ACM 40508, due by or before 27 February 2025.

Additionally, on 9 January 2025, this Court and undersigned counsel's office will be closed, though undersigned counsel intends to work from home as she continues to work on completing the brief in *Casillas*, No. ACM 40551. On 10 January 2025, undersigned counsel will be participating as a moot judge for approximately 2.5 hours. On 14 January 2025, she is required to attend oral argument at the U.S. Court of Appeals for the Armed Forces, which will require half of the day considering travel to and from the court. From 16 January-21 January 2025, undersigned counsel will be on leave outside the local area (overlapping with a family day and federal holiday) to see family that she was not able to see over the holidays while she was working, and to celebrate a family member's birthday. On 3 February 2025, undersigned counsel will be providing a one-hour training, virtually, for an Advanced Sexual Assault Litigation Course, and will need to prepare in advance. There will also be a family day on 14 February 2025 and a federal holiday on 17 February 2025 that may impact the availability for undersigned counsel to obtain a peer and leadership review, as required by the Air Force Appellate Defense Division.

Undersigned counsel expects this will be the last 30-day enlargement of time required for this case. If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

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

Respectfully submitted,

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

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 January 2025.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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13 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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 yearlong 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 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 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]
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 13 January 2025.

[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 40561**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Johnathon T. HAGEN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 4 February 2025, Appellant's counsel submitted a Consent Motion to Examine Sealed Material, requesting counsel for both parties be allowed to examine the discs marked Prosecution Exhibit 4 and Appellate Exhibit XXIII, both ordered sealed by the military judge. The exhibits were presented or reviewed by the parties at trial. Appellant's counsel avers counsel for the Government consents to this motion.

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

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

Accordingly, it is by the court on this 5th day of February, 2025,

ORDERED:

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

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 4** and **Appellate Exhibit XXIII**, subject to the following conditions:

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

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION TO EXAMINE SEALED MATERIALS**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	4 February 2025

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

Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves this Court to permit appellate defense counsel and appellate government counsel to view Prosecution Exhibit 4 and Appellate Exhibits XXIII. A.F. CT. CRIM. APP. R. 3.1(c)(2), 23.1(b), and 23.3(f)(1).

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary to his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. Prosecution Exhibit 4 contains four digital files that are labeled as contraband. R. at 435; Exhibit Index. Appellate Exhibits XXIII contains four images that are labeled as contraband. R. at 41; Exhibit Index. Prosecution Exhibit 4 and Appellate Exhibits XXIII were presented and sealed during the proceedings. R. at 41, 435.

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

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

Appellate defense counsel detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide "competent representation,"[2] perform "reasonable diligence,"[3] and to "give a client his or her best professional evaluation of the questions that might be presented on appeal…[to] consider all issues that might affect the validity of the judgment of conviction and sentence…[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance."[4] These requirements are consistent with those imposed by the state bar to which undersigned counsel belongs.[5]

Each of the sealed exhibits is an exhibit which was presented or reviewed by the parties at trial. To fulfill undersigned counsel's duties, it is reasonably necessary to review the sealed materials to competently conduct a professional evaluation of SSgt Hagen's case and to uncover all issues which might afford him relief.

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

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

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

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Email: samantha.golseth@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 Government Trial and Appellate Operations Division on 4 February 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**CONSENT MOTION FOR ENLARGEMENT OF TIME (ELEVENTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force,	)	No. ACM 40561
Appellant.	)	10 February 2025

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

Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for an eleventh enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3) and 23.3(m)(6). SSgt Hagen requests an enlargement for a period of nine days, which will end on **28 February 2025**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 381 days have elapsed. On the date requested, 399 days will have elapsed.

On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged wrongfully viewed child pornography. Charge Sheet. The military judge sentenced Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings,

GRANTED
11 FEB 2025

[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

approved the sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

Undersigned counsel currently represents 19 clients and SSgt Hagen's case is currently her first priority. A.F. CT. CRIM. APP. R. 23.3(m)(6). Undersigned counsel has been reviewing SSgt Hagen's record and identifying issues. However, through no fault of SSgt Hagen, undersigned counsel needs additional time to complete reviewing his case and to draft all issues that SSgt Hagen wants to raise. Further, undersigned counsel needs this time to ensure there is sufficient time for the peer and leadership reviews that are required by the Air Force Appellate Defense Division. SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time. Undersigned counsel has also discussed this motion with the Government and the Government consents to this motion for the requested enlargement of time.

Moreover, some of the reasons that undersigned counsel needs additional time include: (1) she was detailed to represent the appellant in *U.S. v. Daniels*, No. ACM 39407 (rem.) at the reply stage of that case. This required her to become familiar with that cases lengthy appellate history and the record of trial in that case. She has since advised the appellant and drafted the appellant's reply brief, which is being reviewed internally and will be filed by or before 14 February 2025. (2) She was tasked to teach a lesson on appellate updates at an Advanced Sexual Assault Litigation Course on 3 February 2025 which required her preparation in advance and time to teach. (3) She

needed to dedicate time to provide quality edits and feedback on a colleague's brief that addresses issues granted for review at the U.S. Court of Appeals for the Armed Forces (CAAF). (4) She has been home sick with a fever, cough, fatigue, and other symptoms since Friday, 7 February 2025, and she is still sick. (5) Looking forward, undersigned counsel still needs to balance her completion of SSgt Hagen's brief with other demands, to include: being responsible for teaching new reserve counsel that are joining the Air Force Appellate Defense Division; attending nine moots over the course of eight work days between 11 February 2025 and 24 February 2025; attending a preliminary hearing and legal advisor course on 19 and 20 February 2025; attending arguments at the CAAF on 25 and 26 February 2025; and filing a petition at the CAAF in *United States v. Benoit*, No. ACM 40508, by or before 27 February 2025. During this time, this Court and undersigned counsel's office will also be closed on 14 February 2025 and 17 February 2025. If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

SSgt Hagen respectfully requests, with the Government's consent, that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Certificate of Filing and Service

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 February 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN** United States Air Force *Appellant.*	)	No. ACM 40561 18 February 2025

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States requests this Court grant this motion to attach the following appendices to the record of trial.

- Appendix A – Request for Article 30a Proceeding with Attachments (PDF Portfolio)(29 pages)
- Appendix B – Article 30a Detailing Memo (1 page)
- Appendix C – DD Form3056 – Signed Warrant with Attachments (PDF Portfolio) (5 pages)
- Appendix D – DD Form 3056 – Warrant (No Returns) (2 pages)
- Appendix E – Article 30a – Trial Counsel Emails with Military Judge (3 pages)

Facts

On 25 February 2022, an Article 30a proceeding was held related to Appellant. (Appendices A – E). That proceeding consisted of Government counsel requesting a military judge be appointed to issue pre-referral a warrant for Appellant's electronic communications. (Appendix A). A military judge was detailed. (Appendix B). The military judge issued the warrant. (Appendix C). That warrant returned no results. (Appendices D and E). Charges were ultimately referred against Appellant.

GRANTED
19 Feb 2025

On 27 July 2023, Appellant was convicted, contrary to his pleas, of two specifications of possession of child pornography in violation of Article 134, UCMJ. (ROT Vol. 1, Entry of Judgement). During Appellant's court-martial, Assistant Trial Counsel stated that a proceeding under Article 30a, UCMJ was held on 25 February 2022. (R. at 2). No record of the Article 30a proceeding was included in the record of trial.

On 12 February 2025, undersigned counsel contacted the servicing base legal office to inquire about the missing Article 30a proceeding records. The servicing base legal office provided Appendices A through E.

Law and Analysis

R.C.M. 309(e) states,

> A separate record of any proceeding under this rule shall be prepared and forwarded to the convening authority, special trial counsel, or any combination thereof, with authority to dispose of the charges or offenses in the case. If charges are referred to trial in the case, such record shall be included in the record of trial.

Detailing a military judge to consider a request for a pre-referral warrant for electronic communications – and ultimately issue such warrant – is a proceeding under Article 30a. R.C.M. 309(b)(2). Therefore, Assistant Trial Counsel was correct in identifying that an Article 30a proceeding occurred in Appellant's case, but such records were omitted from the record of trial. Appellant has raised the issue of the missing Article 30a records through their motion to remand. As Appellant identified, addressing this omission prior to Appellant filing his assignments of error "allows this Court … to meaningfully fulfill their … role under Article 66 and Article 70, [UCMJ], 10 U.S.C. §§ 866, 870." (App. Mot. for Leave to File Mot. for Remand and Mot for Remand at 2). Because any issue regarding the content of the records is not fully resolvable by the record of trial Appendices A – E are relevant and necessary to address the issue

raised by the omitted records. Therefore, this Court can consider Appendices A – E and should grant the United States' motion to attach. United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020).

WHEREFORE, this Court should grant the United States' motion to attach.

[redacted]

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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 and the Air Force Appellate Defense Division on 18 February 2025.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**OPPOSITION TO UNITED STATES' MOTION TO ATTACH**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant*	)	No. ACM 40561
	)	19 February 2025

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

Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, opposes the Government's motion to attach. JT. CT. CRIM. APP. R. 23(c).

SSgt Hagen and the Government agree that an Article 30a proceeding was held and no record of the proceeding was included in the record of trial. United States' Motion to Attach. The omission of the Article 30a proceeding renders SSgt Hagen's record incomplete. While the Government acknowledged that the new Rule for Court-Martial (R.C.M.) 1112(f)(1) requires that "[a] copy of all materials required to be provided to the military judge pursuant to R.C.M. 309(a)(3)" be attached to the record of trial,[1] the Government failed to recognize that this rule change applies to SSgt Hagen's case on appeal. This rule change applies because "[a]n 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). Furthermore, before the addition of the new R.C.M. 1112(f)(1), R.C.M. 309 already required that a record of the Article 30a proceeding be included in the record of trial. R.C.M. 309(e). This requirement was clear during SSgt Hagen's court-martial: the military judge told the Government counsel that the Article 30a documents needed to be in the record of trial. R. at 2

[1] United States' Opposition to Defense Motion to Remand at 2, n.1 (quoting Exec. Order No. 14,130, 89 Fed. Reg. 105343, 105360 (20 Dec. 2024)).

("Okay, just make sure that those documents then are included in the record of trial"). The omission of the Article 30a proceeding renders SSgt Hagen's record incomplete.

The Government suggests that this Court "should cure this omission" by granting its motion to attach. United States' Opposition to Defense Motion to Remand. However, a motion to attach does not cure the omission because attachments to the appellate record do not complete the record. *See*, *e.g.*, *United States v. Garcia-Arcos*, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. 9 Jun. 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. 26 Oct. 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the [record]."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. 6 Jan. 2022) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial, . . . ; we did not consider the exhibits as a means to complete the record."). This Court should not attach the record of the Article 30a proceeding because the attachment does not cure the incompleteness of the record. Instead, the proper means for correction is remand, where the trial parties will be permitted to examine and respond to the proposed correction. R.C.M. 1112(d)(2).

SSgt Hagen respectfully requests this Honorable Court deny the Government's motion to attach and return this case to the Chief Trial Judge, Air Force Trial Judiciary, for correction.

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 Government Trial and Appellate Operations Division on 19 February 2025.

Respectfully submitted,

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40561**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Johnathon T. HAGEN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 10 February 2025, Appellant, through counsel, submitted a Motion for Leave to File a Motion for Remand and Motion for Remand, requesting this court remand the record of trial for correction. Specifically, Appellant noted proceedings under Article 30a, UCMJ, 10 U.S.C. § 830a, are not included in the record of trial as required by R.C.M. 309(e). The Government opposed this motion, arguing that when the record of trial in this case was certified, R.C.M. 1112(b) did not require records from Article 30a, UCMJ, proceedings be included.

Contemporaneous with its opposition to the Appellant's motion for remand, the Government submitted a Motion to Attach the Article 30a, UCMJ, materials in this case. This court granted the Government's motion on 19 February 2025.

The court has considered Appellant's motions, the Government's opposition, case law, the Rules for Courts-Martial, and this court's Rules of Practice and Procedure.

R.C.M. 1112(f)(1) states what matters must be attached to the certified record of trial for appellate review. As the Government noted, this rule recently was amended to require attachment of a "copy of all materials required to be provided to the military judge pursuant to R.C.M. 309(a)(3)." In this case, our grant of the Government's Motion to Attach fulfills this requirement.

Accordingly, it is by the court on this 21st day of February, 2025,

ORDERED:

Appellant's Motion for Leave to File Motion for Remand is **GRANTED**.

Appellant's Motion for Remand is **DENIED**.

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 LEAVE TO FILE MOTION FOR REMAND AND MOTION FOR REMAND**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant*	)	No. ACM 40561
	)	10 February 2025

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

Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for leave to file a motion for remand and moves to remand his record for correction. JT. CT. CRIM. APP. R. 23(d).

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where, inter alia, the sentence includes a discharge or sentence for more than six months. 10 U.S.C. § 854. SSgt Hagen was sentenced to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. Therefore, a complete record of proceedings is required. The problem here is that an Article 30a proceeding was held but no record or documentation of this proceeding is in the record of trial. R. at 2. The Article 30a proceeding was required to be included in the record of trial because SSgt Hagen's case was referred to trial. R.C.M. 309(e) ("A separate record of any proceeding under this rule shall be prepared . . . [and] [i]f charges are referred to trial in the case, such record shall be included in the record of trial"). Therefore, this Court should return the incomplete record to the military judge for correction. R.C.M. 1112(d)(2) ("[a] superior competent authority may return a [ROT] to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction.").

Addressing the incompleteness of the record of trial now as opposed to in SSgt Hagen's

assignments of error avoids piecemeal review of his court-martial and allows this Court and undersigned counsel to meaningfully fulfill their individual roles under Article 66 and Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 866, 870.

SSgt Hagen respectfully requests this Honorable Court grant this motion and return this case to the Chief Trial Judge, Air Force Trial Judiciary, for correction.

Respectfully submitted,

SAMANTHA P. GOLSETH, Maj, USAF
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Certificate of Filing and Service

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 February 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO DEFENSE MOTION TO REMAND
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN** United States Air Force	)	No. ACM 40561
Appellant.	)	18 February 2025

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

Pursuant to Rule 23(c) of this Court's Rules of Practice and Procedure, the United States enters its opposition to Appellant's Motion to Remand.

Remanding Appellant's case for inclusion of the Article 30a records under R.C.M. 1112 is inappropriate because the record of trial complied with the requirements of R.C.M. 1112(b). While R.C.M. 309(e) requires a record of the proceedings be prepared and included in the record of trial, this Court should cure this omission by granting the United States' Motion to Attach the records of the Article 30a proceedings in Appellant's case.

Law and Analysis

Article 54, UCMJ establishes the requirement for a record of trial. Article 54(c)(2) states,

> In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months.

Article 54(c)(2), UCMJ.

The President prescribed what is required for a record of trial to be complete through R.C.M. 1112(b). R.C.M. 1112(d)(2) states, "A record of trial is complete if it complies with the

requirements of subsection (b)." R.C.M. 1112(b) does not require records from an Article 30a proceeding be included in a record of trial. Because the record of trial was not required to have the records from the Article 30a proceeding under R.C.M. 1112[1], remand to the military judge under R.C.M. 1112(d)(2) for inclusion of the Article 30a records where Appellant has not alleged the omission was a substantial omission or prejudiced Appellant is inappropriate.

WHEREFORE, this Court should deny Appellant's motion to remand.

[redacted]

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[1] Article 1112(f)(1) was modified by Exec. Order No. 14,130, 89 Fed. Reg. 105343, 105360 (20 Dec. 2024), to require, effective 20 December 2024, to require "A copy of all materials required to be provided to the military judge pursuant to R.C.M. 309(a)(3)" to be attached to the record of trial. Appellant's record of trial was certified as complete on 1 December 2023, before this change went into effect.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 18 February 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (TWELFTH)**
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	21 February 2025

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

Staff Sergeant (SSgt) Johnathon T. Hagen, Appellant, hereby moves for a twelfth enlargement of time to file his assignments of error. A.F. CT. CRIM. APP. R. 23.3(m)(3), 23.3 (m)(4), and 23.3(m)(6). SSgt Hagen requests an enlargement for a period of seven days, which will end on **7 March 2025**. The record of trial was docketed with this Court on 26 January 2024. From the date of docketing to the present date, 392 days have elapsed. On the date requested, 406 days will have elapsed.

When undersigned counsel filed SSgt Hagen's eleventh enlargement of time, she anticipated that by today, she would be done drafting appellant's brief and would be obtaining a peer review, as required by the Air Force Appellate Defense Division. She also anticipated that this would mean that she would have at least four full work days to receive and incorporate leadership reviews before SSgt Hagen's brief would be due. However, when anticipating this progress, undersigned counsel did not know that the Government would move for reconsideration and reconsideration en banc in *United States v. Rocha*, ACM No. 40134 (rem.), on 18 February ue to this filing in *Rocha*, undersigned counsel has had to direct her attention away from n's brief because (1) undersigned counsel is the sole counsel for the appellant in *Rocha;* ppellant's motion in *Rocha* is due on 25 February 2025; and (3) the Government's motion

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in that case is twenty-seven pages in substance. Further, the brief in *Rocha* was filed in the evening on Tuesday, 18 February 2025, and on the Wednesday and Thursday that followed (19 and 20 February 2025), undersigned counsel was attending two full days of a preliminary hearing and legal advisor course to be qualified to serve as a preliminary hearing officer and legal advisor. This training required undersigned counsel's full attention over both days. While undersigned counsel was trying to avoid having to request an additional enlargement of time and through no fault of SSgt Hagen, she requires additional time to finish researching, consulting with SSgt Hagen, and briefing his assignments of error. Furthermore, given the demands on her office, she requires additional time to be able to obtain the peer and leadership reviews required by the Air Force Appellate Defense Division. These demands include attending two moot arguments on Monday, 24 February 2025; four arguments at the U.S. Court of Appeals for the Armed Forces (CAAF) on Tuesday and Wednesday, 25-26 February 2025; a mandatory command all call on Wednesday, 26 February 2025; one moot on Friday, 28 February 2025; and one moot on 3 March 2025.

Further, by or before 27 February 2025, undersigned counsel also must file a petition at the CAAF in *United States v. Benoit*, No. ACM 40508. This deadline is driven by statute. *See* 10 U.S.C. § 867(b) (requiring petitions for grant of review to be filed within 60 days).

Undersigned counsel currently represents 18 clients and SSgt Hagen's case is currently her second priority, following *Rocha*. A.F. CT. CRIM. APP. R. 23.3(m)(6). **SSgt Hagen was (1) provided an update on the status of undersigned counsel's progress on his case, (2) advised of this request for an enlargement of time, and (3) agrees with this request for an enlargement of time.** If this Court is inclined to deny this request for an enlargement of time, undersigned counsel respectfully requests a status conference.

In accordance with Rule 23.3(m)(4), undersigned counsel provides the following case information: On 6 March 2023, 14 July 2023, and 24-27 July 2023, at Ramstein Air Force Base, Germany, a general court-martial comprised of officer members convicted SSgt Hagen, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[1] 10 U.S.C. § 934. R. at 768. Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings, approved the sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action.

SSgt Hagen's record of trial consists of 8 prosecution exhibits, 8 defense exhibits, and 48 appellate exhibits. The transcript is 817 pages. In total, the electronic record of trial is 1,786 pages and contains multiple media files. SSgt Hagen is not confined.

SSgt Hagen respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

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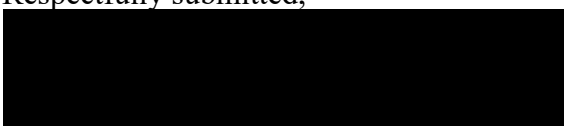
[1] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

Certificate of Filing and Service

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 21 February 2025.

Respectfully submitted,



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24 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) JOHNATHON T. HAGEN, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40561 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 an Assignment of Error in this case.

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
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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 24 February 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	**BRIEF ON BEHALF**
Appellee,	)	**OF APPELLANT**
	)	
v.	)	
	)	Before Panel No. 2
Staff Sergeant (E-5)	)	
JOHNATHON T. HAGEN,	)	No. ACM 40561
United States Air Force,	)	
Appellant.	)	7 March 2025

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

Assignments of Error[1]

I.

Prosecution Exhibit 1 was testimonial and introduced into evidence in violation of SSgt Hagen's constitutional right to confrontation, over defense objection.

II.

The convening authority's selection of the members demonstrates a prima facie showing that gender was impermissibly considered, giving rise to a presumption that the panel was not properly constituted.

III.

The application of 18 U.S.C. § 922 to SSgt Hagen warrants correction.

Statement of the Case

A general court-martial comprised of officer members convicted Staff Sergeant (SSgt) Johnathan T. Hagen, Appellant, contrary with his pleas, of one charge and two specifications of violating Article 134, Uniform Code of Military Justice (UCMJ),[2] 10 U.S.C. § 934. R. at 768.

[1] SSgt Hagen personally requests that this Court consider eleven additional matters pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), which can be found in the appendix.
[2] Unless otherwise noted, all references to the UCMJ are to the version included in the *Manual for Courts-Martial, United States* (*MCM*) (2019 ed.).

Specification 1 of the Charge alleged SSgt Hagen wrongfully possessed child pornography and Specification 2 of the Charge alleged he wrongfully viewed child pornography. Charge Sheet. The military judge sentenced SSgt Hagen to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. The convening authority took no action on the findings, approved the sentence in its entirety, and denied SSgt Hagen's requests to defer his reduction in grade, confinement, and automatic forfeitures. Convening Authority Decision on Action. One hundred and eighty-three days after he was sentenced, SSgt Hagen's case was docketed at this Court. R. at 816; Court Docket, https://afcca.law.af.mil/docket.html (last visited Mar. 3, 2025).

Statement of Facts

Dropbox suspected that one of its accounts contained child pornography. R. at 445. Dropbox is an electronic service provider (ESP) and was legally required to report the facts and circumstances related to its suspicion to the National Center for Missing and Exploited Children (NCMEC). App. Ex. XXXI at 2. In accordance with that requirement, on or about 12 October 2021, Dropbox compiled and sent information related to its suspicion to NCMEC by submitting a cyber tip. App. Ex. XIV at 67-68 (affidavit from Dropbox employee); App. Ex. XV at 9 (affidavit from NCMEC employee); R. at 450. The CyberTipline reporting form that is used to report a cyber tip specifically notifies the ESP that the information provided "will be made available to law enforcement for potential investigation." App. Ex. XIV at 2 (citing https://report.cybertip.org/"). The information submitted by Dropbox included account information for the Dropbox account and incident, to include, the date and time of the incident, the email address ("johnathon.hagen@outlook.com") and username ("John H") associated with the account, and

Internet Protocol (IP) address[3] login information. Pros. Ex. 1. Further, Dropbox stated in the tip: the filenames of the suspected illicit files and that it had viewed the files and found that they were publicly available. *Id*. Lastly, Dropbox provided the files themselves (two images and two graphic interchange formats (GIF)[4]) in its cyber tip. Pros. Ex. 4. Due to a lack of a preservation request, Dropbox did not maintain these files. R. at 534, 604; *see* United States' Motion to Attach, Appendix D (warrant returning "there were no returns and no information obtained . . . The official preservation request was submitted after the 90 day window of the cyber tip being reported.").

Following the receipt of Dropbox's cyber tip, NCMEC produced a "CyberTipline Report" which repeated the information reported by Dropbox without modification in Section A of the report. Pros. Ex. 1 at 3-5 ("The information appearing in Section A is information received in the original submission."). In accordance with its policy, NCMEC referred the CyberTipline Report to law enforcement. Pros. Ex. 1 at 7 ("in accordance with current NCMEC policy, this report will be referred automatically to the designated international law enforcement agency for potential evaluation, investigation, and/or prosecution.").

NCMEC's report was sent to German law enforcement in the region where SSgt Hagen was stationed. R. at 445. German law enforcement coordinated with the Air Force Office of Special Investigations (OSI) to inform SSgt Hagen of the allegation, interview him, and seize and search his electronic devices. R. at 446, 448. When SSgt Hagen was interviewed by OSI in December 2021 or January 2022, he made a series of admissions to include that "around the September, October timeframe" he had searched for child pornography, screenshotted it, saved it

[3] An "IP address" is "a number that is given to each computer when it is connected to the internet." *IP address*, Cambridge Dictionary, available at URL: https://dictionary.cambridge.org/us/dictionary/english/ip-address

[4] A GIF is "a type of computer file that contains a still or moving image." *GIF*, Cambridge Dictionary, available at URL: https://dictionary.cambridge.org/us/dictionary/english/gif.

to his Dropbox, and viewed it. R. at 467, 473, 517 (capturing audio from Pros. Ex. 3). SSgt Hagen's devices did not contain child pornography when searched, but his laptop did contain remnants of file paths. R. at 598, 599, 601; Pros. Ex. 2. The file paths included filenames that matched the filenames that Dropbox had reported to NCMEC. *Id*.

At trial, the Government's case relied upon SSgt Hagen's admissions, the reported filenames of the images and images from the NCMEC CyberTipline Report, and the remnants of file paths found on SSgt Hagen's laptop. *See*, *e.g.*, R. at 733. At the center of all of this was "NCMEC's CyberTipline report provided by Dropbox." R. at 604.

Argument

I.

Prosecution Exhibit 1 was testimonial and introduced into evidence in violation of SSgt Hagen's constitutional right to confrontation, over defense objection.

Additional Facts

No witness from Dropbox or NCMEC ever testified at SSgt Hagen's court-martial. Instead, the Government offered affidavits provided by individuals who were respectively employed by Dropbox and NCMEC in support of its motion to preadmit the NCMEC CyberTipline Report provided by Dropbox to NCMEC. App. Ex. XIV at 67-68 (affidavit from Dropbox employee); App. Ex. XV at 8-10 (affidavit from NCMEC employee). The report was admitted as Prosecution Exhibit 1 over SSgt Hagen's objection that the admission violated his Sixth Amendment right to confrontation. App. Ex. XIV; R. at 305.

Standard of Review

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

Law and Analysis

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

Although the Supreme Court did not articulate a bright-line test for what constitutes testimonial evidence, it explained:

> Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements…contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; ***statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.***

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

1. The NCMEC CyberTipline Report was testimonial.

To determine whether a statement is testimonial, this Court asks if the statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *United States v. Sweeney*, 70 M.J. 296, 301 (C.A.A.F. 2011) (quoting *United States v. Blazier*, 68 M.J. 439, 442 (C.A.A.F. 2010)). In doing so, this Court looks objectively at the "totality of the circumstances" and considers three factors:

> (1) whether the statement was "elicited by or made in response to law enforcement or prosecutorial inquiry;" (2) whether the statement involved "more than a routine and objective cataloguing of unambiguous factual matters;" and (3) whether "the primary purpose for making or eliciting the statement[ ] was the production of evidence with an eye toward trial."

United States v. Goodwater, No. ACM 40304 (f rev), 2024 CCA LEXIS 493, at *8 (A.F. Ct. Crim. App. Nov. 22, 2024) (citing *United States v. Rankin*, 64 M.J. 348, 352 (C.A.A.F. 2007); *United States v. Squire*, 72 M.J. 285, 288 (C.A.A.F. 2013)). "To rank as testimonial, a statement must have a primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n.6 (2011) (internal quotation marks and citations omitted).

"Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." *Melendez-Diaz*, 557 U.S. at 324. But this is not so "if the regularly conducted business activity is the production of evidence for use at trial." *Goodwater*, 2024 CCA LEXIS 493, at *9 (citing *Melendez-Diaz*, 557 U.S. at 321).

The factual background of this case demonstrates that an "objective witness" would reasonably "believe that the statement would be available for use at a later trial." *Crawford*, 541

U.S. at 52. Dropbox is an ESP that is legally required to make a cyber tip. App. Ex. XXXI at 2. That legal mandate is akin to a prosecutor or law enforcement eliciting the statements from Dropbox. *See Rankin*, 64 M.J. at 352.

When Dropbox used the NCMEC's CyberTipline to report the incident, Dropbox would have seen that the report "will be made available to law enforcement for potential investigation," and would have understood the formality of this report. App. Ex. XIV at 2. In that sense, this case differs from *United States v. Scheurer*, 62 M.J. 100, 104-06 (C.A.A.F. 2005), where the United States Court of Appeals for the Armed Forces (CAAF) held casual remarks to an acquaintance were not testimonial because the declarant had made the statements without contemplation that they would be available for use at a later trial. Moreover, when viewing the information that Dropbox submitted, it is clear that Dropbox's statements via the cyber tip were made with the "primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." *Bullcoming*, 564 U.S. at 659 n.6. Dropbox's statement to NCMEC via the cyber tip include the "suspect['s]"[5] information along with incident information (to include categorization of the images as "A1" (meaning a prepubsequent minor engaged in a sex act)) and envision that Dropbox would be contacted by law enforcement, providing a specific point of contact for law enforcement. App. Ex. XIV at 57-59. Therefore, even if it is Dropbox's regular course of business to make a cyber tip report, its statements are still testimonial because its "regularly conducted business activity is the production of evidence for use at trial." *Goodwater*, 2024 CCA LEXIS

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

493, at *9 (citing *Melendez-Diaz*, 557 U.S. at 321).

The same purpose of use at trial applies equally to the very creation of the CyberTipline Report. NCMEC is "a governmental entity" with "special law enforcement duties and powers." *United States v. Ackerman*, 831 F.3d 1292, 1296, 1298 (10th Cir. 2016). The Tenth Circuit—with then-Judge Neil Gorsuch authoring the opinion—found:

> NCMEC and NCMEC alone is statutorily obliged to maintain an electronic tipline for [internet service providers] to use to report possible Internet child sexual exploitation violations to the government. Under the statutory scheme, *NCMEC is obliged to forward every single report it receives to federal law enforcement agencies and it may make its reports available to state and local law enforcement as well*.

Id. at 1296 (emphasis added). Therefore, like Dropbox, NCMEC's statements via the CyberTipline Report were made for the "primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." *Bullcoming*, 564 U.S. at 659 n.6. This conclusion is supported by the First Circuit, which found that "NCMEC effectively acted as an agent of law enforcement, because it received a government grant to accept reports of child pornography and forward them along to law enforcement," *Cameron*, 699 F.3d at 645, and by this Court, which found in a very similar context that "it is hard to see [a NCMEC CyberTipline] report as something other than a consolidation of evidence reported directly to law enforcement for the purpose of proving a past event potentially relevant to later criminal prosecution," *Goodwater*, 2024 CCA LEXIS 493, at *10 (citing *Bullcoming*, 564 U.S. at 659 n.6).

Finally, unlike *Davis v. Washington*, 547 U.S. 813, 828 (2006), where the Supreme Court determined the primary purpose of an out-of-court statement was to enable police assistance to meet an ongoing emergency, there was no ongoing emergency that necessitated law enforcement's attention. Rather, Dropbox and NCMEC's reporting was intended to lead to "an investigation into

possibly criminal past conduct." *See id.* at 829. The statements contained in the report, with exception for the machine-generated Section B[6] were testimonial.

2. The military judge did not make an unavailability determination, and the witness was not subject to prior cross-examination.

Because the report was testimonial, it could not be admitted as evidence unless two conditions were met—the witness was determined to be unavailable AND the witness was subject to prior cross-examination. U.S. CONST. amend. VI; *Crawford*, 541 U.S. at 59; *Blazier*, 69 M.J. at 222. We have neither here. SSgt Hagen was never given the opportunity to confront the Dropbox cyber tip author nor the NCMEC CyberTipline Report author and neither was determined to be unavailable. Therefore, the report should not have been admitted into evidence.

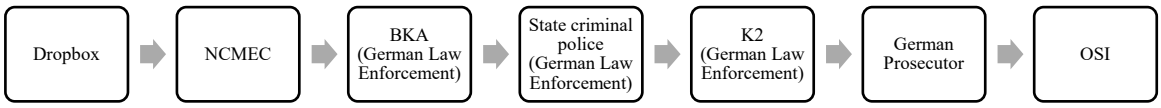
3. The Government cannot prove this violation was harmless beyond a reasonable doubt.

Because the error is constitutional in nature, the Government must show that the error was harmless beyond a reasonable doubt. *See United States v. Sweeney*, 70 M.J. 296, 304 (C.A.A.F. 2011). Among the factors this Court must consider are "the importance of the unconfronted testimony in the prosecution's case, whether that testimony was cumulative, the existence of corroborating evidence, the extent of confrontation permitted, and the strength of the prosecution's case." *Id*. at 306 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). In doing so, it is not enough to find that other evidence that was admitted at trial might have been sufficient to uphold SSgt Hagen's convictions. Instead, to affirm SSgt Hagen's convictions, this Court must find that there is no "reasonable possibility that the evidence complained of might have contributed

[6] "[M]achine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not 'testimonial.'" *Blazier*, 69 M.J. at 224 (footnote and citations omitted).

to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963)); *Sweeney*, 70 M.J. at 304.

This Court cannot find that Prosecution Exhibit 1 did not contribute to SSgt Hagen's convictions because the Government relied on it to prove the truth of the matter asserted: that at a certain date and time, images and GIFs with certain filenames were uploaded to Dropbox. *See* Pros. Ex. 1. The Government used Prosecution Exhibit 1 to explain how the investigation began, connect the specific images and filenames to SSgt Hagen, and mirror the remnants of file paths found on the laptop. R. at 732 (arguing statements from Prosecution Exhibit 1 at the beginning of the Government's findings argument), 733 (arguing the evidence is the "original evidence" despite the "questioning of witnesses about what is the original evidence" because it is what was sent from Dropbox and the Government's digital forensic expert "matched up the Dropbox account that was flagged in that NCMEC report . . . and matched up the files that Dropbox flagged.") Each connection that the Government was able to make was important given that the defense raised questions, for example, about how the case had been transferred from Dropbox to NCMEC and then via a paper file through four German agencies before it was transferred to OSI. R. at 450-53. Meanwhile, there was no electronic file that could be retrieved from any of the German agencies to confirm if the contents of the file had been altered or changed at any time. R. at 452.



Moreover, due to OSI's failure to request preservation of the evidence at Dropbox, the contents of the file could also not be confirmed with Dropbox. R. at 544-46. Therefore, there is a reasonable possibility that this evidence contributed to the findings in this case.

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications.

II.

The convening authority's selection of the members demonstrates a prima facie showing that gender was impermissibly considered, giving rise to a presumption that the panel was not properly constituted.

Additional Facts

The convening authority detailed members to SSgt Hagen's court-martial in a series of three convening orders. Special Order A-41; Special Order A-46; Special Order A-47. The convening authority selected members by initialing next to their names on the 1st Indorsement to the Pretrial Advice. 1st Indorsement to Pretrial Advice. Special Order A-41 initially detailed fourteen members with traditionally male names and seven members with traditionally female names. *See* Special Order A-41. Special Order A-46 then relieved some of these past members and detailed new members, but it included erroneous information regarding the special order that had been previously issued. *Compare* Special Order A-41, *with* Special Order A-46. Special Order A-47 was then accomplished to seemingly correct the error in Special Order A-46. *Compare* Special Order A-46, *with* Special Order A-47. Special Order A-46 and Special Order A-47 both relieve the same members: twelve members with traditionally male names and six members with traditionally female names. Special Order A-46; Special Order A-47. Both orders also then detail the exact same number of members with traditionally male names, twelve, and the exact same number of members with traditionally female names, six. *Id*.

Standard of Review

Where no objection is made, court-martial composition issues are reviewed for plain error. *United States v. King*, 83 M.J. 115, 120-21 (C.A.A.F. 2023). Under plain error review, the

appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *Id.* "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. at 159 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Relatedly, "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); *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1554 (2021).

"[W]henever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *United States v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023). The Government may then seek to rebut that presumption. *Id*. Should the Government be unable to rebut the presumption, automatic reversal is warranted. *Id*. at 74; s*ee also Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017) (granting "automatic relief to defendants who prevailed on claims alleging race . . . discrimination in the selection of the petit jury"); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *Johnson*, 520 U.S. at 466 (citing Supreme Court precedent for the proposition that cases *not* governed by Federal Rule of Criminal Procedure Rule 52(b) are "structural errors" without a prejudice analysis).

Law and Analysis

"[T]he Equal Protection Clause . . . forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. This statement is no less true in the military justice system where

the convening authority might arbitrarily select members based on race to create a more diverse panel, or one representative of the accused's race. *Jeter*, 84 M.J. at 73. In extending *Batson* to panel member selection, the CAAF unequivocally articulated, "It is impermissible to exclude or intentionally include prospective members based on their race." *Id.* "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, only to have discriminated at other stages of the process." *Id*. at 74.

However, at the time of SSgt Hagen's court-martial, *United States v. Crawford* provided that convening authorities *could* use race to select a panel when it was "in favor of, not against, an accused." *United States v. Crawford,* 35 C.M.R. 3, 13 (C.M.A. 1964). Military appellate courts did "not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty." *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994). Taking note of race during panel selection was extended to approve a convening authority's consideration of gender in *United States v. Smith,* 27 M.J. 242, 249 (C.M.A. 1988). As such, at the time of SSgt Hagen's trial, both race and gender could be considered to create a panel.

On September 25, 2023, after SSgt Hagen's trial, *Jeter* explicitly held *Batson* had abrogated *Crawford*'s encouragement to use race when deciding who should be appointed to a panel: "A person's race simply 'is unrelated to his fitness as a juror.'" *Jeter*, 84 M.J. at 73 (quoting *Batson*, 476 U.S. at 87). *Jeter* did not consider the question of using gender as a basis for juror fitness. However, it is clear through the abrogation of *Crawford* by *Batson*, *Smith* is similarly abrogated by *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 129 (1994). *J.E.B.* followed *Batson* and extended *Batson*'s holding to gender: "We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* As with race, "[i]ntentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *Id*. The Supreme Court also wrote:

> Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself. Because gender and race are overlapping categories, gender can be used as a pretext for racial discrimination. Allowing parties to remove racial minorities from the jury not because of their race, but because of their gender, contravenes well-established equal protection principles and could insulate effectively racial discrimination from judicial scrutiny.

Id. at 145. It is clear, then, gender, like race, cannot be considered for court member selection, whether members of certain genders or races are intentionally "included" or "excluded." To "include" one means "excluding" another. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *Id*. at 142 n.13. *Jeter* unequivocally states that "race shall not be a criterion in the selection of court-martial members," and its reasoning indicates the same must be true of gender. 84 M.J. at 73.

Jeter lays out a process for determining whether impermissible criteria were used in the selection of court-martial members. First, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *Id.* at 70. Here, the convening authority's selection of members equates to such a prima facie[7] showing. When relieving previously detailed members and detailing new members, the convening authority replaced the twelve members with traditionally male names with twelve members with traditionally male names. Special Order A-46; Special Order A-47. And similarly, the six members with traditionally female names were replaced with six members with traditionally female names. *Id*. This trade of one for one seems to indicate consideration of gender when selecting members and, considering that *Crawford* was

[7] Prima facie means "sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." *Prima Facie*, *Black's Law Dictionary* (11th ed. 2019).

still good law at the time[8], SSgt Hagen has made a prima facie showing that gives rise to a presumption that impermissible criteria was allowed to enter the court member selection process.

This prima facie showing gives rise to the presumption that the panel was not properly constituted and "[t]he government may . . . seek to rebut that presumption." *Jeter*, 84 M.J. at 70. But here, the documentation regarding the selection of court members fails to rebut this presumption because none of it indicates the convening authority did not consider the gender of the potential members. On the contrary, the results of at least one selection process indicate the probable use of the gender. *See* Special Order A-46; Special Order A-47. Without rebuttal, the presumption that gender was used when selecting court members stands, constituting clear and obvious error since it is plain at the time of appellate review that these factors may not be considered at all.

Although the plain error standard normally calls for an assessment of prejudice, that is not necessary here because the composition of a court-martial is a structural issue, and the unrebutted presumption warrants automatic reversal. *See Jeter*, 84 M.J. at 74; *Johnson*, 520 U.S. at 466. This Court should therefore grant the same remedy the court granted in *Jeter* by setting aside the findings of guilty and the sentence. 84 M.J. at 75.

Therefore, this Court should set aside the findings and sentence and dismiss the Charge and Specifications.

[8] The *Jeter* court noted the understandable belief that *Crawford* was still good law at the time contributed to the prima facie showing. *Jeter*, 84 M.J. at 74.

III.

The application of 18 U.S.C. § 922 to SSgt Hagen warrants correction.

Additional Facts

SSgt Hagen is a United States citizen by birth. *See* Def. Ex. at H at 1 (SSgt Hagen was born in Littleton, Colorado). The Statement of Trial Results (STR) and Entry of Judgment (EOJ), post-trial documents that memorialized the outcome of SSgt Hagen's case, purport to strip SSgt Hagen of his constitutional right to bear arms for life. STR at 3 (citing 18 U.S.C. § 922); EOJ at 3 (citing 18 U.S.C. § 922); U.S. CONST. amend. II. This determination is on the First Indorsement to each post-trial document, which are consecutively paginated with a preceding portion previously signed by the military judge. STR at 1-4; EOJ at 1-4. The military judge is required to incorporate the STR in the EOJ. 10 U.S.C. 860c(1)(A) (2019).

During SSgt Hagen's trial, no evidence suggested that he was a "fugitive from justice," an unlawful user of or addict to a controlled substance, "adjudicated as a mental defective," or "committed to a mental institution." 18 U.S.C. § 922(g)(2)-(4). Each specification was subject to a maximum confinement of ten years. *MCM*, pt. IV, para. 93.d.(1). Both the STR and EOJ note that SSgt Hagen was not convicted of a crime of domestic violence. STR at 3 (citing 18 U.S.C. § 922(g)(9)); EOJ at 3 (citing 18 U.S.C. § 922(g)(9)).

Standard of Review

Whether post-trial processing was properly completed is reviewed de novo. *United States v. Zegarrundo*, 77 M.J. 612, 613-14 (A.F. Ct. Crim. App. 2018) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Vanzant*, 84 M.J. 671, 680 (A.F. Ct. Crim. App. 2024), *rev. granted*, USCA Dkt. No. 24-0182, ___ M.J. ___, 2024 CAAF LEXIS 640 (C.A.A.F. Oct. 17,

2024).

Law and Analysis

The Courts of Criminal Appeals possess "limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). In *United States v. Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *12-13 (C.A.A.F. Sep. 5, 2024), the Court of Appeals for the Armed Forces recently rejected the authority of the Courts of Criminal Appeals to address the firearms prohibition in the STR under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). But this Court remains empowered by statute to correct the unconstitutional deprivation of SSgt Hagen's Second Amendment right to bear arms through Article 66(d)(2), UCMJ. 10 U.S.C. § 866(d)(2); *see also Williams*, 2024 CAAF LEXIS 501, at *14-15 (considering relief under that statute but rejecting it only because of the unique procedural posture of the case).

Article 66(d)(2), UCMJ, authorizes this Court to "provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the" EOJ. 10 U.S.C. § 866(d)(2). SSgt Hagen meets each of the statutory thresholds: (1) an error, (2) raised by SSgt Hagen, (3) occurring after the entry of judgment under Article 60c, UCMJ. *Id.*; *Williams*, 2024 CAAF LEXIS 501, at *14-15. Because only one category of 18 U.S.C. § 922(g) could apply to SSgt Hagen, and its reflection in his post-trial paperwork runs afoul of the superior protection found in the Second Amendment, this Court can and should direct correction, consistent with its authority under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2).

1. SSgt Hagen has demonstrated error: the unconstitutional application of 18 U.S.C. § 922(g).

Facially, only one part of 18 U.S.C. § 922(g) could currently apply to SSgt Hagen: 18 U.S.C. § 922(g)(1)'s prohibition arising from a conviction of a crime punishable by imprisonment for a term greater than one year, because SSgt Hagen faced up to ten years for each offense. *MCM*,

pt. IV, para. 93.d.(1). 18 U.S.C. § 922(g)(6) does not currently apply because SSgt Hagen has not been yet discharged from the Armed Forces. Yet, as discussed below, when either provision is viewed through the lens of the absence of violence in SSgt Hagen's case, the purported statutory application of 18 U.S.C. § 922(g) must yield to the superior protection afforded by the Constitution.

"The military has a hierarchical scheme as to rights, duties, and obligations." *Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997). Above all is the Constitution. *See id*. "While a lower source on the hierarchy may grant additional or greater rights than a higher source, those additional rights may not conflict with a higher source." *Id*. As applied to SSgt Hagen, the question then becomes: Does the application of the lifetime firearm ban enumerated in 18 U.S.C. § 922(g) comport with the Second Amendment?

When evaluating that question, the Supreme Court of the United States has articulated the governing test:

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

N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) (quoting *Konigsberg v. State Bar of Cal*., 336 U.S. 36, 49 n.10 (1961)).

Broadly speaking, and though not without limitation, the Second Amendment "confer[s] an individual right to keep and bear arms." *D.C. v. Heller*, 554 U.S. 570, 595, 626 (2008). As such, the Second Amendment plainly covers SSgt Hagen's right to keep and bear arms, even after his conviction. And, as *Bruen*'s test set out above makes clear, it then falls on the Government to show why its lifetime regulation of that right comports with America's "historical tradition of

firearm regulation." 597 U.S. at 17.

The Supreme Court took up the contours of this assessment in *United States v. Rahimi*, 602 U.S. 680 (2024). Concluding that 18 U.S.C. § 922(g)(8) "fits comfortably within [the Nation's historical] tradition," the court employed a methodology considering whether the regulation at issue is "relevantly similar"—as opposed to identical—to those acceptable to the Nation's founding generation. *Id*. at 681, 690. The determination was clear under the facts specific to *Rahimi* because "the Government offer[ed] ample evidence that the Second Amendment permits the disarmament of individuals who pose" what the Court described as "a clear threat of physical violence to another." *Id*. at 693, 698. But the Court cabined its approval, limiting its affirmance to *temporary* disarmament after a finding of a credible threat to physical safety and noting the vital nexus found between 18 U.S.C. § 922(g)(8) and the historical tradition of "banning the possession of guns by categories of persons thought by a legislature to present a special danger of misuse." *Id*. at 682 (citations omitted), *see also id*. at 701 (rejecting the contention "responsible" is the governing principle in any situation).

Rahimi's limited approval comports with "'longstanding' precedent in America and pre-Founding England . . . that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*." C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 Harv. J.L. & Pub. Pol'y 695, 698 (2009) (emphasis added). But here, SSgt Hagen's case never involved a threat to physical safety or special danger of misuse.

Moreover, the Government has not proven—and cannot prove—that this ban as applied to SSgt Hagen is consistent with this country's history and tradition. Historically, a firearm disability has been applied to "those convicted of a 'crime of violence.'" *Id*. at 699. 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). By contrast, the possession and viewing of child pornography are not crimes of violence and SSgt Hagen's convictions did not involve violence of any kind. And unlike *Rahimi*, the disarmament under 18 U.S.C. § 922(g)(1) or (g)(6) is not temporary; it will last forever.

SSgt Hagen now seeks the constitutionally required relief from the statutory firearms ban for life set out in his post-trial paperwork. Such relief is mandated by the Government's inability to satisfy the *Bruen* test through a historical analogue for a non-violent case like his. And such relief is within this Court's power to provide because, as discussed below, SSgt Hagen has demonstrated the erroneous application of the firearm prohibition occurred after entry of judgment.

2. The error on the indorsement to the EOJ occurred after the entry of judgment.

The alleged error is an "error . . . in the processing of the court-martial after the" entry of judgment. 10 U.S.C. § 866(d)(2). The applicable Air Force regulation required that "[*a*]*fter* the EOJ is signed by the 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) (DAFI 51-201). The firearm denotation on the First Indorsement that accompanies the EOJ into the record of trial explicitly happens *after* the EOJ is signed by the military judge pursuant to Article 60c, UCMJ. *Id*. That is just what happened here, with the First Indorsement to the EOJ signed on 6 September 2023[9] after the military judge signed on 5 September 2023. *Compare* EOJ at 2, *with* EOJ at 3.

[9] The electronic signature on the First Indorsement to the EOJ states it was signed on 6 September 2023. EOJ at 3.

3. Jurisdiction under Article 66(d)(1), UCMJ, is distinct from Article 66(d)(2), UCMJ.

When an error occurring after entry of judgment is raised by an appellant, Article 66(d)(2), UCMJ, provides an independent jurisdictional basis for this Court to conduct its duties. *Williams*, 2024 CAAF LEXIS 501, at *13-14.

This Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is consistent with this Court's published opinion in *Vanzant*, 84 M.J. 671. In *Vanzant*, this Court determined it did not have authority to act on collateral consequences that are not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id*. at *23 ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c]'"). The CAAF agreed with this interpretation. *Williams*, 2024 CAAF LEXIS 501, at *11-13. But whereas *Vanzant* and *Williams* concern those matters leading up to the EOJ, SSgt Hagen is asking this Court to review an error in post-trial processing after the EOJ under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See Vanzant*, 84 M.J. at 680 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)).

Vanzant does not control review of this issue as raised under Article 66(d)(2), UCMJ. But *see United States v. Lawson*, No. ACM 23034, 2024 CCA LEXIS 431, at *2 (A.F. Ct. Crim. App. Oct. 17, 2024) (broadly summarizing *Vanzant* as standing for the proposition that "the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the [EOJ] is beyond a Court of Criminal Appeals' statutory authority to review"). The characterization of *Vanzant* in *Lawson* is incorrect. The 18 U.S.C. § 922 firearm prohibition notation included in the First Indorsement to the EOJ is not beyond this Court's statutory authority to review under Article 66(d)(2), UCMJ. *See Williams*, 2024 CAAF LEXIS 501, at *13 (calling Article 66(d)(2), UCMJ, the "error-correction authority"); *but see United States v. Pulley*, No. ACM 40438 (f rev), 2024

CCA LEXIS 442, at *3 (A.F. Ct. Crim. App. Oct. 24, 2024) (citing *Vanzant* and *Williams* for this Court's inability to correct the firearm prohibition, but without analyzing Article 66(d)(2), UCMJ). Article 66(d)(1), UCMJ, is distinct, and that section is all *Vanzant* analyzes. Using the CAAF's analysis in *Williams*, this Court should find jurisdiction under Article 66(d)(2), UCMJ, and ensure correction of the unconstitutional firearms error in post-trial processing.

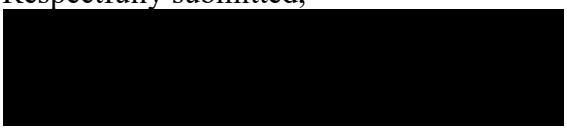
4. Correction under R.C.M. 1112(d)(2).

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. This is appropriate because the First Indorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects SSgt Hagen's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41. Finally, even though the STR contains an indorsement as well, the operative indorsement is the one on the EOJ. DAFI 51-201, at ¶ 29.33. The EOJ and indorsement are the "final disposition." *Id*. Remanding the record for correction would change the firearm prohibition on the EOJ and correct the unconstitutional bar. Specifically, it would correct the erroneous indexing of SSgt Hagen in the National Instant Criminal Background Check System (NICS), which is used nationwide by federal firearm licensees (FFL) to determine if someone is eligible to obtain a firearm. About NICS, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics (last visited Mar. 3, 2025). It would correct the indexing because the Air Force is required to update NICS following an appeal. Department of the Air Force Manual (DAFMAN) 71-102, at ¶ 4.4.3.1 (July 21, 2020) (incorporating guidance memorandum from Sept. 10, 2024), https://static.e-publishing.af.mil/production/1/saf_ig/publication/afman71-102/afman71-102.pdf (last visited Mar. 3, 2025); *see* NICS Indices, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-

and-information/nics/nics-indices (last visited Mar. 3, 2025) (noting it is the contributing agency's responsibility to remove an individual from NICS indices if their prohibitor is no longer valid).

Therefore, this Court should remand the record to correct the EOJ's unconstitutional bar or grant other relief it deems warranted to effectuate the same.

Respectfully submitted,



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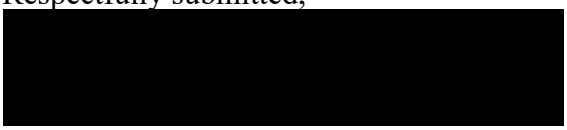
I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 March 2025.

Respectfully submitted,



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Appendix

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

IV.

Whether the evidence is legally and factually sufficient to support the findings of guilt.

Standard of Review

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

Law and Analysis

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297-98 (C.A.A.F. 2018) (citation omitted). "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 [appellant]'s guilt beyond a reasonable doubt.'" *Rodela*, 82 M.J. at 525 (second alteration in original) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)).

As part of this Court's full consideration of the evidence produced at trial, SSgt Hagen personally requests that this Court consider that no representative from Dropbox testified to confirm that the four files admitted as Prosecution Exhibit 4 were the files that were in fact flagged by Dropbox and the original evidence at Dropbox was not preserved for comparison. R. at 534, 604; *see* United States' Motion to Attach, Appendix D (warrant returning "there were no returns

and no information obtained . . . The official preservation request was submitted after the 90 day window of the cyber tip being reported.").

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications with prejudice.

V.

Whether the military judge abused his discretion when he denied SSgt Hagen's motion to dismiss (or abate the proceedings).

Standard of Review

This Court reviews a military judge's ruling on whether to abate proceedings for an abuse of discretion. *United States v. Simmermacher*, 74 M.J. 196, 199 (C.A.A.F. 2015); *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001); *United States v. Wright*, 75 M.J. 501, 509 (A.F. Ct. Crim. App. 2015). "A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable[;] or (4) he fails to consider important facts." *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted).

Law and Analysis

To establish a violation of Article 46, UCMJ, an accused must show "(1) the evidence possesses an exculpatory value that was apparent before it was destroyed; (2) it is of such a nature that the accused would be unable to obtain comparable evidence by other reasonably available means; and (3) the Government acted in bad faith when it lost or destroyed such evidence." *United States v. Yarber*, No. 2013-25, 2014 CCA LEXIS 114, at *9 (A.F. Ct. Crim. App. Feb. 20, 2014) (citing *United States v. Terry*, 66 M.J. 514, 517 (A.F. Ct. Crim. App. 2008)).

To establish a violation of R.C.M. 703(f), an accused must show: "(1) the evidence is relevant and necessary; (2) the evidence has been destroyed, lost, or otherwise not subject to compulsory process; (3) the evidence is of such central importance to an issue that it is essential to a fair trial; (4) there is no adequate substitute for such evidence; and (5) the accused is not at fault or could not have prevented the unavailability of the evidence." *Id*. (citing R.C.M. 703(f)(1)-(2)).

SSgt Hagen moved to dismiss the charge and specifications based on the Government's failure to preserve evidence of central importance to the trial, that is what depictions were actually contained in the Dropbox account at issue. App. Ex. XVIII. SSgt Hagen adopts the legal authorities and argument contained within Appellate Exhibit XVIII and Appellate Exhibit XXVIII, and avers the military judge abused his discretion when he denied SSgt Hagen's motion because SSgt Hagen had satisfied each of the requirements to establish a violation under Article 46, UCMJ, and R.C.M. 703(f). *See* App. Ex. XXIX. Moreover, SSgt Hagen was materially prejudiced because he could not complete a review of the photographs (or lack thereof) or their metadata in comparison with the material provided in the NCMEC CyberTipline report to call that report into question.

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications.

VI.

Whether the military judge abused his discretion when he denied SSgt Hagen's motion to suppress his statements.

Standard of Review, Law, and Analysis

Voluntariness

The voluntariness of a confession, however, is a question of law that this Court reviews de

novo. *United States v. Ellis*, 57 M.J. 375, 378 (C.A.A.F. 2002) (citing *Arizona v. Fulminante*, 499 U.S. 279, 287, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991)).

In order for a confession to be admissible, an accused's statements must be voluntary. *Ellis*, 57 M.J. at 378 (citing *Dickerson v. United States*, 530 U.S. 428, 433 (2000)). The accused has the burden of establishing that their confession is involuntary. *United States v. Swift*, 76 M.J. 210, 218 (C.A.A.F. 2017). A confession is voluntary when it is "the product of an essentially free and unconstrained choice by its maker." *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). A confession is involuntary, and therefore inadmissible if, when considering all the facts together, an interrogation overcomes the appellant's will to resist. *See Ellis*, 57 M.J. at 375.

Corroboration

This Court reviews a military judge's ruling on a motion to suppress an accused's statements for an abuse of discretion. *United States v. Jones*, 73 M.J. 357, 360 (C.A.A.F. 2014) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)); *see United States v. Guihama*, 85 M.J. 48, 54 (C.A.A.F. 2024) (military appellate courts review a military judge's decision to admit a statement under M.R.E. 304(c) for an abuse of discretion). The abuse of discretion standard is detailed in Issue V, *supra*. To determine whether a statement is corroborated and therefore admissible, this Court applies a three-part test:

> First, the military judge must decide whether the proffered evidence is in fact independent evidence. Independent evidence cannot consist of other uncorroborated confessions of the accused that would also require corroboration, but independent evidence can be either direct or circumstantial.
>
> Second, the military judge must decide whether each piece of independent evidence "raises an inference of the truth of the admission or confession." If the piece of evidence meets this threshold, the military judge can use it to determine whether the accused's statement is corroborated.
>
> Third, the military judge must decide whether the pieces of evidence, considered together, corroborate the admission or confession of the accused. In doing so, the

> military judge must assess whether the pieces of evidence "would tend to establish the trustworthiness of the admission or confession."

Guihama, 85 M.J. at 54 (citing *United States v. Whiteeyes*, 82 M.J. 168, 174 (C.A.A.F. 2022)) (cleaned up).

SSgt Hagen moved to suppress his statements to OSI agents, German Polizei, and one SSgt Hagen's supervisors based on his statements being involuntary and uncorroborated. App. Ex. XVI. SSgt Hagen adopts the legal authorities and argument contained within Appellate Exhibit XVI and avers that he met his burden to suppress his statements, and the military judge abused his discretion when he denied SSgt Hagen's motion, thereby prejudicing SSgt Hagen. *See* App. Ex. XXX.

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications.

VII.

Whether the military judge abused his discretion when he denied SSgt Hagen's motion to exclude evidence.

Standard of Review

This Court reviews a military judge's decision to admit Mil. R. Evid. 404(b) evidence at trial for an abuse of discretion. *United States v. Wilson*, 84 M.J. 383, 390 (C.A.A.F. 2024) (citing *United States v. Hyppolite*, 79 M.J. 161, 164 (C.A.A.F. 2019)). The abuse of discretion standard is detailed in Issue V, *supra*.

Law and Analysis

SSgt Hagen moved to exclude evidence offered under Mil. R. Evid. 404(b). App. Ex. IX. SSgt Hagen adopts the legal authorities and argument contained within Appellate Exhibit IX and avers the military judge abused his discretion when he denied SSgt Hagen's motion and that this

error prejudiced SSgt Hagen. *See* App. Ex. XXXIII.

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications.

VIII.

Whether the military judge abused his discretion when he denied SSgt Hagen's motion to compel the production of a consultant in the field of pediatrics.

Standard of Review

This Court reviews a military judge's ruling on a request for expert assistance, and his decision regarding the admissibility of expert testimony, for abuse of discretion. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010). The abuse of discretion standard is detailed in Issue V, *supra*.

Law and Analysis

"[I]n trials where expert testimony is central to the outcome," the accused must be provided with expert assistance. *United States v. Turner*, 28 M.J. 487, 488 (C.M.A. 1989) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985)). A showing of necessity entitles the accused to an expert consultant. *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986). "Necessity" is determined through the application of a three-factor test: "(1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994). In addition, the accused must show that the denial of such assistance would result in a fundamentally unfair trial. *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008).

SSgt Hagen moved to compel the production of an expert pediatrician for the purposes of

consultation. App. Ex. VIII. SSgt Hagen adopts the legal authorities and argument contained within Appellate Exhibit VIII and avers the military judge abused his discretion when he denied SSgt Hagen's motion because SSgt Hagen had met each of the above factors. *See* App. Ex. XXXIII. This Court reviews such errors under the constitutional harmless error standard, which requires the Government to demonstrate that the error is harmless beyond a reasonable doubt such that there is no reasonable probability it contributed to the contested findings of guilty. *United States v. McAllister*, 64 M.J. 248, 252-53 (C.A.A.F. 2007). The Government cannot demonstrate this because there is a reasonable probability that the assistance of an expert pediatrician consultant would have aided the defense to, among other things, question the ages of the persons depicted in the photographs and GIFs at issue. *See* Prosecution Exhibit 4.

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications.

IX.

Whether the military judge abused his discretion when he denied SSgt Hagen's motion to compel discovery.

Standard of Review

This Court reviews a military judge's decision on a request for discovery for abuse of discretion. *United States v. Roberts*, 59 M.J. 323, 326 (C.A.A.F. 2004) (citation omitted). The abuse of discretion standard is detailed in Issue V, *supra*. "The military judge's determination as to the materiality of the requested information is a question of law we review de novo." *United States v. Yates*, No. ACM 39444, 2019 CCA LEXIS 391, *42 (A.F. Ct. Crim. App. Sep. 30, 2019) (citing *Roberts*, 59 M.J. at 326).

Law and Analysis

"A military accused also has the right to obtain favorable evidence under Article 46, UCMJ

. . . as implemented by R.C.M. 701-03." *United States v. Coleman*, 72 M.J. 184, 186-87 (C.A.A.F. 2013). In reviewing discovery matters, this Court conducts a two-step analysis: first, "whether the information or evidence at issue was subject to disclosure or discovery"; and second, "if there was nondisclosure of such information," what the effect of that nondisclosure was on the trial. *Id*. at 187.

SSgt Hagen moved to compel the production of the names of the NCMEC analysts and the material they used to do a visual comparison of the alleged contraband. App. Ex. XII. SSgt Hagen adopts the legal authorities and argument contained within Appellate Exhibit XII and asserts the military judge abused his discretion when he denied SSgt Hagen's motion, thereby prejudicing SSgt Hagen. *See* App. Ex. XXXII.

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications.

X.

Whether the military judge abused his discretion when he denied SSgt Hagen's motion asserting the unreasonable multiplication of charges for sentencing.

Standard of Review

This Court reviews a military judge's decision on the reasonableness of multiple charges for abuse of discretion. *United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010). The abuse of discretion standard is detailed in Issue V, *supra*.

Law and Analysis

The prohibition against the unreasonable multiplication of charges provides this Court "with a traditional legal standard – reasonableness." *Id*. (quoting *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001). *Quiroz* provides five factors to consider when determining if multiple

findings of guilt constitute an unreasonable multiplication of charges:

> (1) Did the accused 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 unfairly increase the appellant's punitive exposure?;
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Quiroz, 55 M.J. at 338 (citation and quotation marks omitted).

SSgt Hagen moved the military judge to merge the specifications in his case for sentencing because they were unreasonably multiplied. App. Ex. II. SSgt Hagen adopts the legal authorities and argument contained within Appellate Exhibit II. The military judge abused his discretion when he denied SSgt Hagen's motion. *See* R. at 787-88.

SSgt Hagen requests this Honorable Court now reassess his sentence without approving a punitive discharge.

XI.

Whether the military judge abused his discretion when he permitted SSgt Hagen's supervisor to testify in sentencing to improper matters in aggravation.

Additional Facts

During presentencing, SSgt Hagen objected to the Government eliciting, from his supervisor, a statement that SSgt Hagen was alleged to have made to his supervisor. R. at 777. The defense argued the statement was not a proper matter in aggravation under R.C.M. 1001(b)(4). R. at 778. Nonetheless, the military judge permitted SSgt Hagen's supervisor to testify that

SSgt Hagen had told her, "[I]f I get a slap on the wrist I'll be disappointed at the military system." R. at 782.

Standard of Review

This Court reviews a military judge's decision to admit or exclude evidence for abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). The abuse of discretion standard is detailed in Issue V, *supra*.

Law and Analysis

The Army Court of Criminal Appeals in *United States v. Pooler*, 18 M.J. 832, 833 (A.C.M.R. 1984), determined "a person's attitude toward the crime of which he has been convicted is directly related to that offense" and is therefore relevant for sentencing, and can fit within the category of evidence in aggravation of that offense. Even so, the military judge abused his discretion by admitting evidence because this evidence was not a matter in aggravation and was more prejudicial than probative. *Cf.* R. at 784-85 (military judge articulating his Mil. R. Evid. 403 balancing analysis).

SSgt Hagen requests this Honorable Court now reassess his sentence without approving a punitive discharge.

XII.

Whether the military judge abused his discretion when he did not consider portions of SSgt Hagen's sentencing evidence.

Additional Facts

During presentencing, SSgt Hagen sought to admit Defense Exhibit B, a character statement from SSgt Hagen's father. R. at 788; Def. Ex. B. The Government objected to consideration of a passage contained in Defense Exhibit B: "[I]t is his hope that the accused can have the choice to remain in the military to finish his enlistment honorably." R. at 789. The

defense contested that the Court could "give the letter the appropriate weight given the comment on service characterization." R. at 789. The military judge determined he would not consider the passage in the statement. R. at 794.

Standard of Review

This Court reviews a military judge's decision to admit or exclude evidence for abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). The abuse of discretion standard is detailed in Issue V, *supra*.

Law and Analysis

There is a prohibition against a witness suggesting a particular sentence in order to prevent a witness from testifying the accused has "[n]o potential for continued service." *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989). But the defense can admit evidence, for example, "that a witness would continue to serve with the accused" because this is mitigation evidence. *United States v. Griggs*, 61 M.J. 402, 407 (C.A.A.F. 2005). The distinction, which allows a permissive approach to the defense, is grounded in the "policy behind R.C.M. 1001(b)(5) . . . to prevent commanders or their representatives from offering opinions which were not rationally based (i.e., lacked foundation) and implicated undue command influence." *Id.* Whereas defense evidence does not foster the same concern in the military justice system because it is offered by the defense. *Id.* Here, SSgt Hagen's father did not state whether SSgt Hagen should be punitively discharged, only his hope that SSgt Hagen could remain in the military to finish his enlistment honorably. Def. Ex. B. Therefore, the military judge erred in excluding the passage in the letter, which provided permissible mitigation evidence for SSgt Hagen. SSgt Hagen requests this Honorable Court now reassess his sentence without approving a punitive discharge.

XIII.

Whether the record is incomplete.

Standard of Review

"Whether an omission from a record of trial is 'substantial' is a question of law which [appellate courts] review *de novo*." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes confinement for more than six months. 10 U.S.C. § 854. SSgt Hagen was sentenced to a reprimand, reduction to the grade of E-1, 14 months' confinement, and a dishonorable discharge. R. at 816. SSgt Hagen's record is nonetheless incomplete because there is not a complete record of the Article 30a proceeding which occurred in this case.

The Article 30a proceeding was required to be included in the record of trial because SSgt Hagen's case was referred to trial. R.C.M. 309(e) ("A separate record of any proceeding under this rule shall be prepared . . . [and] [i]f charges are referred to trial in the case, such record shall be included in the record of trial"). This Court may choose to remand this case for correction. R.C.M. 1112(d)(2) ("[a] superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction"). However, this Court's attachment of the Article 30a proceeding does not complete the record. *See* Order, 21 February 2025 (attaching the Article 30a proceeding documents proffered by the Government with no confirmation from the military judge or opportunity for defense counsel to object). This is because attachments to the appellate record do not complete the record. *See*, *e.g.*, *United States v.*

Garcia-Arcos, No. ACM 40009, 2022 CCA LEXIS 339, at *6 (A.F. Ct. Crim. App. 9 Jun. 2022) ("[W]e do not consider the attachments to the appellate record as a means to complete the record; we assume our granting both motions does not change the fact that the record, as certified and submitted to the court, is incomplete."); *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2 (A.F. Ct. Crim. App. 26 Oct. 2022) ("We acknowledge the motion to attach was granted, but we do not agree that this cures the defect without the exhibit actually being incorporated into the ROT."); *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *7 (A.F. Ct. Crim. App. 6 Jan. 2022) ("[W]e considered the attachments to trial counsel's declaration to determine whether the omission of the exhibits from the record of trial was substantial, . . . ; we did not consider the exhibits as a means to complete the record.").

Where a substantial omission exists and the record is not corrected, a rebuttable presumption of prejudice is raised, and where unrebutted, the appellant may not receive a sentence that includes a punitive discharge. *See Stoffer*, 53 M.J. at 27. Here, this Court chose not to correct the record when it denied SSgt Hagen's motion to remand for correction and SSgt Hagen's record remains incomplete.

Therefore, SSgt Hagen requests this Court remand this case pursuant to R.C.M. 1112 and, if the record cannot be completed, disapprove his punitive discharge.

XIV.

Whether the Government's presumptively unreasonable 183-day post-trial processing delay adversely affects the public's perception of the fairness and integrity of the military justice system, and the record as submitted, still contains errors that together with the delay in this case reflect systemic neglect by the Government.

Standard of Review

This Court reviews de novo whether an appellant has been denied the due process right to speedy appellate review. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Analysis

The 183-day post-trial processing delay in this case is presumptively unreasonable and triggers an analysis of the four non-exclusive factors set forth in *Barker v. Wingo,* 407 U.S. 514, 530 (1972), to assess whether SSgt Hagen's due process right to timely post-trial and appellate review has been violated. *United States v. Livak*, 80 M.J. 631, 634 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135); *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *8-9 (A.F. Ct. Crim. App. 2 Nov. 2023). "Once this due process analysis is triggered by a facially unreasonable delay, the four factors are balanced, with no single factor being required to find that post-trial delay constitutes a due process violation." *Moreno*, 63 M.J. at 136 (citing *Barker*, 407 U.S. at 533 ("We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of [due process]"). Those factors are: (1) the length of the delay; (2) the reasons for the delay; (3) SSgt Hagen's assertion of his right to a timely review; and (4) prejudice to him. *Livak*, 80 M.J. at 634.

Even if this Court does not find a due process violation, this Court may grant relief for excessive post-trial delay under its broad authority to determine sentence appropriateness pursuant to Article 66(d), UCMJ, 10 U.S.C. § 866(d). *See United States v. Tardif*, 57 M.J. 219, 225

(C.A.A.F. 2002); *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *15 (A.F. Ct. Crim. App. 7 Jun. 2024). SSgt Hagen asks that this Court provide him meaningful relief that is consistent with justice and good order and discipline.

The 183-day was presumptively unreasonable. *Livak*, 80 M.J. at 633 (holding when docketing occurs more than 150 days after sentencing, the delay is presumptively unreasonable). This delay exceeded the threshold by thirty-three days. To justify this delay, there must be justifiable, case-specific circumstances that are not just "administrative matters, manpower constraints or the press of other cases." *Moreno*, 63 M.J. at 143. The record of trial reflects no justifiable reason for the delay in this case, and tolerating the Government's unreasonable delay would affect the public perception of the military justice system. *See United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F 2006).

Further, when SSgt Hagen's case was docketed, it was docketed incomplete. *See* Issue XIII. The belated and incomplete docketing of SSgt Hagen's case is evidence of institutional neglect and therefore, even if this Court finds no due process violation, sentencing relief is still appropriate. *See Tardif*, 57 M.J. at 225; *Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17 (finding the Air Force currently has "a systemic problem" with post-trial processing errors, which "indicat[es] institutional neglect").

Therefore, SSgt Hagen requests this Court provide meaningful relief.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO EXCEED PAGE LIMIT
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN** United States Air Force *Appellant.*	)	No. ACM 40561 7 April 2025

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 length limitations. This Answer requires exceeding this Honorable Court's length and word limitations due to the nature and number of issues raised by Appellant in his 39-page Assignments of Error brief. Appellant raises a total of 14 issues that require in-depth discussion of the facts, motion rulings, and witness testimonies.

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

GRANTED
10 APR 2025

[redacted]
BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 April 2025.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-5) **JOHNATHON T. HAGEN** United States Air Force *Appellant.*	)	No. ACM 40561
	)	7 April 2025

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

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INDEX OF BRIEF

III.

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.

IV.

THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE DEFENSE MOTION TO DISMISS OR WHEN HE DECLINED TO ABATE THE PROCEEDINGS.

IX.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO COMPEL DISCOVERY.

X.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION ASSERTING UNREASONABLE MULTIPLICATION OF CHARGES FOR SENTENCING.

XI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE PERMITTED TSGT AR-J TO TESTIFY DURING THE SENTENCING PROCEEDING.

XII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DID NOT CONSIDER PORTIONS OF APPELLANT'S SENTENCING EVIDENCE.

XIII.

THE RECORD IS NOT INCOMPLETE.

XIV.

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TABLE OF AUTHORITIES

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Staff Sergeant (E-5) JOHNATHON T. HAGEN United States Air Force *Appellant.*	)	No. ACM 40561 7 April 2025

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

ISSUES PRESENTED

I.

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

II.

WHETHER THE CONVENING AUTHORITY'S SELECTION OF THE MEMBERS DEMONSTRATES A PRIMA FACIE SHOWING THAT GENDER WAS IMPERMISSIBLY CONSIDERED, GIVING RISE TO A PRESUMPTION THAT THE PANEL WAS NOT PROPERLY CONSTITUTED.

III.

WHETHER THE APPLICATION OF 18 U.S.C. § 922 TO APPELLANT WARRANTS CORRECTION.

IV.[1]

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT THE FINDINGS OF GUILT.

V.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO DISMISS (OR ABATE THE PROCEEDINGS).

VI.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS.

VII.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION EXCLUDE EVIDENCE.

VIII.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO COMPEL THE PRODUCTION OF A CONSULTANT IN THE FIELD OF PEDIATRICS.

IX.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO COMPEL DISCOVERY.

X.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION ASSERTING UNREASONABLE MULTIPLICATION OF CHARGES FOR SENTENCING.

[1] Issues IV through XIV are raised in accordance with United States v. Grostefon, 12 M.J. 431 (1982).

XI.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE PERMITTED APPELLANT'S SUPERVISOR TO TESTIFY IN SENTENCING TO IMPROPER MATTERS IN AGGRAVATION.

XII.

WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DID NOT CONSIDER PORTIONS OF APPELLANT'S SENTENCING EVIDENCE.

XIII.

WHETHER THE RECORD IS COMPLETE.

XIV.

WHETHER THE GOVERNMENT'S PRESUMPTIVELY 183-DAY POST-TRIAL PROCESSING DELAY ADVERSELY AFFECTS THE PUBLIC'S PERCEPTION OF THE FAIRNESS AND INTEGRITY OF THE MILITARY JUSTICE SYSTEM, AND THE RECORD AS SUBMITTED, STILL CONTAINS ERRORS THAT TOGETHER WITH THE DELAY IN THIS CASE REFLECT SYSTEMIC NEGLECT BY THE GOVERNMENT.

STATEMENT OF CASE

On 27 July 2023, a general court-martial composed of officer members found Appellant guilty, contrary to his pleas, of one charge and two specifications of viewing and possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). (*Entry of Judgment*, 5 September 2023, ROT, Vol. 1.)[2] The military judge sentenced Appellant to confinement for fourteen (14) days, a dishonorable discharge, reduction to the grade of E-1, and a reprimand. (Id.) The convening authority took no action on the findings and sentence and

[2] Unless otherwise noted, all references to the UCMJ, Rules for Courts-Martial (R.C.M.), and Military Rules of Evidence (Mil. R. Evid.) are to the versions published in the Manual for Courts-Martial, United States (2019 ed.) (MCM).

denied Appellant's request for deferment of the adjudged forfeitures. (*Convening Authority Decision on Action*, 10 August 2023, ROT, Vol. 1.)

STATEMENT OF FACTS

Relevant facts are provided for each issue below.

ARGUMENT

I.

PROSECUTION EXHIBIT 1 WAS NOT TESTIMONIAL AND DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL RIGHT TO CONFRONTATION.

Additional Facts

The National Center for Missing and Exploited Children's (NCMEC) mission is to "help find missing children, reduce sexual exploitation, and prevent child victimization." (App. Ex. XV, Attachment at page 8.)

On October 12, 2021, Dropbox, Inc. (Dropbox),[3] an electronic service provider (ESP), submitted a report to NCMEC via a CyberTipline. (Id. at 8-9.) NCMEC created the CyberTipline to "allow persons to report online" child pornography amongst other acts of child sexual exploitation. (Id. at 8.) NCMEC "generates CyberTipline reports . . . in the regular course of business." (Id. at 9.) The report from Dropbox concerned a person with the following information: (1) screen/user name: "John H;" (2) email address: johnathon.hagen@outlook.com; and (3) User ID: "3617165232." (Id. at 8.) This information was considered subscriber data and was contemporaneously created when inputted into the system by the user. (App. Ex. XXV at 3.) Dropbox categorized the incident type as "Child Pornography" and uploaded five photographs through the CyberTipline. (App. Ex. XV, Attachment at page 8.) Dropbox

[3] Dropbox is a company that offers cloud storage.

described the images as containing content which showed a "prepubescent minor engaged in a sex act." (Id. at 9.) Dropbox further indicated that it, as the ESP, had viewed the contents of the uploaded files and four of the five images were publicly available. (Id.)

Once NCMEC receives a report from an ESP, or person, a CyberTipline report is auto-generated containing four sections – Section A, Section B, Section C, and Section D. (Id.) Section A "contains information submitted by the reporting" ESP and Section B "contains automated information compiled and documented by NCMEC based on information provided by a reporting ESP." (Id. at 9.) NCMEC staff "cannot alter or change information submitted by a reporting to the CyberTipline." (Id. at 8.)

The unredacted CyberTipline report autogenerated from Dropbox's tip was ten pages in length and contained information regarding the incident type "apparent child pornography," a portion titled "Suspect," which listed Appellant's email address and screen/username (John H), as well as various other references to a "suspect." (App. Ex. XXII). The report also listed the below information:

Further Information on Uploaded Files

Number of uploaded files in each categorization category:

A1: 4

The following categorization system was created by various ESPs in January 2014:

	Content Ranking	1	2
A	Prepubescent Minor	A1	A2
B	Pubescent Minor	B1	B2

Rank	Term	Definition
1	Sex Act	Any image of sexually explicit conduct (actual or simulated sexual intercourse including genital-genital, oral-genital, anal-genital, or oral-anal whether between person of the same or opposite sex), bestiality, masturbation, sadistic or masochistic abuse, degradation, or any such depiction that lacks serious literary, artistic, political, or scientific value.
2	Lascivious Exhibition	Any image depicting nudity and one or more of: restraint, sexually suggestive poses, focus on genitals, inappropriate touching, adult arousal, spreading of limbs or genitals, and such depiction lacks serious literary, artistic, political, or scientific value.

Uploaded File Information

File Tag(s): Automated file categorization is based on NCMEC's review of uploaded files in this report **OR** a "Hash Match" of one or more uploaded files to visually similar files that were previously viewed and categorized by NCMEC at the time a PDF of this report was generated.

Files and Categorization

Filename	MD5	Categorization
cp-boy-12.jpg	a0ebb04911e8738a82f6118f8a2bd7e9	Apparent Child Pornography
cp-boy-15.jpg	080d5041f71b752bfb0eca7753ea4e77	Apparent Child Pornography

(Id. at 6.)

Trial defense counsel filed a motion to suppress the CyberTipline report. (App. Ex. XIV). Government trial counsel opposed. (App. Ex. XV). During oral arguments, trial defense counsel's argument focused on Dropbox's contributions to the CyberTipline; specifically what defense categorized as "human interactions" versus information automatically generated. (R. at 106-117.)

After hearing arguments, the military judge issued a written ruling. (App. Ex. XXXI). In his ruling, the military judge determined the "'machine-generated' data cited in the NCMEC report . . . is nontestimonial" and the "report containing this information qualifies as a record of regularly conducted activity." (Id. at 12.) Specifically, in Section A, he ordered the redaction of the words: "Child Pornography (possession, manufacture, and distribution)," "Point of Contact for Law Enforcement," and "Files Not Reviewed by NCMEC, Hash Match NCMEC Incident Type." (Id. at 10). He also ordered the redaction of the word "suspect" throughout the document and found Section C to be cumulative and, therefore, inadmissible. (Id.)

Ultimately, a very heavily redacted and shortened version of the NCMEC report, complying with the military judge's ruling, was admitted into evidence by the Government as Prosecution Exhibit 1.

Standard of Review

Whether a statement is testimonial for purposes of the Sixth Amendment is a question of law this Court review de novo. United States v. Baas, 80 M.J. 114, 120 (C.A.A.F. 2020) (citation omitted). If a violation of the Confrontation Clause is found, this Court cannot affirm the decision unless it is convinced beyond a reasonable doubt that the error was harmless. *See* United States v. Rankin, 64 M.J. 348, 353 (C.A.A.F. 2007). This "standard is met where a court

is confident that there was no reasonable possibility that the error might have contributed to the conviction." United States v. Tovarchavez, 78 M.J. 458, 460 (C.A.A.F. 2019) (citing United States v. Chapman, 386 U.S. 18, 24 (1967)).

Law and Analysis

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

"Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). "Although not every business record is necessarily nontestimonial . . . the characteristics that distinguish documents prepared 'in the course of a regularly conducted business activity' from those prepared 'in anticipation of litigation' under [Mil. R. Evid.] 803(6) . . . are also indicative of an administrative purpose rather than an evidentiary purpose." United States v. Tearman, 72 M.J. 54, 61 (C.A.A.F. 2013).

"[A] statement is testimonial if 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" United States v. Sweeney, 70 M.J. 296, 301 (C.A.A.F. 2011) (*quoting* United States v. Blazier, 69 M.J. 439, 442 (C.A.A.F. 2010)). "[M]achine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not

'testimonial.'" Blazier, 68 M.J. 218, 224 (C.A.A.F. 2010) (*citing* United States v. Lamons, 532 F.3d 1251, 1263 (11th Cir. 2008); United States v. Moon, 512 F.3d 359, 362 (7th Cir. 2008); United States v. Washington, 498 F.3d 225, 230-31 (4th Cir. 2007); United States v. Hamilton, 413 F.3d 1138, 1142-43 (10th Cir. 2005); United States v. Khorozian, 333 F.3d 498, 506 (3d Cir. 2003); *see also* Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 380 (2d ed. 1994) ("[N]othing 'said' by a machine ... is hearsay")).

Machine-generated data and printouts are distinguishable from human statements, as they "involve so little intervention by humans in their generation as to leave no doubt they are wholly machine-generated for all practical purposes." Lamons, 532 F.3d at 1263, n.23.

A. Prosecution Exhibit 1 was not testimonial.

Recently this Court, in United States v. Goodwater, was called upon to determine whether a NCMEC CyberTipline report was testimonial or not. No. 40304, 2024 CCA LEXIS 493, at *2 (A.F. Ct. Crim. App. 22 Nov. 2024) (unpub. op.). While noting the CyberTipline report was "a record of regularly conducted business activity" under Mil. R. Evid. 803(6), this Court did find that portions of the report were testimonial. Goodwater, 2024 CAAF LEXIS 493 at *9. This Court explained the "report served as the reporting mechanism to law enforcement which triggered the criminal investigation" and "involved more than a routine and objective cataloguing of unambiguous factual matters." Id. at *10. Upon review of the report in that case, this Court found, at minimum, the "following statements in the report were testimonial: (1) 'Incident Type: Child Pornography (possession, manufacture, and distribution)' followed by the exact date and time of incident reported; (2) 'Suspect' information including an email address and username; and (3) 'Were entire contents of uploaded file publicly available? Yes.'" Id. at *10-11.

Here, in contrast to the report submitted in Goodwater, Prosecution Exhibit 1 was mostly devoid of testimonial evidence. As an initial matter, in his brief, Appellant concedes the information contained in Section B was machine-generated and, therefore, not testimonial. (App. Br. at 9).

As for the information in Section A, the Government acknowledges in Goodwater, this Court determined the following statement in a CyberTipline report was testimonial: "'Were entire contents of uploaded file publicly available? Yes.'" Goodwater, 2024 CAAF LEXIS 493 at *9. While this statement was also included in Prosecution Exhibit 1 in this case, the Government contends this portion of the report was like the portion of the report which stated: "Did the Reporting ESP view entire contents of uploaded files? Yes" and which this Court did not highlight as testimonial in Goodwater.

Additionally, while this Court found the statement regarding "[s]suspect information including email address and username" was testimonial in that case's report, it was not testimonial in Appellant's case because it was machine generated and not affixed with the "suspect" label. Goodwater, 2024 CAAF LEXIS 493 at *11. Specifically, in Prosecution Exhibit 1, Section A listed Appellant's email and username, but, importantly, it was not categorized as belong to a "suspect" as in Goodwater. The term "suspect" never appeared in the admitted exhibit. (Pros. Ex. 1.) The information regarding username, email, and IP address only appeared as it would have in Dropbox's system, which would have been simultaneously created at the same time the user (Appellant) input it. An employee for Dropbox explained, "data like basic subscriber information (name, contact, login, activity with corresponding I.P. activity, etc.) . . . are created contemporaneously with the reflected data." (App. Ex. XXV.) Therefore, this data – username, email, and IP address – without the "suspect" label was only a "routine and

objective cataloguing of unambiguous factual matters" created through Appellant's use of Dropbox's services. Goodwater, 2024 CAAF LEXIS 493 at *10.

The majority of information in the CyberTipline report in Appellant's case, as the military judge intended, was either "machine-generated data . . . and thus[,] not hearsay" nor testimonial in nature. Blazier, 69 M.J. at 224. Importantly, the CyberTipline report was gutted of all references to Appellant as a "suspect" or any mention of child pornography. (Pros. Ex. 1). The information that remained was of "a routine and objective cataloguing of unambiguous factual matters" bereft of any human determination regarding what the content was. Goodwater, 2024 CAAF LEXIS 493 at *8 (citing Rankin, 64 M.J. at 348).

However, if this Court finds the remaining statements were testimonial, the Government has met its burden to demonstrate any error was harmless beyond a reasonable doubt.

B. Even if there was a violation of the Confrontation Clause, the error was harmless beyond a reasonable doubt.

In determining whether a Confrontation Clause error is harmless beyond a reasonable doubt, a court will conduct a balancing test taking into consideration the following factors: "(1) the importance of the unconfronted testimony in the prosecution's case, (2) whether that testimony was cumulative, (3) the existence of corroborating evidence, (4) the extent of confrontation permitted, and (5) the strength of the prosecution's case." Sweeney, 70 M.J. at 306 (citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431 (1986)).

Appellant argues the error was not harmless beyond a reasonable doubt because the Government relied on the CyberTipline report to prove: "that at a certain date and time, images and GIFs with certain filenames were uploaded to Dropbox." (App. Br. at 10). But as discussed below there was no "reasonable possibility that the evidence complained of might have contributed" Appellant's conviction. Chapman, 386 U.S. at 23.

Here, four out the five Van Arsdall factors weigh in favor of the Government. First, a minimal number of testimonial statements were introduced and relied on in the Government's case. Again, Appellant concedes that Section B of the CyberTipline report was non-testimonial and Section A consisted of only three out of the seven pages of the exhibit. The information listed in those in Section A only referenced the email address, username, and IP address associated with the account (not labeled as belonging to a "suspect") and the five submitted files. (Pros. Ex. 1 at 3-6.) While there was information provided with the files (i.e.; "Were entire contents of uploaded file publicly available? Yes.") this information was not an essential fact as it was in Goodwater because Appellant was not charged with distribution of child pornography like the appellant in Goodwater.

As a result of the military judge's ruling, any information referencing child pornography, the term "suspect," and descriptions of child pornography were redacted from the admitted exhibit. (App. Ex. XXXI; Pros. Ex. 1). Further, as was evidenced by the testimony of the Air Force Office of Special Investigations (AFOSI) Special Agent EP and Investigator DR, the NCMEC report, as admitted, only served to provide context regarding how Appellant's misconduct was initially discovered. (R. at 443, 465-468). And while the report was a jumping off point for AFOSI's investigation, as Appellant states, that does not mean the admitted report was central to the Government's case. Therefore, the importance of the testimonial statements in Appellant's case was minimal.

Second and third, the testimonial statements in Section A were cumulative and independently corroborated. The IP address, email, username, and file names of the five images were all found on Appellant's MacBook Pro and iPhone during a digital analysis of his devices conducted by SA JB, who also testified. (Pros. Ex. 2.) Additionally, during Appellant's

interview he provided his email address and, while not specifically naming the five files, he did admit to possessing 15-20 images of child pornography. (Pros. Ex. 5). He also confessed that he searched for a site that displayed child pornographic material, took a screenshot of it, and saved it to Dropbox and, then after saving the images to Dropbox, he viewed the images again at least once or twice before his access was blocked. (R. at 473; Pros. Ex. 3.)

Finally, the overall strength of the Government's case was strong. An independent, digital analysis found the *exact* information contained within the admitted NCMEC report. (emphasis added). And while there was no testimony from NCMEC or Dropbox personnel, the examiner of Appellant's devices, SA JB, was subject to extensive cross-examination that did not reveal any errors or holes regarding the same information as was in the testimonial statements. (R. 583-619.) Of course, the Government's strongest evidence against the Appellant came from Appellant himself. Appellant admitted to searching for, viewing, and possessing child pornography when he voluntarily spoke to AFOSI agents, and a recording of his interview was played to the members.

Based on an evaluation of all the factors, there is no "reasonable possibility that the evidence complained of might have contributed" Appellant's conviction. Chapman, 386 U.S. at 23. Thus, Appellant's claim must fail.

II.

APPELLANT HAS NOT MADE A PRIMA FACIE SHOWING THAT THE CONVENING AUTHORITY CONSIDERED GENDER AND IS THEREFORE UNENTITLED TO A PRESUMPTION THAT THE PANEL WAS IMPROPERLY CONSTITUTED.

Additional Facts

Between referral of charges in July 2022 to the commencement of Appellant's trial on the merits in March 2023, the convening authority detailed members to court-martial duty on three different convening orders.[4] When detailing members, the convening authority received a list of proposed members and their data sheets. (*See Pretrial Advice*.) The Pretrial Advice provided to the convening authority stated, "If you decide to refer the charge and specifications to a GCM, you are required to select court members pursuant to Article 25, UCMJ. You should select personnel who, in your opinion, are the best qualified by reason of their age, education, training, experience, length of service, and judicial temperament." (Id.) In the First Indorsement to the Pretrial Advice, the convening authority stated, "By reason of age, education, training, experience, length of service, and judicial temperament under Article 25, UCMJ, I detail the following individuals to serve as members in the court-martial of United States v. [Appellant]." (First Indorsement, Pretrial Advice.)

The original convening order, dated 25 July 2022, detailed 14 officer members and seven enlisted members. (Special Order A-41.) During hearings on 6 March 2023 and 14 June 2023, neither Appellant nor his counsel objected to the court-martial composition of members.

[4] (Special Order A-41, 25 July 2022; Special Order A-46, 20 July 2023; Special Order A-47, 21 July 2023.)

On 21 July 2023, the convening authority excused 12 officer members and six enlisted members and detailed 12 additional officer members and six additional enlisted members to the court-martial panel. (Special Order A-47.) On 24 July 2023, Appellant elected to be tried by officer members. (R. at 268.) Considering this election, the enlisted court members were excused. (R. at 307.)

At no point did the defense file any motions regarding court-martial composition. Notably, at the beginning of the 24 July 2023 session, the military judge provided a summary of the parties' R.C.M. 802 sessions and highlighted that the "Trial counsel discussed with me the convening orders." (R. at 266.) Despite these discussions, neither Appellant nor his defense counsel ever objected or filed motions regarding court-martial composition.

Standard of Review

When no objection is made at the trial level, this Court reviews court-martial composition issues for plain error. United States v. King, 83 M.J. 115, 121 (C.A.A.F. 2023). Under plain error review, Appellant bears the burden of establishing that (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right. Id. at 123 (citation omitted). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law & Analysis

Pursuant to Article 25, "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C.S. § 825(e)(2). Absent contrary indication, military appellate courts presume that the convening authority acted in accordance with Article

25, UCMJ, in "carr[ying] out the duties imposed upon him by the Code and the Manual." United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020) (*citing* United States v. Wise, 6 C.M.A. 472, 478, 20 C.M.R. 188, 194 (1955)).

Here, Appellant contends that "impermissible criteria was allowed to enter the court member selection process" in his court-martial because when "relieving previously detailed members and detailing new members, the convening authority replaced the twelve members with traditionally male names with twelve members with traditionally male names," and "the six members with traditionally female names were replaced with six members with traditionally female names." (App. Br. at 14-15.) Appellant contends this "trade of one for one seems to indicate consideration of gender when selecting members." (Id. at 14.) Appellant is incorrect and has failed to demonstrate clear or obvious error related to the court-member selection process. Therefore, he is not entitled to relief.

Until Appellant raised his issue before this Court last month, Appellant had never claimed any issue with the composition of his court-martial, let alone that it was marred by an alleged impermissible use of gender. As noted above, there were no motions about improper panel constitution, nor were there any related objections at trial. Nowhere in the transcript does the word "gender" appear. (*See generally* R. 1-821.) Indeed, Appellant cannot point to anything in the transcript, exhibits, or allied papers that even *hints* at this issue.[5]

[5] While United States v. Jeter, 84 M.J. 68, 73 (C.A.A.F. 2023) was released following Appellants' trial, the trial participants in Jeter still litigated the issue of "systematic exclusions of members based on race and gender" at the trial level nonetheless. *See* Jeter, 84 M.J. at 71. Appellant did not, however, which proves fatal to his claim.

Still, Appellant now believes "impermissible criteria," namely gender, was "allowed to enter the court member selection process" in his case and that he has made a prima facia showing that this played a role in member selection. (App. Br. at 15.) Appellant is wrong.

In detailing prospective members to court-martial duty, the convening authority may not "exclude or intentionally include prospective members based on their race." Jeter, 84 M.J. at 73. Thus, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." Id. at 70.

Citing the number of excused and newly detailed males and females, along with the fact that Jeter had not been decided at the time of his court-martial, Appellant asserts that he has made such a showing. Even assuming that Jeter applies the same principles to gender as it does to race,[6] Appellant's claim still fails because he has failed to make a showing that gender played a role in the court-martial composition process.

To start, "prima facie" means "at first sight" or "on first appearance." Black's Law Dictionary (4th pocket ed. 2011). Here, there is nothing that suggests "at first sight" that gender "played a role in the panel selection process." Jeter, 84 M.J. at 69.

Further, as noted above, Jeter involved the issue of race and racial identifiers on court member nominee lists. Yet, the solicitation of racial identifiers was but *one* of many conditions which justified a presumption that race entered the selection process in that case. Id. In finding that the appellant had made the required prima facie showing, the Court of Appeals for the Armed Forces specifically noted the existence of evidence that "two African American members on the original convening order were subsequently removed pursuant to the first amendment to

[6] *See* Patterson, at *20-21.

the convening order; and three other courts-martial with African American accuseds were convened by this convening authority before all-white panel members." 84 M.J. at 74.

This demonstrates that it was not the racial identifiers, standing alone, which established the prima facie case in Jeter. Rather, it was the fact that "the effect of the subsequent amending convening orders replacing the original panel of ten members with nine all-white members *at least has the appearance of excluding members of Appellant's cognizable racial group* from his court-martial panel." United States v. Jeter, 81 M.J. 791, 796-97 (N-M Ct. Crim. App. 2021) (emphasis added). In this context, the racial identifiers were a pertinent factor because they might have been used to contribute to that perceived *exclusion*. *See* Jeter, 84 M.J. at 74 ("Although racial identifiers are neutral, they are capable of being used for proper as well as improper reasons.")

Here though, Appellant does not allege any issue with gender identifiers or, like in Jeter, that a certain gender was entirely *excluded* from selection. Instead, Appellant points to the fact that the convening authority excused 12 males and six females and then replaced them with the same number of females and males. (App. Br. at 14.) According to Appellant, this "seems to indicate consideration of gender when selecting members . . . ." (Id.)

Yet, Appellant offers zero authority for this pure speculation. In effect, he asks this Court to presume that instead of selecting members who were "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," the convening authority "*seem[ed]"* to consider gender when selecting members. (Id.) (emphasis added.) But as discussed *supra*, this Court presumes the opposite – that convening authorities act in accordance with Article 25, UCMJ –absent evidence to the contrary. Bess, 80 M.J. at 10. Just as "a prima facie claim of discrimination is not established by the absence of minorities on a single

panel," neither is a prima facie claim of discrimination established by the detailing of specific genders to a particular panel. United States v. Loving, 41 M.J. 213, 286 (C.A.A.F. 1994). Appellant's pure conjecture on what he thinks "seems" to have happened in this case is not enough, especially considering his greater burden of showing clear or obvious error.

Further, our superior Court's decision in Jeter dealt with the issue of "systemic *exclusion* of members based on race and gender." *See* Jeter, 84 M.J. at 71. (emphasis added.) There, the Court was concerned with the *exclusion* of African American members. Here though, there is no exclusion, let alone systemic exclusion, of any gender. Jeter is simply inapplicable to Appellant's case.

Finally, this Court recently denied relief for this exact issue in United States v. Patterson. No. ACM 40426, 2024 CCA LEXIS 399 (A.F. Ct. Crim. App. 27 Sep. 2024). There, like Appellant here, an appellant contended that his court-martial panel was improperly constituted because the convening authorities inappropriately considered gender in selecting members. Id. at *19. That appellant, like Appellant here, noted an instance of choosing a particular set of females and males, calling it "highly unlikely" unless the convening authority considered gender. Id.

This Court was not persuaded that the appellant had met his burden to demonstrate "clear" or "obvious" error in the selection process. Id. at *21. This Court was also not persuaded that the selection on one occasion of two females and two males from a pool of two female and seven male prospective members met the "clear" or "obvious" standard where (1) an innocent explanation is facially plausible, and (2) Appellant has not identified a similar pattern of possible discrimination in any of the other five member selections in this court-martial, nor in any other court-martial involving these convening authorities. Id. at *22. Notably, Appellant in

this case has similarly not identified any similar pattern in any of the member selections in this case or in any other court-martial involving this convening authority.

Finally, this Court explained the distinguishing factors between that case and Jeter, all of which also apply in this case. First, the appellant in Jeter did not forfeit the issue but instead challenged the selection process at trial, alleging "systematic exclusion of members based on race and gender." Id. at *22 (*citing* Jeter, 84 M.J. at 71). Further, the record in Jeter indicated the panel was composed entirely of "white men," and that the two African American members on the original convening order were subsequently removed from the panel by the convening authority. Id. at *23 (*citing* Jeter, 84 M.J. at 74). Finally, "three other courts-martial with African American accuseds were convened by [Jeter's] convening authority before all-white panel members." Jeter, 84 M.J. at 74. Our superior Court concluded those circumstances, coupled with the provision of racially identifying information to the convening authority, were sufficient for a prima facie showing under ordinary standards of review. However, this Court found in Patterson that "we do not have equivalent circumstances," and that the appellant's "burden to demonstrate 'clear' or 'obvious' error is higher." Patterson, at *23.

The same is true in this case. Where there is no appearance of gender motivated member selection, there is no prima facie showing. Here, Appellant has not made a prima facie showing that gender "played a role in the panel selection process." Jeter, 84 M.J. at 69. Thus, he is not entitled to the presumption that his panel was improperly constituted. Further, because he has failed to make the required showing, he cannot demonstrate error, much less clear or obvious error, and is entitled to no relief.

III.

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

Additional Facts

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

Standard of Review

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

Law and Analysis

The Courts of Criminal Appeals possess "limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). Appellant acknowledges that the Court of Appeals for the Armed Forces recently rejected the authority of the Courts of Criminal Appeals to address the firearms prohibition notation in the STR under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) in United States v. Williams, __ M.J. __, 2024 CAAF LEXIS 501, at *12-13 (C.A.A.F. Sep. 5, 2024). (App. Br. at 17.) Still, Appellant claims that this Court may "correct" the alleged error through Article 66(d)(2), UCMJ. 10 U.S.C. § 866(d)(2); *see also* Williams, 2024 CAAF LEXIS 501, at *14-15. (Id.) Appellant's assertions are inaccurate for several reasons.

A. Even if some error was demonstrated, this Court lacks jurisdiction to determine the constitutionality of a collateral issue.

Appellant's argument that this Court can simply make the requested "correction" pursuant to Article 66(d)(2) presumes that 18 U.S.C. § 922 is unconstitutional. First, the preliminary question of the statute's constitutionality far exceeds the scope of this Court's authority under Article 66(d)(1) and (2), as discussed below. Moreover, the law mandating the prohibition is clear: the Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1).

Here, Appellant concedes that a maximum punishment of 10 years imprisonment was authorized for each of his two convictions. (App. Br. at 16-18; *MCM*, pt. 4, para. 93.d.(1).) While the analysis should end there, Appellant nonetheless maintains that the statute's firearm ban should not apply to him because his convictions were not sufficiently violent in nature to overcome his Second Amendment right to bear arms. (App. Br. at 18.) But Appellant's focus on whether the nature of his crimes should justify a firearm ban – at least for Article 66(d) analysis – is misplaced. Article 66(d)(2) grants courts of criminal appeals the authority to correct facial errors in post-trial documents and to provide appropriate relief for excessive delay in processing. Appellant's request, on the other hand, asks this Court to declare a federal statute unconstitutional as applied and except him from its application under the guise of a post-trial processing error. (App. Br. at 17.)

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 *24. First, the Vanzant opinion was clear as to the scope of its jurisdiction under Article 66, UCMJ, and none of the cases cited by Appellant support his position that this Court has the authority to amend post-trial documents beyond correcting clerical errors related to the findings or sentence. *See*, e.g., United States v. Jones, No. ACM S32717, 2022 CCA LEXIS 652, at *4 (A.F. Ct. Crim. App. 7 Nov. 2022); United States v. Graves, No. ACM 40340, 2023 CCA LEXIS 356, at *8-9 (A.F. Ct. Crim. App. 23 Aug. 2023). (App. Br. at 16-22.)

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

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

Then the STR and its First Indorsement are entered into the record again as attachments to the EOJ. Article 60c (a)(1)(A). Because they are entered again as attachments to the EOJ

they are simultaneous with the judgment of the court. The STR and the STR's First Indorsement are not errors occurring after the judgment was entered into the record.

B. No meaningful remedy is available.

Appellant suggests that this Court should send the "defective record" – referring to the First Indorsement to the EOJ – back to the military judge for correction under R.C.M. 1112(d)(2). (App. Br. at 22.) First, it is unclear how the military judge could accomplish such a change to the SJA's indorsement. Then, even if removal of the firearms prohibition notation to the First Indorsement to the EOJ were possible, it would be a pyrrhic victory. An amendment to the EOJ's indorsement would not remove the firearms annotation from the STR that was incorporated into the EOJ (*EOJ*, ROT, Vol. 1, Attach. at 3) because that annotation on the STR occurred before the EOJ was entered into the record.

The statute's application is not triggered by a First Indorsement notation nor is it within the SJA's discretion. More plainly stated, the SJA's notation on the First Indorsement does not disqualify Appellant from possessing firearms; § 922 does. The SJA's notation simply ensures proper criminal indexing. Similarly, even if Appellant's proposed course of action were sufficient to accomplish the removal of Appellant's firearm prohibition from the National Criminal Background Check System (NICS), it would still be unlawful for Appellant to possess a firearm pursuant to 18 U.S.C. § 922(g)(1). Thus, Appellant would remain in the same situation he is in now.

Since this Court's intervention under Article 66(d)(2) would not provide meaningful relief, this Court should deny Appellant's claim.

IV.

THE EVIDENCE IS LEGALLY AND FACTUALLY SUFFICIENT TO SUPPORT APPELLANT'S CONVICTIONS.

Additional Facts

At the time Appellant committed the charged misconduct, he was stationed overseas in at Ramstein Air Base (AB) in Germany. (*Charge Sheet*, 25 July 2022, ROT, Vol. 1.) Appellant's misconduct was first reported to German law enforcement, who then coordinated with AFOSI at Ramstein AB of the incident involving Appellant. (R. at 445-48.) As a part of AFOSI's investigation, Appellant was called in to the detachment for questioning on 4 January 2022. (R. at 468.) During that interview, he made a series of admissions to the suspected misconduct. (R. at 471-517.) Specifically, he voluntarily stated:

> I want to say it probably was around the September, October timeframe though, of last year. I had a Dropbox account that I utilized for various reasons. And I happened to get into a conversation with somebody that sparked a curiosity. I curiosity that was both disgusting to me…I want to make sure that's clear. Disgusting, but enticing…And that is what led to me, searching out a site that did display child pornographic material. And unfortunately, I made the very foolish decision of taking a screenshot of it and saving it to that Dropbox. And in a very short period of time after that, I sought to remove all evidence of that, because I realized the absolute stupidity…

(R. at 473 (capturing audio from Pros. Ex. 3).)

Appellant explained that his interest in child pornography was initially sparked after he made a "connection" who told him about a "Tor browser, in which you can access onion websites" and "dark web websites." (R. at 476 (capturing audio from Pros. Ex. 3.) Appellant then admitted, "Well, seek and you will find. I found a website predominantly focused on the nudity of young boys." (Id.) He described the website as requiring payment to view all the

content, but said he was easily able to take screenshots and snippets of some of the images without submitting a payment. (R. at 477.)

When asked by the agents why he took the screenshots, Appellant responded, "admittedly, for – at the time it was for being able to not having to go to a site to look at them . . . Just a straight up, to be able to look at them again without having to seek them out." (R. at 483.) When further asked about the purpose, Appellant stated, "[j]ust for me. That was solely for the purpose of my perverse pleasures." (Id.) He then clarified that he was referring to his own sexual gratification. (Id.) Finally, Appellant described the images he captured to AFOSI, stating, "I think there may be was one or two that actually displayed the youths being in a sexual interaction with either other youths or an adult . . . But for the most part the images were just images of young boys nude." (R. at 483-84.)

Consistent with Appellant's statements about having deleted the contraband from his devices, AFOSI did not find any child pornographic material when they conducted their search of his devices. However, Appellant's laptop did contain remnants of file paths with filenames matching those initially reported by Dropbox to NCMEC. (R. at 598, 599, 601; Pros. Ex. 2.)

Based on Appellant's recorded admissions to AFOSI, a very heavily redacted and shortened version of the NCMEC report containing the images and respective filenames, and the remnants of file paths found on Appellant's laptop with filenames identical to those reported by Dropbox, the Government argued that Appellant should be found guilty of the charge and specifications. *See*, *e.g.*, R. at 733.

Standard of Review

The standard of review for factual and legal sufficiency is de novo. United States v. McAlhaney, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

The test for legal sufficiency is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. King, 78 M.J. 218, 221 (C.A.A.F. 2019) (internal citations omitted). This test does not require a court to ask whether it believes the evidence established guilt beyond a reasonable doubt, but rather whether any rational factfinder could do so. United States v. Acevedo, 77 M.J. 185, 187 (C.A.A.F. 2017). The term reasonable doubt, however, does not mean that the evidence must be free from conflict. United States v. Wheeler, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017), aff'd 77 M.J. 289 (C.A.A.F. 2018). In resolving questions of legal sufficiency, the Court is bound to draw every reasonable inference from the evidence of record in favor of the prosecution, giving "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." United States v. Plant, 74 M.J. 297, 301 (C.A.A.F. 2015); United States v. Oliver, 70 M.J. 64, 68 (C.A.A.F. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1973)). As a result, the standard for legal sufficiency involves a very low threshold to sustain a conviction. *King*, 78 M.J. at 221.

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 witness," 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)). 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. Galchik, 52 M.J. 815, 818 (A.F. Ct. Crim. App. 2000) (citation omitted).

Analysis

Appellant's guilty findings for wrongfully possessing child pornography and wrongfully viewing child pornography are factually and legally sufficient. To sustain a conviction for unlawfully possessing and viewing child pornography, the government was required to prove, beyond a reasonable doubt, that Appellant knowingly and wrongfully possessed, received, or viewed child pornography and that the conduct of the accused was either: (i) to the prejudice of good order and discipline in the armed forces; (ii) was of a nature to bring discredit upon the armed forces; or (iii) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. Manual for Courts-Martial, United States, pt. IV, ¶ 95.b.

Here, the Charge and Specifications were specifically framed as follows:

> CHARGE: Violation of the UCMJ, Article 134
>
> Specification 1: In that [Appellant], United States Air Force, 86th Communications Squadron, Ramstein Air Base, Germany, did, at worldwide locations, between on or about 1 January 2017 and on or about 31 October 2021, knowingly and wrongfully possess child pornography, to wit: digital images of minors, or what appear to be minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.
>
> Specification 2: In that [Appellant], United States Air Force, 86th Communications Squadron, Ramstein Air Base, Germany, did, at worldwide locations, between on or about 1 January 2017 and on or about 31 October 2021, knowingly and wrongfully view child pornography, to wit: digital images of minors, or what appear to be

> minors, engaging in sexually explicit conduct, and that said conduct was of a nature to bring discredit upon the armed forces.

(*Charge Sheet*, 25 July 2022, ROT, Vol. 1.)

Appellant argues that his conviction for possession of child pornography and unlawfully viewing child pornography are factually and legally insufficient because the Government did not call a representative from Dropbox to testify at trial. (App. Gros. Br. at 1.) Specifically, he claims the Government did not prove that the four files admitted as Prosecution Exhibit 4 were the same four files that were initially flagged by Dropbox and forwarded to NCMEC. (App. Gros. Br. at 1.) Because the original files forwarded from Dropbox were not preserved, Appellant takes the position that this live testimony from a Dropbox representative was crucial to the government's ability to satisfy its burden. Appellant is mistaken.

Appellant's argument under this point fails to recognize that the government was not required to present any specific quantum of evidence or type of evidence to sustain a conviction. Wheeler, 76 M.J. at 568. Instead, the government was simply required to present evidence sufficient to reasonably support a finding of guilt beyond a reasonable doubt. Acevedo, 77 M.J. at 187.

The lack of testimony from a Dropbox representative to confirm that NCMEC's records accurately reflect the information it provided through the cyber tip is far from dispositive of the government's ability to prove that Appellant wrongfully possessed and viewed child pornography – especially given the condensed version of the CyberTipline report that was admitted into evidence. Here, among other witnesses, the Government called Special Agent JB, a digital forensics consultant, who conducted the digital forensic examination in Appellant's case. (R. at 583, 591-92.) *See generally* United States v. Rodriguez-Rivera, 63 M.J. 372, 383 (C.A.A.F. 2006) (finding that the testimony of one witness may be enough to meet the burden

beyond a reasonable doubt so long as the factfinder finds the witness's testimony relevant and sufficiently credible). Special Agent JB walked the members through prosecution exhibit 2, the digital forensic examination report from Appellant's devices. (R. at 588-600; Pros. Ex. 2.). The report showed the below file paths under a folder titled "for my eyes only":

- **cp-boy-12.jpg**. The referenced file path for this is /Users/PlatoTroop/Desktop/Dropbox/NSFW 2/Not to Share/My eyes only/cp-boy-12.jpg, with a timestamp of 11 Sep 2021 at 2009hrs.
- **cp-boy-15.jpg**. The referenced file path for this is /Users/PlatoTroop/Desktop/Dropbox/NSFW 2/Not to Share/My eyes only/cp-boy-15.jpg, with a timestamp of 11 Sep 2021 at 1946hrs.
- **boy-porn6.gif**. The referenced file path for this is /Users/PlatoTroop/Desktop/Dropbox/NSFW 2/Not to Share/My eyes only/boy-porn6.gif, with a timestamp of 11 Sep 2021 at 2009hrs.
- **boy-porn3.gif.** The referenced file path for this is /Users/PlatoTroop/Desktop/Dropbox/NSFW 2/Not to Share/My eyes only/boy-porn3.gif, with a timestamp of 11 Sep 2021 at 2010hrs.

Additionally, the following file names were listed under the /My eyes only file path, all with associated timestamps of 11 Sep 2021 between 1946hrs and 2046hrs:

- cp-boy-13
- cp-boy-39
- cp-boy-40
- cp-boy-41
- cp-boy-28
- cp-boy-14
- cp-boy-8
- cp-boy-7

(Pros. Ex. 2.)

The report also showed that Appellant downloaded a program, a Tor browser, which allowed him to search the dark web, artifacts related to Dropbox – a password, logins, and login attempts, and a bookmark for a dark web site titled "boy child forbidden." (R. at 588-600; Pros. Ex. 2.)

A factfinder, reasonably relying on any of this evidence, alone or combined with the shortened and heavily redacted NCMEC report and Appellant's own statements, *admitting to the charged misconduct*, could have made a determination of Appellant's guilt. But taken together, the government's evidence was overwhelming.

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." King, 78 M.J. at 221 (internal citations omitted). Additionally, the weight of the evidence supports the conviction beyond a reasonable doubt, and this Court should not be "clearly convinced that the finding of guilty was against the weight of the evidence" and affirm the finding of guilt. 10 U.S.C. § 866(d)(1)(B)(iii).

For the reasons outlined above, this Court should find the conviction legally and factually sufficient and deny this assignment of error.

V.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING THE DEFENSE MOTION TO DISMISS OR WHEN HE DECLINED TO ABATE THE PROCEEDINGS.

Standard of Review

This Court reviews a military judge's ruling on whether to abate proceedings for an abuse of discretion. United States v. Simmermacher, 74 M.J. 196, 199 (C.A.A.F. 2015); United States v. Ivey, 55 M.J. 251, 256 (C.A.A.F. 2001); United States v. Wright, 75 M.J. 501, 509 (A.F. Ct. Crim. App. 2015). "A military judge abuses his discretion when: (1) he predicates his ruling on findings of fact that are not supported by the evidence of record; (2) he uses incorrect legal principles; (3) he applies correct legal principles to the facts in a way that is clearly unreasonable[;] or (4) he fails to consider important facts." United States v. Commisso, 76 M.J. 315, 321 (C.A.A.F. 2017) (citations omitted).

Law and Analysis

A. Loss or Destruction of Evidence – Constitutional and Due Process Principles

There are two avenues for remedies for lost or destroyed evidence in a case. The first assesses whether the loss or destruction violates constitutional and military due process, specifically the Fifth, Sixth, and Fourteenth Amendments, as well as Article 46 and R.C.M. 701 and 703. This requires a showing by the defense of bad faith on the part of the government. United States v. Terry, 66 M.J. 514, 518 (A.F. Ct. Crim. App. 2008). *See also* California v. Trombetta, 467 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988); United States v. Kern, 22 M.J. 49, 51 (C.M.A. 1986); and United States v. Mobley, 31 M.J. 273, 277 (C.M.A. 1990).

In Trombetta, the Supreme Court found that a constitutional duty to preserve evidence exists if the following conditions are met: the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Trombetta, 467 U.S. at 489. The Supreme Court in Youngblood established that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Youngblood, 488 U.S. at 58.

In Terry, the Air Force Court of Criminal Appeals cited several examples of "bad faith" as provided by the Supreme Court in Trombetta and Youngblood. Those examples include "official animus towards respondents or of a conscious effort to suppress exculpatory evidence" and "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." Terry, 66 M.J. at 518 (*citing*

Trombetta, 467 U.S. at 488; Youngblood, 488 U.S. at 58). In Illinois v. Fisher, 540 U.S. 544 (2004), the Supreme Court found that police acting within their established procedures did not act in bad faith.

B. Loss or Destruction of Evidence – R.C.M. 703 Generally

The second avenue for remedy stems from the requirements of access under Article 46, U.C.M.J., and of production under R.C.M. 703. These requirements go beyond what is necessitated under Constitutional due process standards, because they do not require the Defense to show that the Government acted in bad faith in losing or destroying evidence to warrant relief. United States v. Manuel, 43 M.J. 282, 288 (C.A.A.F. 1995); United States v. Seton, 2014 CCA LEXIS 103, *11 (A.F. Ct. Crim. App. 2014) (unpub. op.).

In 2015, the Court of Appeals for the Armed Forces refined its test for whether the defense is entitled to relief for a violation of R.C.M. 703(f). *See* United States v. Simmermacher, 74 M.J. 196 (C.A.A.F. 2015). In Simmermacher, the Court of Appeals held that relief shall be granted if the defense establishes: (1) The lost or destroyed evidence was of such central importance that it was essential to a fair trial; (2) There was no adequate substitute for the lost or destroyed evidence; and (3) The loss or destruction of the evidence was not the fault of nor could have it been prevented by the requesting party. Simmermacher, 74 M.J. at 201-202.

At trial, Appellant, through his trial defense counsel, moved to dismiss the charge and specifications based on the Government's failure to preserve the original files from Dropbox. In support of his motion, he argued that the files were of "central importance to the trial," because this evidence would have shown what depictions were actually contained in the Dropbox account at issue. (App. Gros. Br. at 3; App Ex. XVIII.)

Appellant now claims he was "materially prejudiced because he could not complete a review of the photographs (or lack thereof) or their metadata in comparison with the material provided in the NCMEC CyberTipline report to call that report into question." (App. Gros. Br. at 2.) However, Appellant provides no explanation as to why he believes the NCMEC report would have contained different images than the ones originally provided by Dropbox. He further fails to describe *how* the photographs contained within the Dropbox account would have allowed him to challenge the CyberTipline report in any permissible way. Moreover, the fact that Appellant admitted to the charged misconduct during his interview with AFOSI agents eliminates any real possibility that the evidence would have even been helpful to the defense if it had been available.

This case is similar to United States v. Ramirez, 2021 CCA LEXIS 710 (A.F. Ct. Crim. App. Dec. 30, 2021) (unpub. op.). In Ramirez, this Court held that the military judge erred when he abated the proceedings at trial because he erroneously found that the data extraction which had been destroyed would have been helpful to the defense. Id. (observing that the military judge in reaching his finding, erroneously relied on generic, speculative expert testimony concerning what the report *could* have shown).

Here, Appellant presented no evidence at trial to establish how the Dropbox images would have been helpful to the defense if they had been preserved. He similarly presents nothing more than conclusory statements on appeal. Applying the same analysis used in Ramirez, any reliance by the military judge on speculation concerning how the evidence *could* have aided the Defense would not have sufficiently supported a finding that the evidence would have, in fact, aided the Defense. As such, the military judge was correct in his decision to deny Appellant's requested relief and, thus, did not abuse his discretion.

For the reasons outlined above, this Court should deny this Assignment of Error and affirm the decision of the lower court.

VI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS.

Additional Facts

A. Appellant's Statements to German Law Enforcement and AFOSI.

On January 4, 2021, at 1110, German law enforcement met with Appellant in a conference room at his workplace. (App. Ex. XVI at 40.) At the time, German law enforcement oversaw the investigation, however, since Appellant was an active-duty Air Force member, AFOSI was present.[7] (Id.; R. at 151.) Appellant was advised of the allegations against him and read his German rights. (App. Ex. XVI at 40.) Appellant stated he understood his rights, did not want an attorney, and agreed to speak with the law enforcement officers. (Id.) During the conversation, Appellant initially stated he did not have "anything to do with" child pornography but eventually admitted he "might have surfed on such websites once" and saved and uploaded those files to his Dropbox account. (Id.)

Later that day, AFOSI interviewed Appellant. (R. at 468.) AFOSI spent approximately thirty minutes building rapport with Appellant before reading him his Article 31(b) rights. (R. at 471-72; Pros. Ex. 3.) After his rights were read, Appellant waived his right to legal counsel and

[7] German law enforcement initially received the allegation concerning Appellant and coordinated with AFOSI once they learned he was a military member assigned to Ramstein AB. (R. at 467.) AFOSI assisted and observed German law enforcement's actions at the beginning of the case which included German law enforcement's discussion with Appellant at his workplace and searches of Appellant's workplace, vehicle, and home. (R. at 468.) AFOSI expected to receive jurisdiction of the case shortly thereafter. (Id.)

agreed to speak with AFOSI. (R. at 153, 472; Pros. Ex. 3.) Throughout the interview, Appellant made multiple confessions. In part, Appellant admitted:

- He searched for a site that displayed child pornographic material, took a screenshot of it, and saved it to Dropbox.
- He searched the dark web and found a "website predominantly focused on the nudity of young boys." He would use search terms like "gay porn" or "nude boys."
- He took the screenshots of approximately five to eight images so he would not have to seek out a site to look at them again. He could just look at screenshots for his sexual gratification and "perverse pleasure."
- Some of the images contained "youths being in a sexual interaction with either other youths or an adult but most were just images of young boys nude." He explained the average age of the individuals in the images was "preteen . . . but definitely all of them were under the age of 12, probably under the age of 10."
- After saving the images to Dropbox, he viewed the images again at least once or twice before his access was blocked.

(Pros. Ex. 3, R. at 471-500.)

During the interview, the two Special Agents sat back in chairs while Appellant sat on a couch with a coffee table between him and the Special Agents. (Pros. Ex. 3.) The interview lasted approximately three hours, and Appellant was given multiple breaks, offered food, and had a soda and snacks in front of him. (Id.; App. Ex. XVI at Attachment 2; Pros. Ex. 3.)

B. Appellant's Statements to TSgt AP.

TSgt AP was assigned to Appellant's workstation, 86th Communications Squadron, as part of a 45-day career broadening experience. (R. at 134.) While there he became friendly with Appellant who was awaiting his court-martial. (R. at 134-35.) Appellant had multiple conversations with TSgt AP and during these conversations Appellant told TSgt AP that he was facing a court-martial for child pornography, he knew what he had done was wrong, and that some people "resort to drugs and alcohol . . . I guess my way of coping was this." (R. at 135-

37.) TSgt AP understood Appellant to have "coped" by viewing child pornography. (R. at 142-43.) TSgt AP relayed that he did not read Appellant his Article 31(b) rights because he was only providing support, and he did not ask him specific questions about his conduct. (R. at 137-38.) Throughout these conversations TSgt AP acted in the role of a mentor and advised Appellant to seek legal counsel and to prepare for life as a sex offender, if he is convicted. (R. at 137-38).

Prior to trial, defense counsel filed a motion to suppress all of Appellant's statements to German law enforcement, AFOSI, and TSgt AP. (App. Ex. XVI). Defense argued Appellant's statements should be suppressed because the statements to AFOSI and German law enforcement were not voluntary, Appellant was not advised of his rights prior to speaking to TSgt AP, and his statements "lack[ed] of admissible corroboration." (Id.) The Government opposed the motion. (Appellate Ex. XVII). After a motions hearing, where TSgt AP and SA EP testified, and oral arguments were made, the military judge denied defense's motion. (App. Ex. XXX.)

The military judge found there was sufficient corroboration for Appellant's statements. First, he explained "[t]he standard for corroboration is not particularly high. Moreover, not every element or fact contained in an admission must be independently proven for the admission to be admitted in its entirety. The independent evidence need only raise any inference of truth of the admission." (Id. at 9.) In Appellant's case, the military judge identified the following as corroboration: during a search of Appellant's devices AFOSI found "evidence of multiple file names linking them to images Dropbox flagged," the remnants of the four filenames from the NCMEC report, and the screen/username of the Dropbox account was "John H" and the associated email was Johnathon.hagen@outlook.com. (Id.) The military judge also highlighted that AFOSI corroborated Appellant's statements regarding searching the dark web when they

found a bookmark for a dark web site with the title "Boy child forbidden/Join Now" on Appellant's computer. (Id.)

The military judge also found Appellant's statements to AFOSI and German law enforcement were voluntary. (Id. at 9-11.) The military judge explained Appellant received a proper rights advisement, he did not have any deficiency in cognitive ability, and he seemed "relaxed, composed, and coherent" during his interview with AFOSI. (Id. at 10.)

Finally, the military judge determined that Appellant's statements to TSgt AP were admissible. (Id. at 10.) He found TSgt AP was not working in a law enforcement capacity nor was he Appellant's supervisor. (Id.) Instead, he was simply a mentor who wanted to ensure Appellant was informed and his "mental health was sound." (Id.)

Standard of Review

A military judge's ruling on a motion is reviewed for an abuse of discretion. United States v. Jones, 73 M.J. 357, 360 (C.A.A.F. 2014). "A military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect." United States v. Olson, 74 M.J. 132, 134 (C.A.A.F. 2015). Whether a confession is voluntary is a question of law that an appellate court reviews de novo. United States v. Bubonics, 45 M.J. 93, 94 (C.A.A.F. 1996).

The clearly erroneous standard is "a very high one" and is not rebutted by a suggestion that the military judge's findings are "maybe" or "probably wrong." United States v. Leedy, 65 M.J. 208, 213 n.4 (C.A.A.F. 2007) (citation omitted). "To reverse for 'an abuse of discretion involves far more than a difference in . . . opinion . . . The challenged action must . . . be found to be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous' in order to be invalidated on appeal.'" United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987). However, "in the review

of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." United States v. Leiffer, 13 M.J. 337, 345 n.10 (C.M.A. 1982) (quoting Helvering v. Gowran, 302 U.S. 238, 245 (1937)) (internal quotation marks omitted).

Law and Analysis

Article 31(b) states that no person subject to the Code may:

> Interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

In his brief, Appellant fails to identify, or make any argument at, regarding how the military judge was "controlled by some error of law or where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support." Travers, 25 M.J. at 62. Instead, Appellant relies on his initial motion to suppress. (App. Gros. Br. at 6.). This Court should not be persuaded.

A. Appellant's statements had adequate corroboration, and the military judge appropriately denied the motion to suppress on that ground.

"An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been admitted into evidence that would tend to establish the trustworthiness of the admission or confession." Mil .R. Evid. 304(c). "If the independent evidence raises an inference of the truth of the admissions or confession, then it may be considered as evidence against the accused." Mil. R. Evid. 304(c)(2). The plain language of Mil. R. Evid. 304(c)(4) reinforces that the quantum of evidence needed to corroborate a confession is low, saying that

the independent evidence "need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession." In fact, "[t]he independent evidence need raise *only an inference of the truth* of the admission or confession." Id. (emphasis added).

Our superior court developed a three-part test to evaluate whether a military judge's ruling to admit evidence under Mil. R. Evid. 304(c) was an abuse of discretion. United States v. Whiteeyes, 82 M.J. 168, 174-175 (C.A.A.F. 2022). The test posits three questions for a military judge: (1) Is the proffered evidence independent evidence? (2) Does each piece of independent evidence raise an inference of truth of the admission or confession? and (3) Whether the pieces of evidence, when considered together, corroborate the admission of the accused? Id.

First, the proffered evidence was independent evidence. As a part of their investigation, AFOSI conducted a digital analysis of Appellant's devices. (Pros. Ex. 2.) On those devices, AFOSI found remnants of filenames which contained child pornography and were linked to Appellant's Dropbox account, Appellant's email and name (John H) which were, again, linked to the DropBox account, and a bookmark for a dark web page labeled as "Boy child forbidden/Join Now." (App. Ex. XXX.) All this evidence was independent from Appellant's statements.

Second, each "piece of independent evidence raise[d] an inference of the truth of the admission or confession." Whiteeyes, 82 M.J. at 176. Appellant admitted to using Dropbox to save sexually explicit images of children that he screenshotted from sites that displayed child pornographic material. (App. Ex. XXX at 9; Pros. Ex. 3.) Additionally, the remnants of the files AFOSI found on his computer were labeled as cp-boy-12.jpg, cp-boy-15.jpg, boy-porn-6.gif, boy-porn-3.gif and Appellant had "described at least two of the images found in the Dropbox account." (App. Ex. XXX at 9; Pros. Ex. 2.)

When considered together, all this evidence corroborated the admissions of Appellant. As in Whiteeyes, the combined independent evidence consisting of Appellant's admitted email and name linked to the Dropbox account, the saved bookmark to a dark web site, and the remnants of the filenames linked to the images flagged by Dropbox corroborated the admissions Appellant. (Id.)

B. Appellant's statements were voluntary, and the military judge appropriately denied the motion to suppress on that ground.

At trial, Appellant argued his statements to AFOSI and German law enforcement were involuntary. (App. Ex. XVI at 13, 19.) He claimed statements to the German authorities were involuntary because he was not provided an Article 31(b) rights advisement and his statements to AFOSI were involuntary because they should have advised him earlier in the process. (Id. at 13, 19.) Appellant is incorrect.

The Military Rules of Evidence allow evidence derived from an accused's statement to be admitted when the statement was made voluntarily or when the evidence would have been obtained even if the statement had not been made. Mil. R. Evid. 304(b)(1) and (3).

Under Mil. R. Evid. 304(b)(1), the standard for determining whether a statement was legally and voluntarily obtained through foreign interrogations is set out in Mil. R. Evid. 305(f)(2):

> Warnings under Article 31 and the Fifth and Sixth Amendments to the United States Constitution are not required during an interrogation conducted outside of a State, district, Commonwealth, territory, or possession of the United States by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (f)(1). A statement obtained from a foreign interrogation is admissible unless the statement is obtained through the use of coercion, unlawful influence, or unlawful inducement. An interrogation is not

> "participated in" by military personnel or their agents or by the officials or agents listed in subdivision (f)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

Pursuant to the rule, for foreign interrogations, the first question is whether the interrogation was "participated in" by military personnel. United States v. French, 38 M.J. 420, 425 (C.M.A. 1993). If not, the next question is whether the statement was made in response to an interrogation was made voluntarily. Mil. R. Evid. 305(f)(2).

CAAF explained in French that an interrogation was "participated in" by military law enforcement when: "the scope and character of the cooperative efforts demonstrate 'that the two investigations merged into an indivisible entity"; or the foreign "investigator acts 'in furtherance of any military investigation, or in any sense as an instrument of the military." French, 38 M.J. at 425. The fact that an appellant is ultimately tried at a military court-martial is irrelevant when analyzing the facts under either scenario. Id. at 426. And, regardless of if the military has not "participated" in the interrogation or not, the remaining question is whether the statement was made voluntarily. S*ee* Mil. R. Evid. 304(a).

Mil. R. Evid. 304(a) prevents the introduction of an accused's involuntary statements at trial. An "involuntary statement" is one that was obtained through "use of coercion, unlawful influence, or unlawful inducement." Mil. R. Evid. 304(a)(1)(A). This definition is taken from the requirement of Article 31(d), UCMJ, 10 U.S.C. § 831(d), of prohibiting such statements from being admitted in a trial by court-martial. CAAF has explained that a statement is involuntary when an appellant's "will was overborne and his capacity for self-determination was critically impaired." Bubonics, 45 M.J. at 94. (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)). On the other hand, a statement is voluntary when it "is the product of an essentially free and

unconstrained choice by its maker." Id. Determining voluntariness turns on "the totality of all the surrounding circumstances." Id. at 95. The same analysis applies to all reviews surrounding the voluntariness of a confession.

The military judge correctly found that Appellant's statements to both German authorities and AFOSI were voluntary.

i. Appellant's statements to German law enforcement were voluntary.

As a threshold matter, in his initial motion to suppress, Appellant "recognize[d] that an Article 31 rights advisement may not be required where foreign law enforcement has provided a foreign rights advisement." (App. Ex. XVI at 19.) Here, the evidence shows that at the time Appellant was questioned, German law enforcement were the lead investigators and had sole jurisdiction of his case. (R. at 467-68.) While AFOSI Special Agents were present, they were only there because Appellant was a military member and to assist with translation, if needed – Appellant did not argue otherwise. (App. Ex. XVI, Attachment 10.)

Instead, Appellant argued his statements to German authorities were involuntary because he was with law enforcement for much of the day. (Id.) Yet, Appellant began the investigative process with the German authorities at 1110 – they were the first to speak to him regarding this case and he was at work prior to that. (Ex. XVI, Attachment 10.) Appellant failed to present evidence to suggest his statements to the German authorities were based on the use of coercion, unlawful influence, or unlawful inducement. (App. Ex. XXX at 11.)

ii. Appellant's statements to AFOSI were voluntary.

At trial, defense counsel argued Appellant's statements to AFOSI were involuntary because AFOSI "unlawfully influenced" Appellant by appealing to his faith and "commenting on the German investigation and [Appellant's] desire to ask questions in the car." (App. Ex. at XVI

at 13-14.) Yet, based on the totality of circumstances, Appellant's resolve was not "overborne" nor was "his capacity for self-determination [] critically impaired." Bubonics, 45 M.J. at 94. As the military judge noted Appellant was

> a mature, educated, articulate NCO. His interview was not overtly long, he was given a proper rights advisement, and was never restrained or prevented from leaving . . . He also appreciated the consequences of waiving his rights and agreeing to answer the agent's questions. This is underscored by understanding that he could ask for an attorney at any time in the process.

(App. Ex. XXX at 10-11.)

Additionally, throughout the interview AFOSI maintained a conversational tone with Appellant, he was given breaks and was not deprived of food. (Id. at 10; Pros. Ex. 3.) In fact, he drank a Mountain Dew soda and had a snack pack of crackers in front of him during the interview. (Id.)

Additionally, in regard to Appellant's questions to AFOSI in the car, that limited exchange occurred while AFOSI obtained Appellant's information and did not render Appellant's statements involuntary. Despite defense's claims that Appellant should have been read his rights immediately, AFOSI was only attempting to build rapport and did so for a short period of time. Their conduct was not designed to elicit incriminating responses but was instead to ensure Appellant was "mentally sound before engaging [him] in the potentially distressing substance of the interview." (App. Ex. XXX.)

The military judge correctly determined, based on the totality of the circumstances, that Appellant "made a knowing and intelligent waiver of his rights." This Court should agree and find that Appellant's statements to the AFOSI were voluntary.

C. TSgt AP was not required to advise Appellant of his Article 31(b) rights, and the military judge appropriately denied the motion to suppress on that ground.

In general, there is a two-pronged test to determine whether an Article 31(b) rights advisement must be given: if "(1) the person being interrogated is a suspect at the time of the questioning, and (2) the person conducting the questioning is participating in an official law enforcement or disciplinary investigation or inquiry." United States v. Swift, 53 M.J. 439, 446 (C.A.A.F. 2000).

The query of whether the person being questioned is a suspect is an objective question which looks to the totality of the circumstances to determine whether the questioner believed or reasonably should have believed the service member committed an offense. Id. Similarly, the totality of the circumstances are used to determine whether the questioning was part of law enforcement or disciplinary investigation. Id. In looking at this second prong, the Court assesses whether the motivation in questioning was official, as opposed to a personal motivation. Jones, 73 M.J. at 361.

While Appellant was a suspect when he spoke to TSgt AP, the military judge rightly determined Appellant's statements to TSgt AP did not need to be suppressed. TSgt AP was neither law enforcement nor was he Appellant's supervisor and Appellant's conversations with TSgt AP were not a part of a law enforcement or disciplinary investigation. (App. Ex. XXX at 11.)

Looking at the totality of the circumstances, despite outranking Appellant by one rank, , TSgt AP had no supervisory role over Appellant and was only in Appellant's unit as part of a career broadening program. (R. at 134.) Additionally, when Appellant brought up his legal troubles, TSgt AP never pried or asked him specific questions about his conduct. (R. at 137-38.) Instead, his focus was on supporting Appellant and acting in the role of a mentor. (Id.) He

specifically wanted to make sure Appellant was prepared for life as a sex offender, if convicted, and that Appellant had sought legal counsel. (Id.) Thus, the military judge did not abuse his discretion when he determined TSgt AP was not required to provide an Article 31 rights advisement prior to their friendly conversations. (App. Ex. XXX at 10.)

Since the military judge did not abuse his discretion in denying trial defense counsel's motion to suppress Appellant's statements, the United States respectfully requests that this Court deny Appellant's requested relief.

VII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO EXCLUDE EVIDENCE.

Additional Facts

Appellant filed a motion *in limine* to exclude evidence offered under Mil. R. Evid. 404(b). Trial defense counsel objected to the following evidence: (1) that Appellant deleted child pornography from his devices once he learned his Dropbox account was blocked; (2) that Appellant referenced distributing child pornography; and (3) that Appellant searched for "father/son male-younger male sexual relationships" on the internet. (App. Ex. IX.) Trial counsel opposed the motion. (App. Ex. XI.)

Appellant's statement to AFOSI and digital forensics supported all the above evidence. During his interview with AFOSI, Appellant confessed that he "was always looking for gay chat sites . . . in particular, they were a little more focused on dad-son, which is definitely risky . . . my focus was not at all father-son especially of underage, but more that role of an older male and younger male." (Pros. Ex. 3.) Later in the interview, Appellant stated, "there may have been a time that I distributed an image or shared an image with somebody." (Id.)

After reviewing the parties' motions and hearing oral argument, the military judge denied defense's motion. (App. Ex. XXXIII; R. at 45-68.) In making his decision, the military judge applied the test articulated in United States v. Reynolds and the Mil. R. Evid. 403 balancing test. Regarding Appellant's deletion of child pornography from his devices, he found the evidence could have demonstrated Appellant's "intent to view and possess child pornography," and his knowledge in possessing and viewing child pornography, and it rebutted a mistake a fact defense. (App. Ex. XXXIII at 4.) He determined it also could be viewed as consciousness of guilt. (Id.) With regards to Appellant's statements about distributing child pornography, the military judge identified that Appellant's "reference to distribution of child pornography makes it more probable he did in fact possess child pornography . . . for one to distribute a picture, he would need to possess the picture. (Id.) This goes to the heart of [Appellant's] knowledge that he in fact possessed child pornography." (Id. at 4-5.) Finally, regarding the search terms, he determined that Appellant's "own words are powerful" and he used terminology – "older male-younger male sexual content" to "obtain the objects of his desire" which made a fact of consequence more or less likely. (Id. at 5.)

Standard of Review

A military judge's decision to admit evidence under Mil. R. Evid. 404(b) is reviewed for an abuse of discretion. United States v. Phillips, 52 M.J. 268, 272 (C.A.A.F. 2000). The abuse of discretion standard is detailed in Issue VI, *supra*.

Law and Analysis

Military Rule of Evidence 404(b) is a rule of inclusion. United States v. Tanksley, 54 M.J. 169, 175 (C.A.A.F. 2000.) "It permits admission of relevant evidence of other crimes or acts unless the evidence 'tends to prove only criminal disposition.'" United States v. Browning,

54 M.J. 1, 6 (C.A.A.F. 2000) (quoting United States v. Simon, 767 F.2d 524, 526 (8th Cir. 1985). The sole test under Mil. R. Evid. 404(b) is whether the evidence of the misconduct is offered for some purpose other than to demonstrate the accused's predisposition to crime." United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1988).

Courts use a three-part test to determine admissibility under Mil. R. Evid. 404(b): first, does the evidence reasonably support a finding by the court members that appellant committed the prior crime, wrong, or act; second, what fact of consequence is made more or less probable by the existence of this evidence, and third, is the probative value substantially outweighed by the danger of unfair prejudice. United States v. Reynolds, 29 M.J. 105, 109 (C.A.A.F. 1989).

Appellant does not explain in his brief how the military judge failed to appropriately apply the Reynolds test when he admitted the above evidence. Instead, he simply argues the military judge abused his discretion and he was prejudiced. (App. Gros. Br. at 5-7).

A. The military judge did not abuse his discretion by admitting evidence that Appellant deleted child pornography on his devices.

The first prong of the Reynolds test requires only that a jury "can reasonably conclude that the act occurred and that the defendant was the actor." United States v. McDonald, 59 M.J. 426, 429 (C.A.A.F. 2004) (citations omitted.) Here, trial counsel had Appellant's own statements to AFOSI and the digital forensic report which showed that Appellant deleted evidence of child pornography once he realized Dropbox blocked his account. Based on that evidence, a reasonable panel member could conclude that Appellant deleted child pornography from his devices – particularly given that remnants of filenames linked to Appellant's Dropbox were found on his devices.

The second prong of the Reynolds test was similarly met, as the Government was required to prove intent, and the evidence made it more likely that Appellant intended to possess

and view child pornography. It also demonstrated consciousness of guilt and undercut any potential defense of mistake of fact.

Finally, as to the third prong, the evidence was extremely probative, as it went directly to the primary issue before the court: whether Appellant viewed and possessed child pornography. As trial defense counsel was able to fully cross-examine all the witnesses and attack the credibility of the digital forensics report and the person who conducted it, the probative value was not substantially outweighed by the danger of unfair prejudice.

B. The military judge did not abuse his discretion by admitting evidence that Appellant referenced distributing child pornography.

Based upon Appellant's statements to AFOSI, a factfinder could reasonably determine that Appellant distributed child pornography. Appellant told AFOSI, "there may have been a time that I distributed an image or shared an image with somebody." (Pros. Ex. 3.) Therefore, the first prong under the Reynolds test was satisfied. Under the second prong, Appellant's potential distribution of child pornography demonstrated that he possessed and viewed child pornography – one cannot distribute something which they do not have or have not seen. Likewise, the third prong was satisfied as the probative value of Appellant admitting to having possessed child pornography was not substantially outweighed by the danger of unfair prejudice.

C. The military judge did not abuse his discretion by admitting evidence that Appellant searched for "father/son male-younger male sexual relationships" on the internet.

The first prong of Reynolds was satisfied because Appellant confessed to AFOSI that he searched for "father-son" content to get to "older male-younger male" chatrooms. The second prong was also met, as Appellant's confession that he sought out "older male-younger male" content makes it more probable that he possessed and viewed child pornography displaying those themes – especially when two of the charged images depicted an adult male engaged in sexual

activity with a male child. Under the third prong, the probative value of Appellant's admitted searches for "father-son/older male-younger male" sexual content far outweighed the danger of unfair prejudice given the images Appellant was charged with viewing and possessing were far more egregious.

Finally, Appellant failed to introduce at trial a theory of unfair prejudice – nor does he advance a theory of prejudice on appeal. He only states "this error prejudiced" him. (App. Gros. Br. at 6.) However, contrary to his bald assertion, the Government used Appellant's own words and forensic evidence to meet their burden of proof. Appellant fails to point to any portion of the record where the Government used this evidence in an unfairly prejudicial way. The Government declines to speculate as to potential prejudice on his behalf. The evidence was probative in proving that Appellant viewed and possessed child pornography.

As the military judge did not abuse his discretion in admitting evidence under Mil. R. Evid. 404(b), and Appellant has made no showing of prejudice, this Court should deny Appellant's requested relief.

VIII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO COMPEL THE PRODUCTION OF A CONSULTANT IN THE FIELD OF PEDIATRICS.

Additional Facts

Prior to trial, the defense moved the court in writing to compel a pediatrician as an expert consultant; the Government opposed. (App. Ex. VIII; X.) In its request, Defense argued Dr. BW, a pediatrician, was necessary to assist the defense in determining "whether the photos at issue actually contain images of minors or what appears to be a minor based on the physiological development of the person within the photo or gif." (App. Ex. VIII at 5.) Defense argued that

no member of the defense team had the "requisite education, training, and experience to understand and apply the intricacies of the development of the human body with the required precision needed for this case." (Id. at 1.)

In its opposition, Government trial counsel stated that Appellant's "comprehensive" statements to OSI regarding the features of the individuals in the images, negates trial defense counsel's argument. Specifically, when Appellant was asked by investigators what physical indicators led him to believe the images depicted minors, he stated:

> The size of their bodies, they definitely fit more of the prepubescent height range, weight range, like as far as skinniness is concerned. To be completely honest, their skin was way to smooth, and you just don't really see that as people grow older . . . Even if the smoothness doesn't change it, visually there is a difference: their facial structure is definitely more on the boyish side, . . . their genitalia isn't just looking like it's underdeveloped, it is underdeveloped. There's no signs of puberty at all in their genitalia . . . There definitely was no pubic hair. The actual size of the penis was very small and in many cases the testicles looked like they hadn't dropped at all. So, pretty clear signs.

(App. Ex. X; Pros. Ex. 3.)

After considering the parties' submissions, oral arguments, and reviewing the contraband evidence, the military judge denied the defense's request and later issued a written ruling. (App. Ex. XXXIV.) In his written ruling, he determined the defense had not satisfied its burden to demonstrate that it was entitled to the assistance of a confidential expert in pediatrics. (Id. at 3.) He explained to be convicted of the charged offenses, Appellant "need only to have believed the persons to be minors" and the evidence "overwhelmingly suggeste[d] he did." (Id.) Appellant admitted to AFOSI that he used the following search terms: "gay boys," "nude boys," or "boys" to find child pornography online. (Id. at 1.) And, in addition to making the above statements regarding the children's physical characteristics, Appellant told AFOSI he estimated the average

age of the individuals pictured in the images was "preteen," but "definitely all of them were under the age of 12, probably under the age of 10." (Id.) Due, in large part, to Appellant's statements, the military judge determined an expert was not necessary for the reasons trial defense counsel identified. (Id.)

Additionally, since trial defense counsel had submitted a motion to suppress Appellant's statements, the military judge also analyzed defense's request if that motion was granted. However, the military judge determined that, even without Appellant's statements, defense would be able to raise the "theory that the visual depictions are not of minors or apparent minors due to the stages of development." (Id.) He further explained that "advocacy, and not expert assistance" was what was required from defense to convey to the factfinder that the images were not of minors, or what appeared to be minors. (Id.) Finally, the military found that trial defense counsel failed to present any evidence that they had taken to educate themselves on the concepts at issue and/or show that the denial would result in an unfair trial. (Id. at 4.) He found this to be especially true where the Government did not intend to retain or rely on expert witness testimony in their case-in-chief. (Id.)

Standard of Review

This Court reviews a military judge's ruling regarding the appointment of a Government-funded expert for an abuse of discretion and will only overturn that ruling if the findings of fact are clearly erroneous or the decision is influenced by an erroneous view of the law. United States v. Anderson, 68 M.J. 378, 383 (C.A.A.F. 2010).

Law and Analysis

"[I]t is well-established that an accused servicemember has a limited right to expert assistance at government expense to prepare his defense." United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996). To establish necessity,

> an accused must demonstrate something more than a mere possibility of assistance from a requested expert.' An accused 'must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial.

United States v. Gunkle, 55 M.J. 26, 31 (C.A.A.F. 2001) (citing United States v. Robinson, 39 M.J. 88, 89 (CMA 1994)). The court determines whether a witness is "necessary" with a three-part test: "First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." Ndanyi, at 319. (citing United States v. Gonzalez, 39 M.J. 459, 461 (C.A.A.F. 1994)).

The question before this Court is not whether this Court differs in opinion from the military judge's ruling, but whether the military judge's ruling was an abuse of discretion as a matter of law or fact. Again, Appellant does not identify any erroneous facts or conclusions of law by the military judge in this case. Instead, Appellant asks this Court to look to the same facts and law as were offered the military judge but to come to a different conclusion. (App. Gros. Br. at 7.) This Court should decline, as Appellant has failed to raise the threshold issues for abuse of discretion that the military judge erred in his findings of fact or conclusions of law.

Even if this Court were to review the underlying facts as they relate to the above standards, Appellant fails to meet his burden. First, defense argued they needed an expert to determine if the individuals pictured in the images were actual minors or individuals who only

appeared to be minors. (App. Ex. VIII at 5.) And that the expert's assistance would accomplish, depending on his determination, creating reasonable doubt on whether the images are of actual minors. (Id.) However, an expert was not needed to make that determination. Not only did Appellant definitively say that the images were of actual minors and described why, but the images – which the military judge reviewed – "sp[oke] for themselves." (App. Ex. XXXIV at 3.)

Importantly, Defense's request was based entirely on the "mere possibility" that an expert would find that the images did not depict minors or what appeared to be minors. However, based on the images and Appellant's statements, such a determination was extremely unlikely. Moreover, to be convicted of the charge, as the military judge noted, Appellant must have needed "only to have believed the persons to be minors;" which, based on the evidence, he did. (Id.) The military judge did not abuse his discretion when he determined that "advocacy" and not expert assistance, was what trial defense counsel needed to convince the factfinders that images were not of actual minors or what appeared to be minors.

Additionally, defense failed to offer any evidence to demonstrate how the denial of this expert created a fundamentally unfair trial for Appellant. The Government did not have access to expert assistance and trial defense was permitted to challenge the images and articulate exactly what the images depicted. Therefore, the denial of the expert did not hamper the presentation of Appellant's case or defense or result in any fundamental unfairness with substantial impact on the verdict. Given Appellant's own statements, the fact that pictures spoke for themselves, and that trial defense counsel failed to provide any evidence to show what steps they took "to educate themselves on the concepts at issue," Appellant failed to establish necessity. (App. Ex. XXXIV at 4.)

Therefore, this Court should deny Appellant's request to grant relief on this entire Assignment of Error and uphold the finding and sentence as adjudged and approved.

IX.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION TO COMPEL DISCOVERY.

Additional Facts

On April 26, 2022, NCMEC received a request from AFOSI to have all images associated with the CyberTipline from Dropbox reviewed by the Child Victim Identification Program (CVIP) using the Child Recognition and Identification Review (CRIS). (App. Ex. XII at Attachment 6.) NCMEC responded that "available CVIP analysts performed a visual review of the file for any known child victims – one file contained a child victim known to law enforcement." (Id.)

Appellant requested the names of the NCMEC analysts, and any photographs used in the CRIS review be produced in discovery. (App. Ex. XII.) Government trial counsel denied this request and trial defense counsel filed a motion for production which was titled "motion to compel discovery." (Id.) The Government filed a motion in opposition. (App. Ex. XIII.) The military judge denied that motion and issued a written opinion. (App. Ex. XXXII.)

Standard of Review

A military judge's ruling on a discovery request is reviewed for an abuse of discretion. United States v. Jones, 69 M.J. 294, 298 (C.A.A.F. 2011) (citing United States v. Morris, 52 M.J. 193, 198 (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 record; (2) if incorrect legal principles were used; or (3) if his application of the correct legal principles to the facts was

clearly unreasonable." United States v. Ellis, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing United States v. Mackie, 66 M.J. 198, 199 (C.A.A.F. 2008)).

Law and Analysis

Article 46, UCMJ, requires the parties to a court-martial to have equal opportunity to obtain witnesses and other evidence. Military law provides for broad means of discovery. United States v. Reece, 25 M.J. 93, 94 (C.M.A. 1987). For evidence outside the control of the Government, the standard under R.C.M. 703(e)(1) controls – whether the evidence is "relevant and necessary." "Relevance" is defined against the low threshold established by the Military Rules of Evidence. Id. Mil. R. Evid. 401 defines relevance as evidence which: (1) has any tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action. Relevant evidence is "necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." United States v. Rodriguez, 60 M.J. 239, 246 (C.A.A.F. 2004).

Here, Appellant fails to identify how the military judge abused his discretion. (App. Gros. Br. at 7-8.) Appellant does not argue which findings of fact were unsupported by the record, what legal principles were incorrect, or if the military judge's application of the law was unreasonable. (Id.) Nonetheless, he asserts the military judge abused his discretion.

Since the information trial defense counsel sought was not within the control of the Government, R.C.M. 703(f) governed production. Appellant failed to articulate how the names of the analysts or photographs used in their review would help their case in any way. This is especially true once it was clear the Government did not intend to use any aspect of the CRIS review to prove their case. With this aspect of the case removed, trial defense counsel no longer needed the information to prepare for a hypothetical cross-examination of the analysts.

Nor was Appellant prejudiced from the denial of the motion. Trial defense counsel sought production of the names of the NCMEC analysts so they could "properly test their assessment on cross-examination." (App. Ex. XII at 5.) Yet, as identified above, this was unnecessary because the Government did not intend to, and did not, introduce any evidence regarding the CVIP review conducted by the analysts. Nor did the analysts testify. Production of the analysts' names would not have contributed anything to Appellant's case.

As the military judge did not abuse his discretion in denying trial defense counsel's motion to compel production of evidence, the United States respectfully requests that this Court deny Appellant's requested relief.

X.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DENIED APPELLANT'S MOTION ASSERTING UNREASONABLE MULTIPLICATION OF CHARGES FOR SENTENCING.

Additional Facts

On 5 March 2023, trial defense counsel filed a motion for unreasonable multiplication of charges. (App. Ex. II.) Defense requested the specifications be merged for sentencing "because they are unreasonably multiplied as it applies to punishment." (Id. at 1.) The Government opposed the motion. (App. Ex. VII.) Neither party requested a hearing on the issue. (R. at 785.)

The military judge denied Appellant's motion to merge the charges for sentencing. Using the nonexclusive list of factors in United States v. Quiroz, 55 M.J. 334 (C.A.A.F. 2011), he ruled:

> [T]he specifications of the charge address separate and distinct acts separated by time. The act of saving and viewing the images after acquiring them highlights this. The accused searched at the dark web using a Tor browser, using specific search terms to find what he was looking for. He saved the images to his Dropbox account in a folder

> called my eyes only. The accused reviewed the images at least two times. Applying the *Quiroz* factors, each charge and specification is aimed at distinctly separate criminal acts as each offense requires proof of a fact which the other does not. The number of specifications does not misrepresent or exaggerate the accused criminality. The number of specifications does not unreasonably increase the accused's punitive exposure. There is no evidence of prosecutorial overreaching or abuse in the drafting of the charges.

(R. at 787.)

Standard of Review

This Court reviews a military judge's denial of relief for claims of unreasonable multiplication of charges for an abuse of discretion. United States v. Campbell, 71 M.J. 19, 22 (C.A.A.F. 2012). The abuse of discretion standard is detailed in Issue VI, *supra*.

Law and Analysis

Under R.C.M. 1003(c)(1)(C), a military judge may merge offenses for sentencing "[i]f the military judge finds that there is an unreasonable multiplication of charges." *See also* R.C.M. 906(b)(12). Unreasonable multiplication of charges is a non-constitutional violation, and it "addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion. Quiroz, 55 M.J. at 334.

At trial, the framework for an unreasonable multiplication analysis includes the consideration of several non-exhaustive factors, including: "(1) whether each charge and specification is aimed at distinctly separate criminal acts, (2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality, (3) whether the number of charges and specifications unreasonably increase the [Appellant's] punitive exposure, or (4) whether there is any evidence of prosecutorial overreaching or abuse in the drafting of the charges." Campbell, 71 M.J. at 24 (citing Quiroz, 55 M.J. at 338).

Yet again, Appellant does not explain how the military judge misapplied Quiroz in his analysis, he just asserts, "[t]he military judge abused his discretion when he denied [Appellant's] motion." (App. Gros. Br. at 9.)

When applying the Quiroz factors to this case, it is apparent the military judge did not abuse his discretion in denying Appellant relief in the sentencing portion of the court-martial. Appellant's conduct, in viewing and possessing child pornography, was the result of distinctly separate criminal acts. *See* United States v. Escobar, No. ACM 38721 2016 CCA LEXIS 199, at *6-8 (A.F. Ct. Crim. App. 24 Mar. 2016) (unpub. op.)(holding convictions for possessing and distributing child pornography were not unreasonably multiplied where the offenses involved "additional or affirmative steps" from the other.) Appellant first search for child pornography on the dark web, he then viewed the contraband, then he downloaded images to his personal device, and then on at least two separate occasions he viewed the downloaded files for five to ten minutes. Since Appellant's misconduct in viewing the images encompassed "additional affirmative steps," the Government did not unreasonably multiply the specifications against Appellant. Escobar, unpub. op. at *8.

Additionally, the two specifications do not misrepresent or exaggerate the accused's criminality, nor do they demonstrate prosecutorial overreach. Appellant was charged with two specifications because his conduct encompassed different acts – viewing and possessing. And even though he possessed at least four images he was only charged with one specification of possession. Similarly, even though he viewed child pornography on multiple occasions, he was only charged with one specification for that conduct. The charge did not exaggerate or misrepresent Appellant's criminality. Further, each specification "implicated multiple and significant criminal law interests, none necessarily dependent on the others" which the

Government had an obvious interest in criminalizing. Campbell, 71 M.J. at 24. Appellant facing punishment for both silos of misconduct was appropriate.

The last Quiroz factor to consider is whether the number of specifications unreasonably increased the accused's punitive exposure. While two specifications did increase Appellant's punitive exposure it was not unreasonable. Appellant committed two discrete acts when he possessed child pornography and then saved it to his device to view again later, which he did on at least two occasions. It was not unreasonable for Appellant to face punishment for both actions.

The military judge did not abuse his discretion, and this Court should deny Appellant's request for relief.

XI.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE PERMITTED TSGT AR-J TO TESTIFY DURING THE SENTENCING PROCEEDING.

Additional Facts

During the sentencing proceeding, Government trial counsel identified that TSgt AR-J, Appellant's co-worker at the time, would testify about a conversation she had with Appellant prior to the court-martial. Specifically, the Government proffered that Appellant told TSgt AR-J "he knows that what he did was bad, and he does not want to just get a slap on the wrist for it." (R. at 778.) Trial defense counsel objected and argued the witness' testimony would not be a "proper matter in aggravation" or fall under a "specific item" within R.C.M. 1001(b)(4) and objected. (R. at 778.)

After hearing the Government's proffer, the military judge overruled defense's objection. (R. at 708.) The military judge found Appellant's statement would be "indicative of the

accused's attitude and awareness of the seriousness of the crime." (Id.) While noting, it is "not typically the direction in which the attitude goes." (Id.) The military judge also conducted an M.R.E. 403 balancing test and concluded the "probative value of the accused's statement was not substantially outweighed by the danger of unfair prejudice, confusion of the issues. I find that the statement has particular probative value with regard to his awareness of the magnitude and seriousness of the crime." (R. at 784-85.)

TSgt AR-J ultimately testified that Appellant, while discussing his upcoming court-martial, told TSgt AR-J, "it can go anything from getting a slap on the wrist to going to jail. But if I get a slap on the wrist, I'll be disappointed at the military legal system." (R. at 782.)

Standard of Review

A military judge's decision to admit or exclude evidence at sentencing is reviewed for an abuse of discretion. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009).

Law and Analysis

R.C.M. 1001(b)(4) permits Government trial counsel to introduce "evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has already been found guilty." This Court has held that "[a]n accused's attitude toward the offense of which he has been convicted is directly related to that offense and relevant to fashioning a sentence appropriate to both the offense and offender" and "[a]n accused's awareness of the magnitude and seriousness of a crime is admissible in sentencing." United States v. Alis, 47 M.J. 817, 825 (A.F. Ct. Crim. App. 1998) (citing to United States v. Pooler, 18 M.J. 832, 833 (A.C.M.R. 1984)). And an appellant's statements "provide[] the best evidence of his true feelings, which [a] military judge [is] justified in considering" when determining an

appropriate sentence. United States v. Leach, No. ACM 39805 2022 CCA LEXIS 76, at *19 (A.F. Ct. Crim. App. 3 Feb. 2022) (unpub. Op.).

Appellant, in his brief, without providing any reason or case law to support his position, argues that the military judge abused his discretion. (App. Gros. Br. at 10). Appellant is incorrect. Appellant's statement – that if he gets a slap on the wrist, he'll be disappointed in the justice system – is directly related to his attitude towards his crime. Based on this statement, Appellant, rightly, understood the magnitude and seriousness of possessing and viewing child pornography. Alias, 47 M.J. at 825. The Appellant's statements were the best evidence of his attitude towards his crimes and the military judge was permitted to consider his statements when crafting an appropriate sentence.

However, if this Court finds the military judge abused his discretion, Appellant was not unfairly prejudiced. Appellant was sentenced by military judge-alone and, prior to allowing TSgt AR-J to testify, the military judge stated he was "capable of giving the [testimony] the weight that it deserve[d]." (R. at 784-85.) Additionally, as the military judge noted, typically evidence of an accused's attitude is offered to show lack of remorse or an inability to understand the gravity of their actions. In this case, Appellant's statements suggest he recognized the severity of his misconduct and the military judge's consideration of this evidence could have been to his benefit. The admission of Appellant's own statements did not unfairly prejudice Appellant.

Appellant has not demonstrated that the military judge abused his discretion. Accordingly, this Court should deny his request to reassess his sentencing without the punitive discharge.

XII.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DID NOT CONSIDER PORTIONS OF APPELLANT'S SENTENCING EVIDENCE.

Additional Facts

For sentencing, Appellant chose to be sentenced by military judge alone. (R. at 770.) As part of his sentencing evidence, Appellant attempted to admit a character letter from his father, retired MSgt DH. (R. at 788.) In the character letter, Appellant's father wrote, in part, "[m]y hope is that he can have the choice to remain in the military to finish his enlistment honorably." (Def. Ex. B.) Trial counsel objected to this sentence on the basis that "a witness cannot offer an opinion concerning whether the accused should receive a punitive discharge." (R. at 789.) Trial defense counsel stated the military judge "can give the letter the appropriate weight given the comment on service characterization" and conceded trial counsel's point. (Id.) The military judge admitted the character letter and ruled he would not consider the above statement. (R. at 794.)

Standard of Review

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. United States v. Eslinger, 70 M.J. 193, 198 (C.A.A.F. 2011). "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. Solomon, 72 M.J. 176, 179 (C.A.A.F. 2013) (quoting United States v. White, 69 M.J. 236, 239 (C.A.A.F. 2010)).

Law and Analysis

An accused is permitted to present evidence of his rehabilitative potential during the sentencing proceeding. R.C.M. 1001(b)(5)(A). However, a "witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit." R.C.M. 1001(b)(5)(D). The restriction on opinion evidence applies equally to government and defense sentencing evidence. United States v. Ohrt, 28 M.J. 301, 304-05 (C.M.A. 1989).

Prior to ruling, the military judge considered trial counsel's argument, and defense's concession, that Appellant's father was offering an improper opinion regarding a punitive discharge and continued military service. (R. at 789.) On appeal, Appellant contends that his father's comment in the character letter was a matter in mitigation, and he did not state that Appellant should receive punitive discharge, only that he hoped Appellant "could remain in the military to finish his enlistment honorably." (App. Br. at 11.) While Appellant argues the military judge erred in excluding this portion of the character letter, he fails to meet his burden of showing that the military judge's decision was "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." Solomon, 72 M.J. at 179.

Here, the military judge's decision was not clearly erroneous. Retention evidence falls under the rubric of mitigation evidence that is proper. However, our superior court has found that there is a "thin line between an opinion that an accused should be returned to duty and the expression of an opinion regarding the appropriateness of a punitive discharge. Obviously, an accused cannot return to serve in his unit if he receives a punitive discharge." United States v. Griggs, 61 M.J. 402, 409 (C.A.A.F. 2005). The portion of MSgt(ret) DH's character letter which implored the court to allow Appellant to remain in the military so he could "finish his enlistment

honorably" crossed that line. The military judge's decision not to consider this statement was appropriate and ensured his role as the sentencing authority was not improperly usurped by the opinion of a witness.

Even if this Court determines the military judge abused his discretion, Appellant did not meet his burden for prejudice. In his brief, Appellant failed to identify how he suffered prejudice because the military judge did not consider one sentence, in one character letter. The Government declines to theorize on Appellant's behalf.

Since Appellant failed to demonstrate that the military judge abused his discretion. Therefore, this Court should deny Appellant's claim.

XIII.

THE RECORD IS NOT INCOMPLETE.

Additional Facts

An Article 30a proceeding in Appellant's case was held on 25 February 2022. (*Government Motion to Attach*, App. A, 18 February 2025.) That proceeding consisted of Government counsel requesting that a military judge be appointed to issue pre-referral a warrant for Appellant's electronic communications. (Id.) Appellant identified that the Article 30a proceeding was missing from the record and, on 10 February 2025, he filed a motion to remand his case for correction. (*Motion for Leave to File Motion for Remand and Motion for Remand*, 10 February 2025.) In response, on 18 February 2025, the Government filed a motion to oppose remand and a motion to attach. (*Government Motion to Attach*, 18 February 2025; Government Opposition to Defense Motion to Remand, 18 February 2025.) The motion to attach included the following attachments:

- Appendix A – Request for Article 30a Proceeding with Attachments (PDF Portfolio);

- Appendix B – Article 30a Detailing Memo;
- Appendix C – DD Form3056 – Signed Warrant with Attachments (PDF Portfolio);
- Appendix D – DD Form 3056 – Warrant (No Returns); and
- Appendix E – Article 30a – Trial Counsel Emails with Military Judge.

(*Government Motion to Attach*, 18 February 2025.) Appellant opposed the Government motion to attach and argued that "the attachment does not cure the incompleteness of the record." (*Opposition to Government Motion to Attach*, 19 February 2025.) On 19 February 2025, this Court granted the Government's motion to attach.

On 21 February 2025, this Court denied Appellant's motion for remand. (*Order*, 21 February 2025). In its Order, this Court found

> R.C.M. 1112(f)(1) states what matters must be attached to the certified record of trial for appellate review. As the Government noted, this rule recently was amended to require attachment of a 'copy of all materials required to be provided to the military judge pursuant to R.C.M. 309(a)(3).' In this case, our grant of the Government's Motion to Attach fulfills this requirement.

(Id.)

Standard of Review

Whether an omission from a record of trial is "substantial" is a question of law reviewed de novo. United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000).

Law and Analysis

Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record incomplete and raises a presumption of prejudice that the government must rebut. United States v. Henry, 53 M.J. 108, 1111 (C.A.A.F. 2000) (citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not

raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts can conduct an informed review. *See* United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding that despite the omission from the record of an Article 39(a) session containing the military judge's findings and conclusions related to an R.C.M. 917 motion, the record, as it was, was "adequate to permit informed review by this court and any other reviewing authorities"). R.C.M. 1112(b) states that a record of trial shall include "[a] substantially verbatim recording of the court-martial proceedings."

Appellant asserts that his Article 30a proceeding was not included in the record of trial. (App. Br. at 12.) Although the record of trial was missing the Article 30a proceeding, this Court can conduct appellate review because, in a separate motion to attach, the United States filed, and this Court granted, the missing documents from the record. (*Government Motion to Attach*, App. A, 18 February 2025.) Additionally, this Court already determined that remand was not necessary or appropriate on this issue. (*Order*, 21 February 2025.)

The omissions from the record of trial do not require sentencing relief or a remand. For these reasons, this Court should deny this assignment of error.

XIV.

APPELLANT DID NOT SUFFER A DUE PROCESS VIOLATION NOR DOES HIS CASE WARRANT ARTICLE 66 RELIEF BASED ON HIS CASE BEING DOCKETED THIRTY-THREE DAYS BEYOND THE STANDARD SET BY THIS COURT.

Additional Facts

Appellant was sentenced on July 27, 2023. (*Statement of Results of Trial*, 28 July 2023, ROT, Vol. 1.) One hundred eighty-three days elapsed between sentencing and docketing of the case with this Court.

Date	Action	Days Elapsed
27 July 2023	Sentencing	0
15 November 2023	Court Reporter uploaded transcript to Webdocs and provided court reporter documents to Legal Office.	111
16-21 November 2023	Legal Office finalized Part 1 of the ROT.	112-117
22 November 2023	Legal Office Served Part 1 of the ROT on Appellant on 22 November 2023.	118
23 November 2023	Legal Office shipped completed ROT to JAJM.	119
1 December 2023	eROT was completed and uploaded to JAJM.	127
26 January 2024	ROT Docketed	183

Of the 183 days, 111 days are attributable to the court-reporter's caseload. (*Court Reporter's Chronology*, 15 November 2023, ROT, Vol. 1.) The 86 AW/JA Legal Office continuously worked on the ROT, and eROT, from the day it received the transcript until the ROT was mailed to JAJM and the eROT was uploaded. Only eight days passed before the ROT

was mailed to JAJM and sixteen days before the eROT was uploaded. (*Government Motion to Attach*, 7 April 2025, App. A.)

Since this case was docketed on 26 January 2024, Appellant has requested twelve enlargements of time to file his assignments of error. In total, he requested 346 additional days. All but one of the requests were opposed by the Government, but granted by this Court. The enlargements of time resulted in 392 days elapsing before Appellant filed his assignments of error with this Court. Prior to his assignment of error, Appellant never asserted his right to speedy post-trial processing.

Standard of Review

This Court reviews de novo an appellant's entitlements to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006).

Law and Analysis

A. Due Process.

Post-trial delay of more than 150 days from sentencing is presumptively unreasonable, Livak, 80 M.J. at 633, and triggers review of four factors: (1) the length of delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 129 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). Here, because Appellant's case was docketed thirty-three days beyond the 150-day threshold, the delay is facially unreasonable. Livak, 80 M.J. at 633. But under the Barker factors, Appellant is not entitled to relief for post-trial delay because (1) the length of delay was not excessive; (2) there are reasonable explanations for the delay; (3) Appellant never asserted his right to speedy post-trial processing; and (4) Appellant suffered no prejudice.

Absence of a factor does not prevent finding a due process violation. Moreno, 63 M.J. at 136. But, in the absence of prejudice to the appellant, a court must find that the delay was "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system." United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006).

i. Length of the Delay.

The length of the delay must be balanced with the other factors. United States v. Anderson, 82 M.J. 82, 86 (C.A.A.F. 2022). The slight delay of docketing Appellant's case with this Court weighs in favor of the Government. A thirty-three-day delay would not "caus[e] the public to doubt the entire military justice system's fairness and integrity" to render it an egregious delay. Id. *See generally* Anderson, 82 M.J. at 86 (holding 481 days of Government delay between sentencing and convening authority action would not "caus[e] the public to doubt the entire military justice system's fairness and integrity.").

ii. Reasons for the Delay.

When evaluating the reasons for the delay, "different weights should be assigned to different reasons." Barker, 407 U.S. at 530. Neutral reasons such as "negligence or overcrowded courts" are considered but weighed less heavily than deliberate attempts to delay. Id. Here, most of the delay – 111 days – is due to a neutral reason: the court reporter's need to balance her caseload. (*Court Reporter's Chronology*, 15 November 2023, ROT, Vol. 1). The Government's efforts after receipt of the transcript weigh in its favor, as similar and more substantial delays have not resulted in relief where the Government otherwise demonstrated reasonable diligence in post-trial processing. United States v. Lunby, No. ACM S32500, 2019 CCA LEXIS 181 (A.F. Ct. Crim. App. 23 April 2019); United States v. Cook, No. ACM 40333,

2024 CCA LEXIS 276, *76-77 (A.F. Ct. Crim. App. 3 July 2024). Here between the transcript's completion and the forwarding of the ROT to JAJM, there were no periods of delay. The Legal Office mailed the ROT to JAJM within eight days – two of those days were a weekend. (*Government Motion to Attach*, 7 April 2025, App. A.) And the eROT was uploaded within 16 days – five of those days were weekend days. (Id.)

Under these circumstances, this Court should find that this factor weighs in favor of the Government.

iii. Appellant's Lack of Assertion of Right to Timely Review and Appeal.

This factor favors the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay." Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While failing to demand timely review and appeal does not waive that right, only if Appellant actually "asserted his speedy trial right, [is he] 'entitled to strong evidentiary weight'" in his favor. Id. (quoting Barker, 407 U.S. at 528).

Appellant did not make a post-trial demand for speedy trial, nor did he not assert his right to speedy post-trial processing to the convening authority. (*Submission of Matters*, 31 July 2023, ROT, Vol. 1.)

iv. Prejudice.

This factor favors the Government. The CAAF has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in case of retrial, might be impaired.

Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id.

Appellant has not claimed he suffered any prejudice because of the slight delay. To find a due process violation where there is no prejudice, this Court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness of the military justice system." Toohey, 63 M.J. at 362. This Court should conclude that the delay in Appellant's case was not so egregious as to impugn the fairness and integrity of the military justice system. It did not involve years of post-trial delay like in Moreno – over four years – Toohey – over six years, or Bush – over seven years. Furthermore, "there is no indication of bad faith on the part of any of the Government actors." Anderson, 82 M.J. at 88.

Additionally, Appellant requested twelve (12) enlargements of time, which resulted in an additional 392 days of delay from docketing the case with this Court until he filed his assignments of error. To the extent that Appellant was "prejudiced" by the post-trial processing delay, he was arguably more prejudiced by his own delay in filing an appeal. Therefore, the prejudice analysis weighs in favor of the Government.

This Court should decline to find that Appellant was deprived of his due process right to speedy post-trial review, and this Court should deny his requested relief.

CONCLUSION

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

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 April 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHAN T. HAGEN,** United States Air Force, *Appellant.*	)	No. ACM 40561
	)	14 April 2025

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

Appellant, Staff Sergeant (SSgt) Johnathan T. Hagen, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Government's answer, dated 7 April 2025 (Ans.). In addition to the arguments in his opening brief, filed on 7 March 2025 (App. Br.), SSgt Hagen submits the following arguments for the issues listed below.

I.

Prosecution Exhibit 1 was testimonial and introduced into evidence in violation of SSgt Hagen's constitutional right to confrontation, over defense objection.

The Government concedes that some of the statements in Prosecution Exhibit 1 were testimonial, stating "Prosecution Exhibit 1 was *mostly* devoid of testimonial evidence," and "a minimal number of testimonial statements were introduced and relied on in the Government's case." Ans. at 9 (emphasis added), 11. The tension present in the Government's argument is that Prosecution Exhibit 1 contained statements that mirror statements that this Court, and this Panel, determined were testimonial in *United States v. Goodwater*, No. ACM 40304, 2024 CCA LEXIS 493 (A.F. Ct. Crim. App. Nov. 22, 2024). *Id*. This Court should find, like it did in *Goodwater*, that the statements are also testimonial in this case because there is no meaningful distinction

between the statements found to be testimonial in *Goodwater* and the statements in Prosecution Exhibit 1.

Prosecution Exhibit 1 may have redacted the word "suspect," but the message in Prosecution Exhibit 1 was the same with or without the word "suspect." *See* Ans. at 9; Pros. Ex. 1. The Electronic Service Provider (ESP) (DropBox, Inc.) reported an "Incident" via the "CyberTipline," which is made available to law enforcement. Pros. Ex. 1 at 1, 3. Further, Dropbox's CyberTipline report included specific information regarding the incident (the files that were part of the incident and details surrounding them) and the person responsible for the incident (the specific user's email address, screen/username, User ID, and IP addresses). Pros. Ex. 1 at 3-5.

Additionally, the Government seems to confuse Dropbox's own business records (which are not at issue in this case because they were not made an exhibit) with Dropbox's report to the National Center for Missing and Exploited Children (NCMEC), which is contained within Prosecution Exhibit 1. *See* Ans. at 9-10 (explaining Dropbox's collection of information). The statements in Prosecution Exhibit 1 were submitted by Dropbox for the purpose of reporting an incident that Dropbox had become aware of and were not machine-generated.[1] *See* Pros. Ex. 1. Rather, the statements from Dropbox required human input. For example, the "Uploaded File Information" required Dropbox to state whether it viewed the contents of the file, whether the file was publicly available, and whether the metadata for the file was provided separately by the ESP. *Id*. at 4-5.

[1] "[M]achine-generated data and printouts are not statements and thus not hearsay -- machines are not declarants -- and such data is therefore not 'testimonial.'" *United States v. Blazier*, 69 M.J. 218, 224 (C.A.A.F. 2010) (footnote and citations omitted).

SSgt Hagen stated in his opening brief that Section B of Prosecution Exhibit 1 was machine-generated, but this was in error, as it also contains testimonial statements. App. Br. at 9. Specifically, while Section B of Prosecution Exhibit 1 contains "Automated Information Added by NCMEC Systems," this only addresses NCMEC's statements. Pros. Ex. 1 at 6-7. It does not address the fact that NCMEC's automated system repeats Dropbox's statements regarding the filenames and IP addresses that were not machine-generated but instead reported by Dropbox. *Id*. Therefore, both Section A and Section B of Prosecution Exhibit 1 include testimonial statements.

Given that Prosecution Exhibit 1 contains testimonial statements, the military judge abused his discretion when he allowed Prosecution Exhibit 1 to be admitted. This error was not harmless beyond a reasonable doubt because there is a "reasonable possibility that the evidence complained of might have *contributed*" to SSgt Hagen's conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967) (emphasis added).

Review of the facts of *Chapman* makes clear that its standard is a very difficult standard for the Government to meet on appeal. In *Chapman*, three individuals, Ms. Chapman, Mr. Teale, and Mr. Adcox, were seen together at about 2:00 a.m. outside of a bar where Mr. Adcox worked. *People v. Teale* 63 Cal. 2d 178, 183, 45 Cal. Rptr. 729, 404 P.2d 209 (1965).[2] Mr. Adcox was later found shot in the head with .22 caliber bullets and the estimated time of his death was 3:00 a.m. *Id*. at 183-84. The Government prosecuted Ms. Chapman and Mr. Teale and its evidence against them was strong. Ms. Chapman had purchased a .22 caliber weapon six days earlier. *Id*. at 184. Mr. Adcox's deceased body was found in a different area than the bar location and investigators found a check signed by Ms. Chapman in the vicinity of Mr. Adcox's body. *Id*. Mr.

[2] The facts of *Chapman* were not fully recited by the U.S. Supreme Court but can be found in the lower court's opinion, *People v. Teale,* 63 Cal. 2d 178, 45 Cal. Rptr. 729, 404 P.2d 209 (1965).

Adcox's blood was found spattered inside Ms. Chapman and Mr. Teale's vehicle and on their clothing. *Id*. The Government also presented an informant who testified Mr. Teale told him that he and Ms. Chapman had robbed and killed Mr. Adcox. *Id*. at 184-85. In addition to all the above, Ms. Chapman claimed she was in different city at the time of the killing, but this was proven to be false by the fact that she had registered at a motel at 4:40 a.m. near the location where Mr. Adcox's body was found, and the registration card was in her handwriting. *Id*. at 185. At trial, neither Ms. Chapman nor Mr. Teale testified, and the prosecutor repeatedly argued to the jury that the silence of the defendants could be used against them, which was bolstered by an improper instruction from the trial judge. *Id*. at 186, 196. Based on this constitutional error, and despite the strong evidence admitted at trial, the U.S. Supreme Court reversed the convictions. *Chapman*, 386 U.S. at 26. This decision, despite the significant evidence against Ms. Chapman and Mr. Teale, demonstrates the Supreme Court's intent that constitutional errors be reversed if there is *any* reasonable possibility that the error contributed to the convictions.

Here, there is a reasonable possibility that the error contributed to SSgt Hagen's convictions because the Government used Prosecution Exhibit 1 to argue that the images were the images that were sent by Dropbox to law enforcement when the origin of the images was an issue at trial. *See* R. at 732, 733. The Government's reliance on Prosecution Exhibit 1 to argue that the files were in fact the files that SSgt Hagen viewed and possessed demonstrates Prosecution Exhibit 1's admission contributed to SSgt Hagen's conviction and was therefore, not harmless beyond a reasonable doubt.

SSgt Hagen requests this Honorable Court set aside the findings and sentence and dismiss the Charge and Specifications.

II.

The convening authority's selection of the members demonstrates a prima facie showing that gender was impermissibly considered, giving rise to a presumption that the panel was not properly constituted.

At the time of SSgt Hagen's court-martial, convening authorities were encouraged to consider race and gender when deciding who should be appointed to a panel. *United States v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964); *United States v. Smith,* 27 M.J. 242, 249 (C.M.A. 1988). As a result, the convening authority could consider these factors for inclusive purposes and neither the convening authority nor SSgt Hagen could have known during his court-martial that the U.S. Court of Appeals for the Armed Forces (CAAF) would later end the use of race, and by extension gender, for any purpose when selecting panel members. *United States v. Jeter*, 84 M.J. 68, 74 (C.A.A.F. 2023). Nevertheless, "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008). Therefore, it does not matter that SSgt Hagen did not raise this issue at trial because the error is plain on appeal. And the CAAF's opinion in *Jeter* specifically excuses a lack of development of this issue at the trial level because the changed landscape could not be anticipated. *Jeter*, 84 M.J. at 74.

The error is plain in this case because any use of race or gender when deciding who should be appointed to a panel is now impermissible, and SSgt Hagen has met the low standard of making a prima facie showing that gender was used when deciding who should be appointed to his panel. *See id.* at 73-74; *United States v. Proctor*, 81 M.J. 250, 255 (C.A.A.F. 2021) (noting that a prima facie showing is a low burden). SSgt Hagen established that "it seems to be true on first

examination"[3] that the convening authority considered gender when specifically replacing one for one the number of males and females on his panel. *See* Special Order A-46; Special Order A-47 (replacing the twelve members with traditionally male names with twelve other members with traditionally male names and replacing six members with traditionally female names with six other members with traditionally female names). This satisfies the requirement for a prima facie showing. And crucially, the Government offered no rebuttal that gender was not considered. *See* Ans. at 13-19. The Government could have sought additional information from the convening authority and the staff judge advocate, as in *Jeter*, 84 M.J. at 73, but there is no indication that it did so. Therefore, this Court should conclude there is an unrebutted prima facie showing that the convening authority impermissibly (under the law now applicable on appeal) considered gender when selecting panel members.

Given that the composition of a court-martial is a structural issue, this unrebutted presumption warrants automatic reversal. *See Jeter*, 84 M.J. at 74; *Johnson v. United States*, 520 U.S. 461, 466 (1997) (citing Supreme Court precedent for the proposition that cases not governed by Federal Rule of Criminal Procedure Rule 52(b) are "structural errors" without a prejudice analysis). Therefore, this Court should set aside the findings and sentence and dismiss the Charge and Specifications.

[3] *Prima Facie*, *Black's Law Dictionary* (11th ed. 2019) (defining prima facie as "sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue.")

Respectfully submitted,

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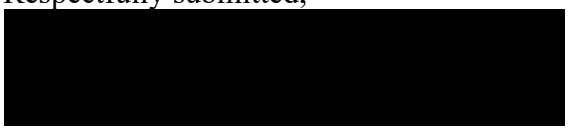
CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 April 2025.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO ATTACH
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN** United States Air Force *Appellant.*	)	No. ACM 40561 7 April 2025

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States requests this Court grant this motion to attach the following two documents located in the attached appendices.

- Appendix A – TSgt Leon Taylor Declaration, executed 18 March 2025 (1 page)
- Appendix B – US v. Hagen, Chronology of Adjournment of Trial to Forwarding of the Record of Trial, dated 18 March 2025 (2 pages)

On 7 March 2025, Appellant filed his Assignments of Error, which included a request for meaningful relief due to a post-trial processing delay. (App. Gros. Br. at 14-15.) The attached declaration and chronology explain the reason for the delay of thirty-three (33) days. It is relevant to whether this Court should return the record to resolve a potential error that Appellant has raised. Consistent with United States v. Jessie, this Court may consider this declaration and chronology in order to resolve an issued raised by the record: whether the delay in post-trial processing was unreasonable. 79 M.J. 437, 445 (C.A.A.F. 2020).

WHEREFORE, this Court should grant the United States' motion to attach.

GRANTED
15 APR 2025

BRITTANY M. SPEIRS, Maj, USAF
Appellate Government Counsel
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 the Air Force Appellate Defense Division on 7 April 2025.

[redacted], Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40561**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jonathon T. HAGEN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 July 2023, a general court-martial composed of officer members convicted Appellant, contrary to pleas, of one specification of possession of child pornography and one specification of viewing child pornography, both in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Appellant was sentenced to dishonorable discharge, confinement for 14 months, reduction in grade to E-1, and a reprimand. Appellant requested deferment of the reduction in rank, confinement and automatic forfeitures. The convening authority took no action on the findings and approved the sentence in its entirety.

On 5 September 2023, the military judge signed the entry of judgment.

This case was docketed with this court on 26 January 2024. Appellant submitted his assignments of error brief on 7 March 2025. Appellee submitted their answer on 7 April 2025.

Our review of the record of trial revealed that Prosecution Exhibit 3, a compact disk purporting to contain four digital files consisting of Appellant's interview with the Office of Special Investigations, is merely an empty compact disk with no digital files.

Accordingly, it is by the court on this 23d day of April, 2025,

ORDERED:

Not later than 9 May 2025, counsel for Appellee shall **SHOW GOOD CAUSE** as to why this court should not remand record of trial for correction under Rule for Courts-Martial 1112(d), or take other corrective action.

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Acting Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40561**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Johnathon T. HAGEN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 27 July 2023, a general court-martial composed of officer members convicted Appellant, contrary to his pleas, of one specification of possessing child pornography and one specification of viewing child pornography, both in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Appellant was sentenced to a dishonorable discharge, confinement for 14 months, reduction in grade to E-1, and a reprimand. Appellant requested deferment of the reduction in rank, confinement and automatic forfeitures. The convening authority took no action on the findings and approved the sentence in its entirety.

On 5 September 2023, the military judge signed the entry of judgment.

On 26 January 2024, this court docketed Appellant's case. On 7 March 2025, Appellant submitted his assignments of error brief, and on 7 April 2025, Appellee submitted an answer to Appellant's brief.

Our initial review of the record of trial revealed that Prosecution Exhibit 3—a compact disk purporting to contain four digital files consisting of Appellant's interview with the Office of Special Investigations—is merely an empty compact disk with no digital files. On 23 April 2025, we ordered Appellee to show good cause as to why this court should not remand the record of trial for correction under Rule for Courts-Martial (R.C.M.) 1112(d), or take other corrective action. Appellee has until 9 May 2025 to respond to this court's 23 April 2025 order.

Further review of the record has also revealed that despite the transcript indicating that the convening orders and their amendments are included in the record of trial, none of those documents are included in the record of trial. The court now orders the Appellee to show good cause why Appellant's record of trial should not be remanded, or take other corrective action, for these missing documents, and sets the same response date.

Accordingly, it is by the court on this 5th day of May, 2025,

ORDERED:

Not later than 9 May 2025, counsel for Appellee shall **SHOW GOOD CAUSE** as to why this court should not remand Appellant's record of trial for correction under R.C.M. 1112(d), or take other corrective action, to correct the record for any missing convening orders and their amending orders to be included in the record of trial.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40561**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Johnathon T. HAGEN	)	**PANEL CHANGE**
Staff Sergeant (E-5)	)	
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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40561**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Johnathon T. HAGEN	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel***

On 5 May 2025, the court ordered the Government to show good cause why Appellant's record of trial should not be remanded, or take other corrective action, for missing convening orders and their amendments in Appellant's record of trial. The documents were later located under Defense Exhibits and are no longer missing.

Accordingly, it is by the court on this 7th day of May, 2025,

ORDERED:

The court's 5 May 2025 order is hereby **RESCINDED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

* Since the issuance of this order, there has been a panel assignment change to Appellant's case.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' RESPONSE TO SHOW CAUSE
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN** United States Air Force *Appellant.*	)	No. ACM 40561 9 May 2025

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

On 23 April 2025 and 5 May 2025, this Court *sua sponte* directed the following: "Not later than 9 May 2025, counsel for the Appellee shall **SHOW GOOD CAUSE** as to why this court should not remand the record of trial for correction under Rule for Courts-Martial 1112(d), or take other corrective action." (*Order*, dated 23 May 2025.) On 9 May 2024, undersigned counsel filed Prosecution Exhibit 3, a compact disk containing four digital files consisting of Appellant's interview with the Office of Special Investigations. (*United States' Motion to Attach*, dated 9 May 2025.)

Standard of Review

Whether a record of trial is complete is a question of law that courts review *de novo*. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law and Argument

Prosecution Exhibit 3 was provided via the United States' Motion to Attach so it is not necessary for this Court to remand the record for correction. (*United States Motion to Attach*, 9 May 2025.) This Court has often elected not to provide any remedy for an incomplete record where the government has provided the missing portions through a motion to attach.

When a record is incomplete, Rule for Court Martial 1112(d)(2) allows this Court to return the record of trial to the military judge for correction. Yet if the omitted portions of the record have already been provided to this Court, there is no utility in returning the record for correction. Where the Government has produced missing documents through a motion to attach, this Court has often not granted any remedy. *See* United States v. King, ACM 39583, 2021 CCA LEXIS 415 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.); United States v. Jones, 2022 CCA LEXIS 584, *10 (A.F. Ct. Crim. App. 17 October 2022) (unpub. op.); United States v. Garron, 2023 CCA LEXIS 67, *5 (A.F. Ct. Crim. App. 9 February 2023) (unpub. op.). This Court should continue to follow this method.

Additionally, this Court should accept Prosecution Exhibit 3 without remand because it was included in the electronic record of trial. Digitized copies of the ROT are authorized copies of the ROT. (*Records of Trial*, Department of Air Force Manual, 51-203, para. 5.2.) Appellant both received, and cited to, Prosecution Exhibit 3 in his brief. (App. Br. at 4.)

Since this Court now has the missing exhibit, it can conduct a full Article 66(d) review. Additional delay is unnecessary in this case particularly considering Appellant alleged unreasonable post-trial delay in his assignments of error. (App. Br. at 14.) Since the United States provided Prosecution Exhibit 3, this Court should decline to remand the record for correction.

WHEREFORE, the United States respectfully requests this Court not remand the record for correction.

[redacted]
BRITTANY M. SPEIRS, Maj, USAF
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 the Air Force Appellate Defense Division on 9 May 2025.

[redacted], Maj, USAF
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,*	)	UNITED STATES' MOTION TO ATTACH
v.	)	Before Panel No. 2
Staff Sergeant (E-5) **JOHNATHON T. HAGEN** United States Air Force *Appellant.*	)	No. ACM 40561 9 May 2025

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

Pursuant to Rule 23(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests to attach the following appendices/documents to this motion:

- Appendix A – Prosecution Exhibit 3 (1 disk)
- Appendix B – Capt Morgan Brewington Declaration, dated 9 May 2025 (1 page)

This Court identified its copy of the Record of Trial is missing Prosecution Exhibit 3. This Court ordered that "Not later than 9 May 2025, counsel for the Appellee shall **SHOW GOOD CAUSE** as to why this court should not remand the record of trial for correction under Rule for Courts-Martial 1112(d), or take other corrective action." (*Order*, 23 April 2025.)

Appendix A to this filing provides the entirety of Prosecution Exhibit 3, a compact disk containing four digital files consisting of Appellant's interview with the Office of Special Investigations. Prosecution Exhibit 3 is a required portion of the record and is responsive to this Court's show cause order, dated 23 April 2025. Additionally, the entirety of Prosecution Exhibit 3 should have been included in the record of trial that was provided to this Court. Here, Prosecution Exhibit 3 was included in the electronic or digitized copy of the record of trial provided to the Appellate Government and Defense Divisions. Digitized copies of the ROT are

GRANTED
21 MAY 2025

authorized copies of the ROT. (*Records of Trial*, Department of Air Force Manual, 51-203, para. 5.2.) Therefore, this Court should accept documents from the digitized ROT that has been distributed. The inclusion of the audio recording in Prosecution Exhibit 3 ensures a complete record of trial in accordance with the Rules for Courts-Martial. R.C.M. 908(b)(5).

WHEREFORE, this Court should grant the United States' motion to attach.

[redacted]

BRITTANY M. SPEIRS, Maj, USAF
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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 motion and Appendix B was delivered to the Court and the Air Force Appellate Defense Division on 9 May 2025 via electronic mail.

Capt Morgan Brewington hand delivered Appendix A to the Court and the Air Force Appellate Defense Division on May 9, 2025.

, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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